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A
COLLECTION
OF THE
REPORTS OF CASES,
THE
Statutes, and Ecclesiastical Laws,
RELATING TO
TITHES.
WITH
A COPIOUS ANALYTICAL INDEX.

By F. K. EAGLE, Esq. LL.B. AND E. YOUNGE, Esq.
OF THE MIDDLE TEMPLE, BARRISTERS AT LAW.

IN FOUR VOLUMES.

VOL. I.

By FRANCIS KING EAGLE, Esq. LL.B.

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P R E F A C E.

THE researches attending the investigation of some Tithe questions of a very intricate and important nature, in which I was professionally engaged, made me long ago sensible of the inaccuracies and deficiencies of the existing collections of Tithe Cases. To supply those deficiencies is the principal design of the present work. Of their extent the Public will be enabled to judge from the contents of this volume, which, from the Year-Books down to the year 1726, comprises upwards of eight hundred cases not to be found in that part of Sir HENRY GWILLIM's work which extends over the same period. The translations have, in every instance, been either newly made or carefully compared with the originals. The marginal abstracts, which Sir HENRY GWILLIM, in the Preface to his Tithe Cases, has noticed "as not always entitled to that credit which they ought to carry with them," have been accurately examined and corrected, and, in numerous instances, they have been, now for the first time, added.

As the present work is intended to embrace the whole series of precedents and authorities relating to the Law of Tithes, every case which could be found in the different reporters, in print or manuscript, (with the exception of Exchequer cases of merely a local nature,) has been impartially inserted. Some of these might undoubtedly have been spared, but it is difficult, and might appear invidious, to draw any line of distinction, and as this is a work of reference and not for reading, it was thought better to make it as complete as possible; and that if there were any ground of complaint it should rather be that it contained too much than that it contained too little. Of some of the more important cases, where the varieties seem to authorize it, several reports have been inserted, but they have always been kept separate and distinguishable. In every case references are given to all the reporters in which it has appeared, and the particular report which has been selected is distinguished by being included between brackets.

The cases comprised in the Second and Third Volumes have been collected by Mr. YOUNGE, to whose exertions I think the Public will feel themselves indebted. His observations relative to that part of the work will be found in the Preface to the Second and Third Volumes. The Fourth Volume contains a List of Monasteries, the Statutes relating to Tithes, and also the Ecclesiastical Laws upon the same subject: these last, I conceive, will tend materially to elucidate many customary payments existing in various parts of the kingdom. The digested Index, which I have endeavoured to make as full and comprehensive as possible, will, I trust, be found of considerable utility.

It is scarcely necessary to remark that this is in the strictest sense a work concerning the Law of Tithes, and that every thing which might have a tendency to a discussion involving the policy of that Law has been scrupulously avoided.

Some apology is due to the Public for the omission of Selden's History of Tithes, the reprinting of which was in contemplation at the time of the publication of the First Volume. It has, however, been deemed more advisable to abandon that part of the plan, than to enlarge, to an inconvenient size, a work, which, by the unavoidable insertion of matter more immediately connected with the main object of the undertaking, and in particular the great length of the modern Cases, is in its present state sufficiently voluminous.

To my brother, who, by his constant residence in the Temple, has been able to pay attention to the progress of the work, when, from the nature of my pursuits and engagements, it was impossible for me to do so, I and the profession, if the work shall be considered of any value, will be under obligations.

FRANCIS KING EAGLE.

1, *Garden Court, Temple,*
Dec. 24, 1825.

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CASES

RELATING TO

TITHE S.

6 Joh. Rot. Pat. M. 10. No. 25. [Prynne's Rec. vol. iii. lib. 5. c. 1. p. 7.]

1204.

THE king, to all, &c. To all his foresters in Essex, greeting:—We command you, that without hinderance you cause our venerable father in Christ, W. Lord Bishop of London, to have the tithe of venison, taken for our use in Essex, according to the tenor of our charter, which he has thereof, and we prohibit you from causing him any trouble or molestation, or permitting it.

A grant of tithe of venison taken in Essex, made by the king to the bishop of London, enforced.

4 H. 3. [Prynne's Rec. vol. iii. lib. 5. c. 1. p. 50.]

1219.

TO our venerable lord and friend in Christ, our dearest R. De Neville, dean of Lichfield, prior of St. Edmund's, and the convent of the same place, their fullest respects, greeting:—We thank you for benefits often and so liberally bestowed upon us and ours; requesting, that according to your accustomed liberality, you order your chaplain and servants at Hingham, not to make new and undue exactions from our monies and our men, by reason of tithes; disturbing us and ours respecting those things which we have peaceably possessed for forty years; viz. tithes of hay, and of mills, and of widows Peter-pence, which is unheard of in our parts. Besides it cannot be unknown to you, that in ancient time an acre of meadow, was given for tithe of hay; and a church, as it is said, is in possession of that acre. They also exact tithes of heaths(1), which we never gave, nor any of our neighbours. We request therefore that we may enjoy peaceable possession, until we shall have had an interview with you thereon. Farewell in the Lord.

A prescription claimed, by reason of forty years peaceable possession. An acre of meadow given for tithe of hay. Tithe of heaths denied.

(1) *De Bruariis.*

8 H. 3. Rot. Plac. & Inquis. [Seld. 423.]

1223.

MASTER Eustace de Cestreton was attached to answer Hugh de Lege, wherefore he draws him into plea in court christian concerning the lay fee of the said Hugh in Cestreton, against the prohibition, &c. Wherefore the said Hugh complains that he sues him in court christian for certain money for tithes of mills, and certain meadow, to wit, three acres of meadow, and also concerning his weir; and for lands cultivated, if he let them, he demands the tenth penny, &c. And Master Eustace comes and defends himself against him and his suit, that he never drew him into plea concerning any thing certain, except for tithes of hay and mills, as tithes ought to be paid thereof; nor does he ask any meadow, nor any money for mills, nor any thing concerning his weir, nor any land, but garbs alone; therefore it is ordered to the

A prohibition granted against a parson who sued for tithes of rent. A suit for the tenth penny for tithe of uncultivated land complained of.

1223.

said Eustace that he do not sue hereafter in court christian, concerning any lay fee, or any thing which is against the crown of our lord the king.

1224.

Oct. S. Mic. 9 & 10 H. 3. Rot. Plac. [Prynne's Rec. vol. iii. lib. 5. c. 1. p. 69.] 1 Gw. 105.

The spiritual court had no jurisdiction of lay fees. The spiritual court held pleas of tithes of hay, mills, and pannage.

PHILIP DE ARDERN, clerk, was attached to answer John Fitz-Robert, wherefore he draws him into plea in court christian concerning the lay-fee of the said John Fitz-Robert, contrary to the prohibition, &c. Wherefore the said John, by his attorney, complains, that the said Philip draws him into plea concerning the wood of Lee, and the moor of Wycton; and also for this, that whereas the said John and his men take pledges of the said Philip, for injuring his corn and meadow, and other wrongs; the said Philip draws him into plea for that taking, whereby he is injured, &c. to the value of one hundred marks, and therefore he brings suit, &c.

And Philip comes and says, that he ought not to answer the said John or his attorney in any plea, because he is excommunicated; and he brings therefore the letters of the archbishop of York, which testify this *in hac verba*. "W. by the grace of God, &c. Know ye, that the abbot of Kokersand, and the priors of Kokersand and of Rokeham, have informed us, that they have, by the authority of the pope, put in the bond of excommunication the noble man John Fitz-Robert; commanding us that we should denounce him such, which we signify to you at the instance of master Philip, the bearer of these presents, that you may be certified hereof. Farewell. Given, &c." And therefore the said Philip says, that he will not answer him, unless the court shall have advised.

And John comes by his attorney, and says, That he does not complain of the plea before those judges, because as to the tithes of hay and mills which Philip there demanded, he will willingly do what of right he ought to do; but he has impleaded him against the prohibition, &c. before W., treasurer, and G., penitentiary, of York, concerning his lay-fee aforesaid, and besides concerning a certain hermitage, and the tenth beast of his forest; and therefore he has suit; and he freely grants to him, &c. the tithes of hay and mills, and pannage.

And Philip defends the whole, except only so far as concerns the tenth beast which he demands, and whereof his church was seised, and says, that he and his men have always had their pasture every where in the forest; and the said John and his men take his men, and deprive him of his pasture and common.

Because the said John does not shew at the said day, by citations or any other means, that the said Philip prosecuted any plea in court christian, concerning any lay-fee, it is considered that Philip go thereof quit, and John be in mercy. And it is prohibited to Philip to prosecute any plea against the crown of the lord the king. Day is given to them to hear judgment in the octave of St. Hilary *prece partium*.

1226.

Rot. Claus. 11 H. 3. p. 1. m. 9. in dorso [Seld. Hist. 284.]

The king grants tithes of hay and mills in all his demesnes in the kingdom.

THE king, with the advice of his archbishops and bishops, has granted that tithes of hay and mills be rendered hereafter in all his demesnes within his kingdom. And it is commanded to the bailiffs of Corsham, that they cause tithe of hay to be given to the church of Corsham out of his demesne of Corsham. Witness the king, at Westminster, the 18th of May.

M. 13 H. 3. [Fitzh. Prohib. 20.]

1228.

NOTA, it was adjudged by the court, that if a parson sell his tithes for a certain sum, to be paid at a certain day, if he do not pay, &c. the parson may well sue in court christian for the money, and no prohibition, &c.

A parson may sue in court christian for money due for tithes sold.

1246.

31 H. 3. Rot. Pat. m. 8. [Prynne's Rec. vol. iii. lib. 5. c. 1. p. 105.]
THE king, to all, &c. greeting:—Know ye, that we have granted to the prioress and nuns of St. Mary in Chester, the fourth part of the tithe of all victuals of our house, so often as, wheresoever, and so long as we shall happen to be at Chester, and shall retain the earldom thereof in our hands; so that if we shall give it to any one, whether our son, or any other such earl, and his successors for the time being, earls of Chester, shall be bound to give to the aforesaid prioress and nuns, and their successors, the fourth part of the tithe of all victuals of their house, wheresoever the said earls or their families shall be throughout England, as by the charter of Hugh, formerly Earl of Chester, they are specially bound. Witness the king, at Radynges, the 7th day of November.

The tithe of the fourth part of all victuals spent by the king in his house while he held the earldom of Chester in his hands, and that all succeeding earls should be chargeable with the same.

Rot. Linc. 10. 55 H. 3. [Prynne's Rec. vol. iii. lib. 5. c. 1. p. 126 b. (1)]
 1 Gw. 106.

1271.

Mr. Prynne found the following case and resolution upon an attachment for a suit in court christian against the king's prohibition, in a fragment of plea rolls (in the Tower), before the justices itinerant, about the 55th Hen. 3, as he conjectures by the hand.

MASTER William de Branucewell was attached at the suit of Gilbert Parleben, wherefore he impleaded him in the court christian about the chattels of the said Gilbert, which do not concern either testament or matrimony. And Henry, the Dean of La Ford, was attached to answer the said Gilbert, wherefore he held the same plea. And William and the dean come and say, that after the prohibition of the lord the king, they never held nor prosecuted the said plea; but they wish to speak the truth, that in reality the said William sold to the said Gilbert, and to a certain person his partner, the tithes of the corn of his church for thirty-seven marks, and because he did not pay the money at the appointed times, he as parson impleaded him in the chapter before prohibition, and he prays judgment if he could do that or not.

The spiritual court allowed to hold plea for money due for tithes sold.

And Gilbert comes and avows all this, but says, that he paid the said money to him, but he has no (2) proof thereof; and he says that the said William demands of him a certain penalty. And William says, that he neither does nor will exact any penalty from him.

And it is therefore considered that the said William may lawfully prosecute the said plea in the court christian, since it is concerning tithes, and that the said dean may hold the same, and Gilbert in mercy.

(1) *Note*, that this book is marked by pages to page 97, and from thence it is marked by folios to folio 133 inclusive, but after that is again *paged*, the first

page being 117.

(2) For this interpretation of the word "*secta*," see Selden's notes on Fortescue, 57, n. a.

Plac. Parl. 18 E. 1. [1 Rot. Parl. p. 32.] Ryl. Pl. Parl. 38.

1290.

WHEREAS the ecclesiastical judges often stay proceedings in causes before them, by reason of the king's prohibition, in cases where remedy cannot be given to the complainants in the king's court by writ

it shall appear from the libel, that the complainant has no remedy in the temporal court, and that the cognisance of the cause belongs to the spiritual court.

A *procedendo* shall be granted after prohibition, when

1290.

out of his chancery, whereby they are deprived of their remedy as well in the king's as in the spiritual court, to their great damage, as the king has understood from the grievous complaint of some.

The king wills and commands, that when the ecclesiastical judges surcease in the cases aforesaid, by reason of the king's prohibition delivered to them, that the chancellor, or chief justice of the said king for the time being, having seen the libel in the cause, shall, at the instance of the complainant, (if they shall see that remedy cannot be given to him in his case by writ out of chancery, but that the determination of the cause belongs to the spiritual court) write to the judges before whom the cause was before depending, that they proceed therein, notwithstanding the king's prohibition before (1) delivered to them.

(1) "Directed." Ryl.

1290.

18 Ed. 1. [1 Rot. Parl. 37. No. 34.] Ryl. Pl. Parl. 49. [Prynne's Rec. vol. iii. lib. 5. c. 3. p. 409.] 1 Gw. 107.

Extra parochial tithes, granted by the king in the forest of Ingelwood to the prior and canons of Carlisle.

RALPH, bishop of Carlisle, demands against the prior of the church of Carlisle, the tithes of two pieces of land newly assarted in the forest of Ingelwood, one of which is called Lynthwait, and the other Kirkethwait, and which belong to the said bishop, for that the said pieces are within the boundaries of his parish church of Aspaterick, and for that the said bishop and his predecessors, always before the said pieces were brought into cultivation, and while they were covered with wood, have used to receive the tithes of the pannage of the same pieces, until the said prior by a certain suggestion made (2) upon a suppression of the truth, this year brought a certain writ of the lord the king to the justice of the lord the king of his forest beyond Trent, and unjustly deprived the said bishop of the tithes aforesaid; and whether the tithes aforesaid belong to the said bishop by reason of his church of Aspaterick aforesaid, he prays may be inquired of by the country, &c.

And the prior comes and says, that the tithes aforesaid belong to him and his church of the blessed Mary of Carlisle, and not to the said bishop; for he says, that the lord Henry, the old king, granted to God and his church of the blessed Mary of Carlisle, and the canons serving God there, all the tithes of all lands which the said lord the king, or his heirs, kings of England, should cause to be brought into cultivation in the aforesaid forest, and enfeoffed the said church thereof by a certain ivory horn, which he gave to his said church, and which it still has; and he prays judgment, &c.

And hereupon master Henry de Borton, parson of the church of Thuresby, comes and says, that the tithes aforesaid belong to him by reason of his church, and not to the bishop and prior; because he says, that the pieces of land aforesaid, of which the tithes are demanded, are within the boundaries of his parish, and that he and his predecessors were always in the actual perception of the great and small tithes of the aforesaid pieces, as of right of his church of Thuresby, until the said prior, together with certain other persons, in this year, by means of the said writ, unjustly deprived him of the said tithes; and that those places are within the boundaries of his parish; and that he and his predecessors were always in the actual perception of the said tithes, as well great as small, he prays may be inquired of by the country, &c.

And William Inge, who sues for the lord the king, says, that the tithes aforesaid belong to the lord the king, and to no other, because he says, that the said pieces are within the bounds of the forest of the said lord the king, of Ingelwood, and that the said lord the king may in his said forest, build towns, erect churches, assart lands, and confer such

(2) "Tacitū veritate."

churches, with the tithes of those lands, upon whomsoever he will at his pleasure, for that the said forest is not within the boundaries of any parish; and he prays that those tithes may remain to the lord the king, as of right they ought, for the reason aforesaid, &c.

And because the lord the king would be certified upon the premises, and that to every one may be given that which is his, let William de Vesey, justice of his forest beyond Trent, Thomas de Normanvill, escheator of the said lord the king, in those parts, and Michael de Arkla, be assigned to inquire the truth of the matter in the premises; and what they shall have done therein let them make known to the lord the king in his next parliament after Easter; and let the parties aforesaid wait that term. Afterwards, at the said parliament after Easter, the said William de Vesey and Thomas de Normanvill, recorded before the said lord the king and his council, that they could not proceed to take the aforesaid inquisition at the day given, by reason of a certain letter of the bishop of Carlisle delivered to them, inhibiting them from putting any to their oath at that time; which letter, sealed with the seal of the said bishop, the said William and Thomas produced before the said lord the king: therefore, by the command of the lord the king, let the aforesaid William and Thomas and John de Lithpeynes, and Michael de Arkla, be assigned to take the aforesaid inquisition, so that they certify the lord the king thereof at his next parliament after the feast of St. Michael next ensuing, &c. and that they adjourn the aforesaid parties to the same day, &c.

Trin. 23 Ed. 1. Exch.

The King v. Bude, [1 Year Book, Mem. Scac. 34.]

1295.

YORKSHIRE.—Master William de Buda, rector of the church of Preston, in Holderness, was attached to answer what should be objected to him on behalf of the king: Wherefore he was put to answer for this, that the natives of the king, in the manor of Preston, which formerly belonged to the countess of Albemarle, and which is in the king's hand after her death, in times past have always been accustomed, as well in the life-time of the said countess, as after, to give to the church aforesaid for the tithe of hay of every bovat of land in the vill aforesaid, sixpence only, [yet] the aforesaid William has caused the said natives of the king to be cited before the ordinary of the same place, for tithe of hay in the same vill, and to be excommunicated, notwithstanding the payment of the said sixpence; as if they had not paid the same in the name of tithe, in contempt of the king, and to the grievous damage of his natives, &c.

A custom in a vill to pay sixpence for each bovat, in lieu of tithe of hay.

And the said William came and said, that he had not excommunicated the natives aforesaid, but that as by decrees of synod long since published, all obstructing the rights of the church, and detaining its tithes unjustly, are excommunicated *in genere* four times in the year, as well throughout the archbishoprick of York, as elsewhere in the kingdom, his chaplain according to the duty of his office, had generally excommunicated all such, and not the said natives of the king by name, and this he prayed might be inquired, &c.

Therefore it is ordered to Thomas Weston, clerk, that by the oath of good and lawful men, by whom, &c. and to have that inquisition before the treasurer and barons, &c. and the same day, &c. to the said William by mancaptors, &c.

The jury found that one of the natives only was excommunicated for the tithe of hay, &c. and that being under sentence forty days, he was taken by the king's writ and imprisoned; and that the aforesaid natives of Preston have used to pay, &c.; and that they offered at the altar of

1295.

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Preston twenty-six shillings, viz. sixpence for the tithe of the hay of each bovat, which the chaplain of the parish church of Preston received, and afterwards the said native S. was excommunicated, and still is, at the suit of the said W.: Therefore the said William is ordered to be imprisoned, and afterwards was fined for his said offence forty shillings.

1304.

Tithes of rabbits by special grant.

33 Ed. 1. [1 Rot. Parl. 159. Ry. Pl. Parl. 241.] 1 Gw. 109.

**T**O the petition of the prior and convent of Christ Church, praying remedy hereupon, that whereas Isabella de Fontibus, late countess of Albemarle, granted to them by her deed, the tithe of all conies in the manor of Thorle, in the Isle of Wight, William Russell, the now keeper of the king of the isle aforesaid, does not permit them to take any tithe of this sort:

It is answered—Let a writ go out of chancery to the treasurer and barons, that they inspect the deed, and make inquiry of the seisin, and further do what shall be just.

1305.

Extra parochial tithes granted by the king in the forest of Dean to the bishop of Landaff, and a petition for tithes of his lands newly assarted.

Petit. in Parl. 33 Ed. 1. No. 38. [1 Rot. Parl. 163. No. 38.]

**T**O the petition of the bishop of Landaff, praying that the king would assign to the bishop's church of All Saints, in the forest of Dean, the tithe of lands newly assarted in the proper soil of the king in the same forest:

It is answered—That the king wills that the bishop may have that which is extra-parochial, and which the king may grant; and let letters patent be made of this grant, and a writ close to J. de Botetout, keeper of the forest, &c.

1305.

Tithes of the stannary in Cornwall paid to the bishop of Exeter by the king.

Petit. in Parl. 33 Ed. 1. No. 46. [1 Rot. Parl. 164. No. 46.]

**O**F parsons and vicars claiming tithes of the stannary in Cornwall, where the king has paid annually to the bishop of Exeter for the tithe aforesaid:

It is answered—Let it be as has been accustomed in the time of the earl and king. (See 12 Co. 10. Seld. Hist. 285.)

1307.

A commission directed to inquire concerning the boundaries of the extra parochial lands in the forest of Dean.

Petit. in Parl. 35 Ed. 1. No. 58. [1 Rot. Parl. 200. No. 58.]

**T**O the petition of the poor chaplain of Landaff, reminding the lord the king of his gift to him, viz. that he had given him the tithes of the assarts of the forest of Dean, which are extra-parochial, in aid of the aforesaid chaplain, and for the support of a chaplain to celebrate divine service for the lord the king, and his progenitors for ever in the church of Newland, of his advowson in the same forest; and because the parsons of the neighbouring parishes, which are not of the advowson of the lord the king, oppress and grieve him on account of the tithes aforesaid of assarts, &c. he prays the lord the king that he would be pleased to declare which are the extra-parochial lands whereof he has granted the tithes to him, and to cause the said lands to be set out with bounds; so that he may take his said profit in peace; and that the lord the king would be pleased to cause inquiry to be made what were the ancient bounds of the neighbouring churches against his demesne lands in the said forest, and how the parsons of the aforesaid

churches claim to have the tithe of his said demesne lands, as he is not their patron, &c. :

It is answered—Let Walter de Gloucester, the king's escheator, and Nic. Fermbaud, be assigned by writ out of chancery, to go in person to the places assarted, whereof the king has granted the tithe to the said bishop, as is contained in the petition, and that they inquire by good and lawful men, which are those assarted demesnes of the lord the king, and which are the metes and bounds between the parochial churches and the lands of the lord the king newly assarted; and let them send that inquisition to the treasurer and barons of the exchequer, &c. and let them do what ought further to be done, &c.

1307.

Hil. 3 Ed. 2. C. P. [3 E. 2. 63.]

A MAN brings trespass against the prior of Hunt', and others named in the writ, and declares, that on a certain day they wrongfully took his corn, to the value, &c.—*Hunt'*, for the prior and the others, says, that the tenth sheaf belonged to him of all the corn growing within the fee of L., within which fee he complains this trespass was committed, and he and his predecessors have had, &c.; so that after T., who complains, had in August carried his corn to the barn, and the tithe was severed, the prior came, &c. and took the corn as his tithe, as he well might, and not with force and arms, nor against the peace.—*WILL[UGHBY]*. Sir, whereas he says, that he took his tithes and his own corn, we say, that this was our corn, as our writ supposes.—*Prest, &c.*—*BER[ESFORD]*. You shall not escape so, for the prior has acknowledged the carrying off this corn in form, as his corn and his tithe, to which form, cause, and avowry, you must answer, if at the time of the taking away it was your corn, and not his, nor his tithe, as he says.—*WILL[UGHBY]*. Sir, whereas he avows the carrying away, by reason that the tithe in the fee of L. belongs to him, and says further, that the place where we have complained is within the fee of L. Sir, not in the fee of L., but in the fee of C.—*Prest, &c. Et alii à contra.*

In this plea two things may be observed, one is, that although the plaintiff would have maintained his writ, he was compelled to answer over to the justification of the defendant. Another is, in C. and not in fee of L.; if so, the plaintiff would recover his damages without trying the right of tithes, &c.

1310.

Questions of boundaries are to be tried at common law.

E. 7 Ed. 2. C. P.

*The Abbot of Aungers v. The Prior of Norton*, [7 E. 2. 230.]

THE abbot of St. Nicholas of Aungers brings his writ of annuity against the prior of Norton, and demands of him 119s. which were in arrear of an annuity of 22s.; and for this, &c. that whereas debate was between one James, formerly abbot of St. Nicholas, and one, &c. formerly prior of Norton, of tithes of the fee of Norman D'Atey in D., when it was agreed that the said tithes should remain in the prior and his convent for ever, rendering to the aforesaid abbot for ever 22s., of which annuity he and his predecessor were seised by the hands of Aleyn and his successors, &c. until now within seven years, the prior had withdrawn it wrongfully, &c. and shews the deed of the prior, &c. and his convent.—*SCROP[E]*. You see, Sir, that they have demanded this annuity by reason of an agreement made upon a debate, &c. of tithes, &c. between the said abbot, &c. and counts that the tithes should remain, &c. *ut supra*, rendering yearly, &c. *ut supra*, and so they have shewn this

1314.

Where, upon dispute to whom certain tithes belonged, it was settled, that one should take the tithes, paying an annuity to the other, it was held that the annuity might be recovered in the temporal court, it being founded on a lay contract, and the tithes not in

tract, and the tithes not in

1314.

annuity to be issuing solely out of tithes, which are spiritual, wherefore we contend that the court will not take consuance, and demand judgment.—**INGE.** They demand this annuity by reason of a lay contract by deed of their predecessors, which shall bind the person and the goods and chattels to the payment of the annuity, and the tithes are not in plea, wherefore make some other defence.

1314.

Petit. in Parl. Ann. incert. Ed. 1 & 2. [1 Rot. Parl. 474. n. 85.]

The king directs tithes to be paid of his mills in Holderness as they are paid of other mills in those parts.

**T**O our lord the king, pray the parsons of the churches in Holderness, that he would be pleased to command to his bailiffs and officers in Holderness, to pay tithe to the holy church of his mills in Holderness, in like manner as he had willed and commanded to give tithe of the colts of his stud of Brustwyk, and of the fish of his fisheries in the same country :

Let a writ be directed to Ric. Oysel, the bailiff of Holderness, that he would cause tithes to be given of the king's mills in his bailiwick, as tithes are given of other mills in the parts of Holderness.

1314.

8 Ed. 2. [1 Rot. Parl. 313.] 1 Gw. 109.

Whether there was a composition of half a mark to the vicar and 8s. to the rector in lieu of tithes of the mills of Liskeard.

**T**O our lord the king and his council, shew his tenants of his town of Liskeard, in Cornwall, that whereas King Richard, of Germany, formerly Earl of Cornwall, granted to them in fee-farm, his town of Liskeard aforesaid, with the mills of the town, rendering therefore yearly 18l. 18s. and half-a-mark to the vicar of the said town, and that to be in satisfaction of the tithes of the said mills; and that the said tenants should not be any more charged against their warranty, the said King Richard gave 8s. of rent to the prior of Launceston, parson of the said town of Liskeard, at the great request of the said prior and vicar, who then covenanted that it was the established payment for tithe for ever; from which time till now, the said farmers have paid the half-mark to the vicar, and the king's provost of his manor of Liskeard has paid the 8s. to the parsons of the church; but now lately, John Launseles, vicar of the said town, notwithstanding the composition made between the King Richard, of Germany, and the vicar's predecessors above-named, came and demanded of them the tithes in kind, whereas by the aforesaid composition he ought to have only the demy-mark, and the prior, the parson, the 8s. to the disherison of the king, and to the charge of the town aforesaid; and upon this the bishop of Exeter has excommunicated them, and interdicted their church, and condemned them, whereas they can neither charge nor discharge themselves, nor prove the said composition, nor put it in judgment without the king and his council; wherefore they pray remedy :

**Answer**—Let Hugh de Curteney, John de Foxle, and John de Westcote, or two of them, so that the said Hugh be one, be assigned to inquire in the presence of the parties of the tithe within written, to wit, how much tithe hath been used to be given for the mills, &c. at the time when it was in the hand of King Richard, of Germany, and whether there be a composition thereof or not, and of the other articles, &c. and let them return the inquisition before the treasurer and barons of the exchequer, and let there be done thereupon there what justice shall advise; and let there be a writ to the bishop, commanding him, in the mean time, to supersede the execution to be done against the men of Liskeard, of those things which were drawn in plea before him concerning the said tithe, and in the mean time to revoke also the sentence, if any should have been denounced against them in that case.

8 Ed. 2. [1 Rot. Parl. 318.] 1 Gw. 110.

1314.

**T**O the petition of the prior of the church of Christ of Twynham, suggesting, that whereas he had impleaded the prior of Brummore, in court christian, for certain tithes arising in the lands of the said prior of Brummore, in the parish of the church of the said prior of the church of Christ of Bolre, yet by a certain prohibition of the king, directed to the judges, forbidding them to proceed in the said plea, for that the said prior of Brummore, held all his demesne lands in the new forest of the King Henry, the king's grandfather, the said judges have not proceeded any farther in the plea, &c.; wherefore they pray remedy:

Prohibition to a suit in court christian, upon suggestion that the lands were demesnes of the gift of the king, and an inquisition directed, returnable in chancery.

It is answered—Let John de Foxle and John de Westcote be assigned to inquire, in the presence of the parties, who are previously to be summoned, if they choose to be present, whether the said place of which the tithes are demanded, be included in the king's charter made to the prior of Brummore, and whereof the demesne lands of the said prior, at the time of making the said charter, or whether the said prior acquired that place afterwards, and if so, then of whom, and when; and if the said place be within the limits of the parish church of Bolre, and were titheable before it came to the hands of the said prior, or not; and if so, then in what manner, and how; and let them return the inquisition into chancery.

8 Ed. 2. [1 Rot. Parl. 319.] 1 Gw. 111.

1314.

**T**O the petition of Thomas de Yurlet, parson of the church of St. John of Devises, suggesting, that he and all his predecessors have used to have the tithe of hay in the meadow of the park of Devises; which meadow is now converted into pasture, and sold to divers men of the country for the feeding of their beasts; and which tithe is now of late subtracted; wherefore he prays remedy:

Petition to the king for tithes of his land, and an inquisition directed returnable before the king.

It is answered—Let John De Foxle, master John Waleweyn, and William de Harden, or two of them, be assigned to inquire whether the king, at the time when the park was in his hand, used to give the tithe of hay of the meadows in the said park, and from what time, and in what sort, and how; and if those meadows be changed into pasture, then when, and by whom, and in what sort, &c. and how much the tithe thereof coming is worth, &c. and let the inquisition be made in the presence of the parson, if, being previously summoned, he choose to be present, and let the inquisition be returned before the king.

8 Ed. 2. [1 Rot. Parl. 331. Seld. Hist. 436.] 1 Gw. 111.

1314.

**T**O the petition of the abbess and the convent of Godestowe, suggesting to the king, that they are of the foundation of the king's ancestors, and that at the foundation of their house the tithes of all things renewing in the manor and park of Woodstock were granted by the charters of the king's progenitors; by virtue of which grant the said abbess and convent, and their predecessors, have always hitherto been seised of such tithes, to wit, of the tithes of all colts of the king's stud; and that the now keeper of the said stud refuses to pay such tithes, paying only one of the weaker colts to the said abbess and convent yearly; and fourteen colts of the two years last past, for which they have received nothing, remain to be accounted for; wherefore they pray a fit remedy:

A petition to the king for tithes of all colts of the king's stud in the manor and park of Woodstock, answered by his council.

It is answered by the council—It seems to the council, that if such sort of tithe be due, and the religious be in the actual perception of it,

1314.

it must be commanded to the king's bailiff that he pay the tithes due annually, and also pay the arrears thereof if any there be.

(According to Selden a return was made by the bailiff in French, acknowledging the right of the abbess.)

1315.

8 &amp; 9 Ed. 2. [1 Rot. Parl. 343.]

A petition to the king for tithe of colts in his park of Reylegh, and an inquisition directed.

**T**O the petition of William de Herlaston, clerk of the chancery of our lord the king, and parson of the church of Estwode, near Reylegh, suggesting to the king, that whereas he ought to have, and his predecessors have always had the tithe of colts in the park of Reylegh, until the said park came into the hands of our lord the king; wherefore he prays redress:

It is answered—Let some of those parts be assigned to inquire concerning the contents of the petition, and let the constable of the castle of Haddeleye, or his lieutenant, be summoned to be present at this inquisition, to urge for the king what they know of this matter, and let the inquisition be returned without delay; that the king being certified hereof, may do further what of right ought to be done.

1320.

14 Ed. 2. [1 Rot. Parl. 377.]

A petition to the king for tithe of mines.

**T**O the petition of Reginald Pipard, parson of the church of Bire, claiming tithe of mines within his parish aforesaid:

It is thus answered—As it appears that a composition was heretofore made between the lord Edward, formerly king of England, father, &c. and the predecessor of the said present rector; therefore let it be seen whether he has any thing from that composition, &c.

1321.

15 &amp; 16 Ed. 2. [1 Rot. Parl. 389.] 1 Gw. 112.

A petition of the prior and convent of Brecknock, for tithes due by the king's keepers of certain lands and castles.

**T**O our lord the king and his council: His poor chaplains, the prior and convent of Brecknock (1), pray remedy; for that whereas the keepers of the lands and castles of Brecknock, Hay, Glenleveny, and Talgath, thereto appointed by our lord the king, detain from them certain tithes, of which they have been seised from the time of the foundation of their house until now, under divers deeds of the lords of those lands and castles, that is to say, of the tithes of all manner of things consumed by the lords of the same lands and castles, or by their servants, whether the lord be present or absent, and the tithe of pleas, tolls, gifts, gains, rents, and of all manner of profits; by which detention your said chaplains are in great mischief of their livelihood: wherefore may it please you, for God's sake, to command your said keepers that they may have and receive the aforesaid tithes for their sustenance, as they hitherto have done, according to the purport of their charters: for if they are not supplied with the aforesaid tithes for their sustenance, they cannot remain there to do for the service of God as they are bound:

Answer—Be it commanded to the keepers of these parts, that they suffer the prior and convent to have and receive the tithes, &c. as they have always before this time had and received them; as they can by inquisition, or any other manner, reasonably know what they have had and received,

(1) *Brecknock.*

Petit. in Parl. 18 Ed. 2. [1 Rot. Parl. 425. No. 34.]

**T**ITHE of wool and lamb due to the archbishop of York, as guardian of the spiritualties of the vacant see of Carlisle, as appropriate rector of Penreth and Dalston.

tithe of a vacant see, as appropriate rector.

1325.

Tithes of wool and lamb due to the guardian of the spiritual-

19 Ed. 2. [1 Rot. Parl. 433.]

**T**O our lord the king and his council, pray his devout chaplains the prior and convent of Hatfield Brodok, parsons of the church of Hatfield Brodok, that whereas they have all manner of tithes, as well of the young of animals and other small tithes, as great, within the bounds of all the parish of the church aforesaid, and now of late our lord the king has established a breed of mares in the park of Hatfield, which belonged to Humfrey de Bohun, earl of Hereford, and which is within the bounds of the aforesaid parish; that it would please his majesty to command his keeper of the said stud to deliver to the said prior and convent the tithes of foals of the said stud, as the right of holy church requires:

Let it be inquired in chancery, in presence of the keeper, &c. if the park be within the bounds of the parish, and whether tithes have been used to be paid of animals depastured in the said park heretofore, and from what time, &c. and of what else shall be necessary, &c.; and upon return of the inquisition into chancery, if it accord with the petition, let justice be further done in the premises.

1325.

A petition for tithes of foals in Hatfield Broad Oak Park, ordered by the king to be referred to the court of chancery to inquire whether the park was within the bounds of the parish, and what tithes had been paid, &c.

1 Ed. 3. [4 Rym. Fæd. 277.] 1 Gw. 112.

**T**HE king, to all to whom, &c. health:—The venerable father Gaucelin, cardinal priest of the title of St. Mary and St. Peter, has prayed us by his petition exhibited before us and our council, that whereas divers persons in our realm are bound to him in divers sums of money for the tithes and fruits of his benefices in England purchased by them, and maliciously refuse to satisfy him or his proctors for the same; and the said persons, though they had voluntarily submitted themselves to the coercion of the ecclesiastical jurisdiction, and had consented that they might be compelled by ecclesiastical censures to the payment of those sums, if they should fail therein at the appointed periods; nevertheless bring the king's prohibitions to the ecclesiastical judges, by reason of which the said judges dare not compel them to make such payments, so that the said cardinal is defrauded of his debts; we would be graciously pleased to provide for his indemnity in this behalf: we, having consideration of the laudable obedience which the said cardinal paid to the lord Edward, late king of England, our father, and which he continues to pay daily to us and to our whole realm, and willing, of our special grace, to provide for his indemnity in this behalf, will and grant that the said cardinal and his aforesaid proctors may demand and sue in the ecclesiastical court for all debts which are owing to the said cardinal for the tithes and fruits of his benefices in England, and that the ecclesiastical judges may compel the said debtors by any censures of the church to make payment of the said debts, any prohibition from us notwithstanding.

1327.

A grant by the king to a cardinal to sue in the spiritual court for debt, notwithstanding any prohibition.

In witness whereof, &c. to endure for two years.

Witness the king, at Westminster, the 26th day of March.

By the king and council.

1328.

The revocation of the above suspension of a prohibition as made against the common law.

2 E. 3. [4 Rym. Fœd. 356.] 1 Gw. 113.

**T**HE king, to all to whom, &c. health:—Although we have granted by our letters patent to the venerable father Gaucelin, cardinal priest of the title of St. Mary and St. Peter, that he and his proctors may demand and sue in the ecclesiastical court for all debts which were owing to the said cardinal for the tithes and fruits of his benefices in England; and that the ecclesiastical judges may compel the said debtors by any ecclesiastical censures to make payment of the said debts, any prohibition from us notwithstanding; yet because, at the prosecution of Robert de Lasey, suggesting, by his petition, in our parliament lately convened at Northampton, that he has been impleaded in court christian by the proctors of the said cardinal for such kind of fruits sold to the said Robert, and that he, by reason of our said letters patent, could not have any aid in our court against the said proctors, according to the law and custom of our realm; it seemed to the great men and nobility of the said realm there present, that the said grant was made against the common law of the same realm; we will, that if the said Robert be hereafter impleaded in court christian by the said cardinal, or his proctors, under pretence of the said grant, for such sort of debts as aforesaid, that the said Robert may henceforth have prohibitions and attachments thereupon in our chancery if he please, our aforesaid grant notwithstanding.

In witness whereof, &c.

Witness the king, at Evesham, the 28th day of June.

By petition of the council.

1328.

A petition of the bishop of Landaff to the king and council for tithe of an iron mine granted by Edw. 1.

2 E. 3. [2 Rot. Parl. 13.] 1 Gw. 114.

**T**O our lord the king, and his council, prays his chaplain, the bishop of Landaff, that whereas he holds the church of Newland in the forest of Dean to his own use, and we have a mine of iron within the parish whereof we make profit, and whereof your father, sire, whom God have mercy upon, commanded by his writ that tithe should be given to your petitioner's predecessor who lately died, the transcript of which writ is attached to this petition; nevertheless, sire, your bailiffs of those parts will not give the said tithe without a further command; wherefore the bishop prays, that having regard to this, that the tithe is due of right, and that it has been yielded before this time, you would command the said bailiffs, that the tithe may be given as it belongs to him:

Answer—Let the rolls of chancery be searched; and if it be found that such writ was heretofore granted, let such writ be had now.

The writ.

The king to the keeper of his forest of Dean, greeting:—The venerable father I, bishop of Landaff, has prayed us by his petition exhibited before us, that whereas tithe ought to be given to God and holy church of every thing yearly renewing, and we yearly receive great profit from our mine of iron in our forest aforesaid within the parish of the church of the said bishop of Newland, which he holds to his own use, and are willing to yield a tithe to the same church for such kind of profit arising from our mine within the parish of the church aforesaid; we, though it fully appears to us by the certificate thereupon made to us at our command by our treasurer and barons of the exchequer, that no tithes have been heretofore given of such kind of profit, nor any recompence made in times past in lieu of such tithes; willing nevertheless to assent to the petition of the said bishop in this behalf, command you, of our special grace, that you cause the tithe of such sort of profit, arising from our mine of iron within the parish of the church aforesaid,



to be henceforth yielded to the same church, and we will make due allowance to you thereof in your account of the aforesaid profit. Witness ourself at Westminster, the 15th day of November, in the 14th year of our reign.

By the king himself.

Petit. in Parl. 4 Ed. 3. [2 Rot. Parl. 44. No. 61.]

**T**O our lord the king and his council, prays John, bishop of Carlisle, that whereas King Edward, grandfather of the present king, had given and granted to the prior and canons of Carlisle the tithes of assarts already made, and of other parcels and lands to be assarted in time to come, within the forest of Ingelwood, which are without the bounds of any parish, as is fully contained in their charter; the present prior and the aforesaid canons, acting contrary to the charter aforesaid, came within the parish of the bishop of Carlisle, and carried away the tithes of wool and lambs, and of all manner of beasts depastured within the forest aforesaid, and within the parish of the bishop aforesaid. And this spoliation they have done and do by force every year since the aforesaid John has been bishop, of the tithes of wool and lamb, and all manner of beasts within the forest and parish of the bishop aforesaid; In peaceable possession whereof, the church and bishop of Carlisle have been for a hundred years before and at the time of the making of the grant; and if the prior and canons had made this thing known to the king, they would not have obtained the favour aforesaid: Therefore the bishop prays that redress may be given him, for he has been damaged more than twenty marks of silver yearly by reason of the said grant:

Let this petition be carried before the king, and having called there the king's serjeants, and having heard the reasons for the king and the bishop, let right be done.

Relief ordered on the petition of the bishop of Carlisle for redress against the prior and canons of Carlisle, who under colour of a grant by the king of the tithes of assarts, and of other lands to be assarted, within the forest of Ingelwood, which were extra parochial, carried away tithes of wool and lamb and agistment within the forest and parish of the bishop.

1331.

Petit. in Parl. 4 Ed. 3. [2 Rot. Parl. 50. No. 80.] 1 Gw. 115.

**T**O our lord the king and his council, shew his chaplain the prior and convent of saints, Fredeswode of Oxford, that whereas they are parsons of Acle and of Brehulle, within which a great part of the forest of Bernwode lies, in which forest master John Mautravers, late keeper of our lord the king of his forests on this side Trent, made sale for the king's profit of underwood, whereof the said prior and convent, as parsons of the said place, ought by right of holy church to have the tithe; for which they have lately applied to the said master John, for so much, while he was keeper, as they ought to have for their tithes, as the right of holy church requires, and he thereupon did nothing; wherefore they pray our said lord the king for his grace, and that he will order that they be paid their tithes aforesaid:

Answer—Let the keeper of the forest be commanded to cause the tithe to be paid to ———, as it has been paid in the time of his progenitors.

Tithe of underwood sold by the king's keeper of the forest of Bernwode, ordered to be paid by the keeper.

1331.

Hil. 5 E. 3. C. P.

*The Prior of Carlisle v. The Bishop of Carlisle*, [5 E. 3. 8. 27.]

**T**HE prior of Carlisle brings his writ of trespass against William bishop of Carlisle and others, &c. *de bonis et catallis asportatis*. All say by their attorney that the prior was excommunicated, and produce the letter of the said bishop, who deprived him at the suit of a stranger, and (1) pray judgment if he ought to be answered.—SCHARD[EBURGH].

To trespass brought by the prior of Carlisle against the bishop of Carlisle and

1332.

(1) See 2 Sa. 210. n. as to this form of plea in abatement.

1332.

others, for carrying away, &c. the plaintiff's goods. The defendants pleaded the excommunication of the plaintiff, and produced the bishop's letter depriving him: this plea being disallowed, the defendants pleaded that the bishop was impropriator of the church of D. and that he ordered his servants to the place, &c. to collect his tithes, and that they took the goods as his tithes, and submitted that the court would not take consueance of tithes. Plea held bad, as it did not state that the goods of the taking of which the plaintiff complained were the tithes of the bishop severed from the nine parts, but were merely the tithes of the parishioners, and therefore no answer to the action.

The bishop himself is party, wherefore one shall not suppose other reason for this which he produces, but his own malice.—SCOTRE. The others named shall not lose their advantage, by reason that the plaintiff has named the bishop in his writ, and further the letter is of a prior date to the writ, and moreover the excommunication is at the suit of another. SADDINGTON, *ad idem*. Although the bishop were sole party, yet the letter shall make him not responsible at law; for if the bishop had given sentence against him unreasonably, the prior might appeal to the superior judge above the bishop.—STONORE. If one should send the suit without day by this plea, the bishop shall never be put to answer.—SCOTRE. If the suit be sent without day against the others, it cannot remain against the bishop.—STONORE. When the bishop has pleaded, we will consider well, if the others who allege excommunication, &c. *et adjournatur in quindena Paschæ*, at which time the parties pleaded as before.—HERLE. Although the suit remain without day against the others named, it is not reasonable that the letter of the bishop should send the suit without day against himself, and this is a personal action which cannot be continued against some, and against the others remain without day, therefore answer.—SCOTRE. The bishop says that he holds the church of Dalston appropriate, and that he ordered his servants to the place where, &c. which is within the same parish, to collect his tithes, and the parishioners delivered the said corn, butter, and cheese to his servants, so they took his goods as his tithes, and we do not conceive that this court will take consueance of tithes.—SCHARD[EBURGH.] It amounts to this, that you did not take our goods, &c.; and as to your plea that they are tithes, we need not answer it; for the rest of your plea is a traverse of our writ, which we will maintain.—DEVON. You may reply and say that they were your lay chattel, and not our tithes, so you may have a good traverse of our plea.—HERLE. Can we inquire if the goods, of which, &c., were your tithes or not? (as if he had said we cannot) for you yourselves suppose that we cannot take consueance of tithes here.—MALM, *ad idem*. If he should reply that they were not your tithes, he would depart from his own writ, and it would abate.—DEVON. This would be but to maintain his writ.—HERLE. If you should say that the goods of which the prior complains were your tithes severed from the nine parts, perhaps your plea would then be good; but you say that these were the tithes of other people, wherefore you say nothing to his writ of trespass, wherefore answer his writ; for we will inquire of no more than whether you took his goods with force, &c. and as he complains or not.—SADDINGTON. Not Guilty. *Prest, &c. et alii è contra*.

1334.

Hil. 7 E. 3. C. P. [7 E. 3. 4. 7.]

In former times, before a constitution newly made by the pope, the patron of a church would grant tithes within his parish to another parish. But a man cannot grant his extra parochial tithes to whom

THE abbot of Newenham brought his *quare impedit* against the dean and chapter of the church of St. Peter, of York, and John Giffard, clerk, and Thomas de Waleis, clerk, and demanded the presentation of the church of A.

HERLE. I well know that the king granted as much as in him lay, that you might hold the church appropriate, but it does not therefore follow that you hold it appropriate.—PARNING. In former time, before a constitution newly made by the pope, the patron of a church could grant tithes within his parish to another parish, much more then the king may at this time grant to hold a church appropriate.—HERLE. And now a man cannot grant his extra parochial tithes to whom he would, but the he will; and according to HERLE, C. J. the bishop of the place shall have

bishop of the place shall have them, and it is against reason that a man cannot give his alms to whomsoever he would (1).

1334.

(1) The rest of the case is worthy of the immediate subject of the present perusal, more particularly with regard to appropriations, but it is too irrelevant to work to justify its insertion.

Petit. in Parl. 8 E. 3. [2 Rot. Parl. 87. No. 61.] 1 Gw. 115.

1335.

**T**O our lord the king, shews his clerk Henry de Kendale, parson of the church of Rye, which is the king's advowson, that none of the fishermen of his said parish yield any tithe of their fisheries to the said parson; wherefore he prays that he may have leave of our said lord the king to sue his action against them for the said tithe in court christian, without incurring the contempt or indignation of the king:

Licence granted by the king as patron of the advowson of Rye to the rector to sue fishermen of the parish for their fisheries.

Answer—Let him sue if he will.

the tithes of

Ann. incert. E. 3. [2 Rot. Parl. 402.] 1 Gw. 116.

**T**O our lord the king, and his council, the abbes of Godstowe prays, that whereas our lord the king's ancestors have, by their charters, granted to the abbes and house of Godstowe, at the foundation of the church, the tithe of all the venison which should at any time thereafter be taken in the forest of Whittlewood; by virtue of which grant, the predecessor of the now abbes was seised, until Hugh Le Despenser, the father, when he was keeper of the said forest disturbed Mabile Wafre, the predecessor of the now abbes, in the receipt of the said tithe; wherefore she prays remedy:

A petition of the abbes of Godstowe for tithe of venison in the forest of Whittlewood, alleged to have been granted by the king's ancestors, and an inquisition directed returnable in chancery.

Answer—Let her shew the charter in chancery, and thereupon let a writ issue to the justice of the forest, or to his lieutenant, &c. that he cause inquiry to be made whether the predecessors of the said abbes were seised of this tithe as the petition purports, and which of her predecessors was first ousted thereof, and by whom and for what cause, and of all other necessary things; and the inquisition being returned into chancery, let it be shewn to the king.

21 Ed. 3. [2 Rot. Parl. 205. No. 5.] 1 Gw. 116.

1348.

**T**O our lord the king, and his council, his poor chaplains the abbot and convent of La Roche, parsons of the church of Haytfield, pray, that whereas they ought to have yearly one heifer in the park or woods of Haytfield; and also sixteen great beasts for the whole year in the park or woods aforesaid, in lieu of tithe of herbage; and likewise to have all their pigs fed within the parsonage aforesaid quit from paying any pannage in the woods of Haytfield aforesaid in lieu of the tithe of pannage; and also for the tithe of the fishery of Braythemer and Neuflet, a bind of eels yearly, to be taken as of the right of their church of Haytfield; whereof the said abbot and convent and their predecessors, parsons of the church aforesaid, have been seised time immemorial, until the manor of Haytfield came into the hands of our lord the king, after the death of John late earl of Warren, and now in the hands of madam the queen Philippa, who holds it of the grant of the king; wherefore may it please our said lord the king to ordain remedy in this case:

An inquisition directed returnable in chancery on the petition of the abbot and convent of L. parsons of the church of H., claiming to be entitled from time, &c. to agist certain cattle in the park and woods of H. in lieu of the tithe of herbage, and to

feed pigs in the same woods free from pannage in lieu of the tithe of pannage, and to a bind of eels in lieu of the tithes of certain fisheries; the manor of H. having come to the hands of the king, and having been granted by him to the queen.

1348.

**Answer**—Let proper persons be assigned in chancery, to inquire, in the presence of the queen's keeper there, of the matters contained in the petition; and the inquest being returned into chancery, let the chancellor call before him the said queen's counsel, and the king's serjeants, and any others whom he shall think proper to call; and having heard the reasons of the parties, let him further do law and right.

Cases in Itin. temp. Ed. 3. [Keilw. 147.]

Nothing can be appendant to a church but gross tithes; but to a manor with which a church is endowed, franchises may be appendant; and therefore, on a plea by the parson, that he and his predecessors had been seised of a franchise in right of his church for time, &c. held, that he ought to have alleged, that he found the church seised of the franchise, and have prayed aid of his patron.

**THE** parson of a church was summoned to answer, &c. who came and said, that he and his predecessors had been seised of the franchise in right of his church for time whereof memory runs not.—**SCROPE** (1). Then you claim this franchise as appendant to your church. *Devon.* Yes, Sir.—**SCROPE**. Nothing can be appendant to a church but gross tithes, but to a manor with which a church is endowed, such franchises may well be appendant.—**CAUNTER**. The parson of a church has no other estate than for life, wherefore you ought to have said that you found your church seised of these franchises, and prayed (2) aid of your patron, for you have not so high an estate as to enable you to maintain your claim, which is in the right, and this you have yourselves shewn, wherefore, &c.

(1) Henry le Scrope was appointed Ch. J. K. B. 10 Ed. 2. removed 1 Ed. 3. Again appointed 3 Ed. 3. and made Ch. B. 4 Ed. 3.; and Geoffry le Scrope, who had filled the office before, appointed

Ch. J. in his place; he was a justice itinerant in Northamptonshire. 3 Ed. 3.

(2) See Com. Dig. Aide. B. 4. 1 Rol. 175. l. 30. 37. 39.

1365.

H. 38 Ed. 3. C. P. [38 Ed. 3. 5.] Jurisd. F. 43.

If one carry away tithes with his corn, before they are severed from the nine parts, the suit shall be in the spiritual court, but if they are severed from the nine parts trespass lies.

**THE** parson of the church of K. brought his writ of trespass against W. parson of the church of M. and declared that he wrongfully impounded his corn in D. to wit, wheat and barley in garbs.—*Finchden*. Sir, you perceive that the plea is between parsons, and we say that D. is parcel of the vill of M. of which we are parson, and the corn for which the writ is brought were our tithes, belonging to our church of M. Judgment, if the court will take consuance.—*Wilt*. Sir, you perceive we have alleged that he had carried away our chattels, which he says were his tithes, we say they were severed from the nine parts, at which time they were lay chattels, to which he answers not. Judgment. **KIRT[ON]**. You are parsons on both sides, and he says he took his corn as his tithes, and you contend that you demand them as your tithes, and the right of tithes, whether they belong to him or you, cannot be tried here, but in court christian.—*Finchden*. If a man carry away my tithes with his corn, before they are severed from the nine parts, the suit shall be in court christian; but if they are severed from the nine parts, whoever carries them away shall be subject to an action of trespass against him.—**THORPE**. It is true that after they are severed, you may have a writ of trespass, as for goods taken out of your possession; but since the dispute is between parsons, it shall be intended that the dispute is concerning the right to tithes. Wherefore, since you are named parsons, and the action is brought against him as parson, it appears that the dispute between you is concerning tithes (3), unless you show some special matter; especially since he has said, that D. is parcel of the vill of which he is parson; therefore consider if you will plead any other

(3) 13 Co. 39. 2 Mall. Mod. Ent. 452. X. 1.

matter. And *Chellery* said, besides this, they had a suit depending in court christian concerning this, &c.—*Willt* dared not demur, but said, whereas he says that D. is parcel of the vill (1) of M., of which he is parson, we say it is parcel of the vill of K. and not of M.; so he took our goods with force and arms, as we have alleged in our writ.—*Chellery*. To this we say, that K. is a hamlet of D., and there are two other hamlets in D., to wit, E. and W., and the place where, &c. is in E. which is in our possession. *Prest*, &c.

(1) 2 Mall. Mod. Ent. 401. E. 1.

1365.

22 Ed. 3. C. P. [Lib. Ass. 22. 101. pl. 75.] F. Jurisd. 31.

OUR lord the king granted certain tithes to the provost of C., of the new assarts in the forest of Rok., wherefore he sued out a *scire facias* in the chancery against divers parsons of Holy Church, who held the tithes, to have execution of the tithes aforesaid, who came and alleged that the court ought not to take consueance of such a plea, which belonged to the ecclesiastical court; but it was said that it did not, if the tithes were not (2) demanded of those who ought to pay tithes. And afterwards they pleaded to the inquest in the chancery, wherefore the chancery sent the whole process against all the persons into the king's bench, as is meet where a man pleads to the country in the chancery. And afterwards the defendants made default, wherefore the plaintiff prayed execution for their default.—*THORPE*. We do not know whether we can do that, for it used to be law, when there was a certain place which was extra parochial, as in Englewoode, and such like, in such case the king had and ought to have the tithes of such place, and not the bishop of the place, to grant to whom he pleased, as he has granted to you, &c. Nevertheless the archbishop of Canterbury this year has petitioned the parliament of our lord the king to have such tithes, which remains in parliament yet to be tried, and wherefore before it is tried, we will not grant you execution. And upon this they granted time, &c.

1340.

By *THORPE* it used to be law that the king had and used to have tithes in extra parochial places, (and not the bishop of the place) to grant to whom he pleased; but the archbishop of Canterbury has petitioned parliament to have such tithes, which petition remains to be tried.

Where upon a *scire facias* a man pleads to the inquisition in chancery, the whole process

is sent into the king's bench, as is meet where a man pleads to the country in chancery.

(2) See Fitzherbert.

38 Ed. 3. Exch. [Lib. Ass. 38. 227. pl. 20.] F. Jurisd. 32.

1365.

ONE prior Francis was caused to appear in the exchequer to answer to the king of certain arrears of his farm, when the possessions of aliens were in his hands, who came and said that there was a parson who held a parcel of tithes which were part of the possessions which he had; wherefore he was less able to answer the king without having that which was in his hands. Therefore a writ was granted to cause him to appear to answer *tam nobis, quam predicto priori*, &c.—*Kirkton* for the parson. Sir, This action is brought at the suit of a common person, and not at the suit of the king, nor his minister of that place; for though the parson should be discharged, the prior must be responsible.—*SKIPWITH* answer; for of all that concerns the king and may turn to his advantage, to hasten his business, we take consueance.—*Wichingham*. We say that we are parsons of C., and the same goods of which we are questioned, are our tithes growing in the hamlet of T., which is in our parish: and we and our predecessors for time whereof memory runs not, have been seised of these goods; as our tithes, except one time, when the

The exchequer took consueance of tithes in the case of the king or his farmer, though neither K. B. nor C. P. would.

1305.

prior disturbed us, for which we recovered against him by [writ of] spoliation. And we pray judgment, if the court will, &c.—SKIP[WITH] Oft times for the king has the court received such plea, and not been ousted of jurisdiction. Wherefore answer over. Wherefore the prior averred they were his tithes, and this he was ready, &c. And the others that they were their tithes. And so to the country. *Quod mirum*. And note, that neither in the common pleas, nor the king's bench, will the court take consuance of tithes, &c.

1365.

H. 38 Ed. 3. C. P. [38 E. 3. 6.] Jurisd. F. 43. St. 15.

In trespass for carrying away, &c. corn in garbs, the defendant pleaded that the corn was his tithes: the plaintiff replied that the lands were his demesne, and produced a deed of composition by which the defendant agreed not to tithe the demesne lands, it appearing from this that the question related to tithes, the court held that it must be settled in the spiritual court.

If a defendant justify as for tithes severed from the nine parts, and the plaintiff plead a grant of the defendant of the tithes of the land for a year or two years, *semble*, that the temporal court shall not be ousted of jurisdiction.

**T**HE abbot of S. brings his writ of trespass against the prior of G. and counts that he came with force and arms, and his corn in garbs took and carried away.—*Chellery*. Sir, we say that we are parsons of the vill, where, &c. and that the corn was our tithe, and severed from the nine parts, so we took it as our tithe. Judgment, if wrong, &c. *Claim*. Sir, We say that S. is a house of religion, of the Cistercian order, of which the demesne lands are not titheable; and a composition was made between the prior and the abbot, by which the prior granted to the abbot that he should not tithe his demesne lands in the said vill; and see here the deed of composition. Judgment, and we pray our damages.—*Finchden*. Sir, you see he has brought his writ as for his goods carried away, which we have justified, for that they are our tithes; to which he comes and says that his demesne lands are not titheable; so by his own plea it is shown that the dispute is concerning tithes, which cannot be tried here. Judgment, if the court will take consuance. *Kirton*. And since we have declared and you have justified, and so given jurisdiction to the court, and we have replied specially, and shown your deed, which proves a composition in law, to which you have not answered, judgment, &c.—*Chellery*. Although the plea comes from you, which ought to take away the jurisdiction of the court, it is no reason that the court should proceed more than before. Now the right to tithes is not triable in this court; and we have said that these are our tithes, within our parish, severed from the nine parts, and you say that they are demesne lands, which are not titheable; so, whichever be the issue, it will be the right of tithes,—let it be whether we have right to them as our tithes, or whether you hold them discharged of tithes,—which is not triable here.—*Wichingham*. We have not acknowledged that they were severed from the nine parts, but we have produced a deed of composition, by which laity is proved by your own deed. As if I grant to you my tithes in a place certain for a pension, that which before was spiritual is become temporal; wherefore, since we have produced your deed, which proves a contract and covenant between you and us, you must answer to the deed.—*THORPE*. Since he has said, that he had severed the tithes from the nine parts, and you have produced an agreement, which proves that you ought not to tithe your demesne lands, and the severance proves the contrary of the deed, you cannot be aided by the deed; and inasmuch as it is not denied by you, that the whole dispute between you is concerning the right to tithes, this court cannot take consuance.—*Wichingham*. The severance can be no cause for his claiming the tithes in contradiction to his deed: for although I place my corn in different parcels upon my land, and there is one portion amounting to the tenth part, yet if the parson take and carry it away, I shall have an action of trespass against him, and yet I could not say that the tenth part was not severed from the remainder.—*THORPE*. In the case you put that is true, for they are

not tithes; and if this case were so, you could safely say that he took your corn with force and arms, without this, that they were tithes. *Mort.* It appears to me, that he shall be obliged to answer to the deed, as he would in case the parson granted to me all the tithes growing in my lands for one or two years, although I should make a severance of the ten parts, and the parson should take them as his tithes, I should have an action of trespass against him: so here.—THORPE. The cases are not alike, for you acknowledge the right to be in the parson; but in this case the abbot does not acknowledge the right to be in the prior, but claims to hold the land acquitted of tithes in his own right: both of them also are persons able to hold tithes.—KNIVET. You have brought your writ of trespass against the prior, to which he appears, and says he is parson of the vill, and they were severed from the nine parts, so he took them as his tithes; to which you have replied, and say that you have an ancient privilege to hold your demesne lands acquitted of tithes, and produce a composition of late date, by which the prior grants that you should hold your lands not tithable, paying yearly to the prior five marks; and the dispute is concerning the right to tithes, which is not triable here. Wherefore the court awards that you take nothing by your writ, but sue in court christian, if you will (1).

(1) Stattham adds, "afterwards the upon the said composition, and recovered abbot brought an action of covenant his damages, &c."

E. 38 Ed. 3. C. P. [38 E. 3. 8. 1.] Jurisd. F. 44, 45.

**T**HE prior of D. brings a writ of trespass against the abbot of S. T. W. and R., his converts (2), and declared that they came with force and arms, and his corn in garbs took and carried away in the vill of S.—*Claim.* Sir, the prior is parson of the said vill, and we hold our demesnes not tithable by composition, and we took the said corn in our demesnes; and he brings this action for that we took away tithes. Judgment, if the court will take consuance.—*Ufflett.* We have alleged that you carried away our corn with force and arms, and we have not shewn that we are parsons of the vill, nor that they are tithes. Since you have not answered us, judgment for us, as for want of a plea. Afterwards *Claim* pleaded, and prayed judgment of the writ; for the writ is *pone per ead. &c. T. Abbat. de S. & W. & R. conversos ejusdem domus.* And *domus* is not before in the writ; so it ought to be *ejusdem abbatis.* Judgment, &c.—*Finchden.* It is all one, for if they be converts of the house, they are converts of the abbot. Wherefore afterwards the writ was held to be good.

were converts of the

The said prior brings a writ of covenant against the said abbot, S. and declares, that by composition made between them, the said abbot granted to the said prior, by deed which he shews, that he should tithe all his demesnes in S., wherefore the said prior had often come to the said abbot, and requested him to keep his covenant, which he would not do, to his injury and damage.—*Claim.* Sir, you see the cause of action here is concerning tithes, which cannot be tried in this court. Judgment, if the court will take consuance.—*Ris.* Our action is brought upon a covenant, which cannot be tried any where but here;

the subject of the action being tithes, the court would not take consuance. this being an action of covenant, tithes could not be recovered in it, and the objection therefore disallowed.

(2) See Jac. L. Dict. V. *Conversos.* Fitzh. has "*Conversos.*"

1365.

1365.

In trespass, the writ being *pone per ead. &c. T. Abbat. de S. et W. et R. conversos ejusdem domus.* it was objected that *domus* not having been mentioned before in the writ, it ought to have been *ejusdem abbatis:* But held to be sufficient; for if they were converts of the house, they abbat.

In covenant by the prior of D. against the abbot of S., on a deed of composition granted by the abbot to the prior, that he should tithe all his demesnes in S., it was objected, that But held, that the objection

1365.

and we cannot by this writ recover any tithes, or any thing but damages; and if you demur, it is to our action.—*Claim*. Although you have founded this action upon a covenant, yet you yourselves have shewn that tithes are the cause of this covenant, which is not triable here, but in court christian.—*TH[ORPE]*. He has brought this action upon a covenant expressed by your deed, and he can recover no tithes by this writ. Wherefore answer, &c.

1365.

E. 38 Ed. 3. C. P. [38 E. 3. 8. 2.] Juried. F. 46.

If one who is not a parson bring trespass for taking his corn against another, who claims it as tithes, being a parson, the court shall not be ousted of jurisdiction, as it is not between two parsons; and therefore the plea is but a traverse of the writ, viz. that it is not the corn of the plaintiff.

**O**NE William brings his writ of trespass against one T. and declares that he came with force and arms, and his cart, full of garbs, with three horses, of the value of, &c. took and carried away in K.—*Belknap*. We say, that we are parson of the vill of K., and that the corn was our tithe. Judgment, if the court will take consuance. And as to the cart and three horses, forasmuch as he had used this team with the corn, which is our tithe, of which the court cannot take consuance, Judgment of the writ.—*Chellery*. Sir, You see, he says, this was his corn, which is as much as to say, that he did not take our corn; wherefore we aver that he took our corn, &c.—*Belknap*. We have pleaded to the jurisdiction, forasmuch as we are parson of the same vill, and these were our tithes; for the other term in such an action (1) the defendant pleaded such a plea as we have, that he was parson of the same vill, and allowed. *THORPE*. This is not like the case of the other term, for there the dispute was between parson and parson, so that the court was apprised that the dispute was concerning tithes between two parsons; but here the dispute between you is not of tithes: wherefore your plea is nothing but a traverse of his writ. Therefore would you wish to say any thing else? And afterwards *Belknap*, as to the cart and horses, not guilty: and as to the corn it was his tithes, without this that he had carried away the corn in the manner he has declared. *Prest, et alii è contra*.

(1) Ante, Hil. 38 Ed. 3. p. 16.

1365.

T. 38 Ed. 3. C. P. *The King v. The Prior of St. John of Jerusalem*. [38 E. 3. 13. 9.] Indicavit. F. 4.

*Indicavit* will lie by the equity of the statute for a fourth part of the tithes and offerings, though only tithes are expressly mentioned.

In many places in London, a man shall have no tithes, but offerings.

**T**HE king brought his writ *de droit d'advowson* of the fourth part of the tithes and offerings of the church of St. Dunstan in Fleet Street, in the suburbs of London, against the prior of the Hospital of St. John of Jerusalem in England.—*Cavendish*. Sir, You perceive this writ is given by stat. Westm. 2. *Cum per breve de indicavit*, which statute allowed that a writ might be granted for (2) a fourth of the tithes, and this writ is for a fourth part of the tithes and offerings, which is not warranted by the statute. Judgment of the writ.—*Finch[den]*. The statute gives a writ for the fourth part of the tithes and offerings, and as well of tithes as other things: and in many places in London a man shall have no tithes, but offerings.—*Cavendish*. It is necessary that your writ should be supported by the statute, and that it be according to the statute; now you have brought your writ for tithes and offerings, whereas

(2) The statutes of Westm. 2. st. 1. (c. 5. s. 4.) and that of *circumspete agatis*, st. 4. were both passed 13 Ed. 1. and seem here to be considered as one statute.

The latter, though anciently reputed rather as an ordinance made by the king and prelates, has long since been received into practice as a statute. Seld. 424.



the statute does not give it but for tithes, and before the statute you could not have had such a writ; and if it can be maintained you may have a writ for less than a fourth part. Wherefore, &c.—**THORPE**. His demand is but for the fourth part of the tithes of the whole; and although it mentions nothing by express words but tithes; yet in chancery they may frame a writ in *consimili casu*, and the writ is good enough. Wherefore answer.

1366.

## T. 38 Ed. 3. C. P. [38 Ed. 3. 19.]

**T**HE abbot of C. brings his writ of trespass against I. of K., and declares that he took his corn in garbs.—*Claim*. Sir, We say that we are parson of E., and that a composition took place between the abbot and our predecessor, viz. that we should not have tithes in the demesnes of the abbot, nor the abbot have tithes in our demesnes, and that of the other lands and tenements in the same vill we have two garbs, and the abbot the third: and we say that the place where he supposes the trespass to be done, is the glebe of our church. And we pray judgment if the court will take consuance.—*Morice*. Sir, You perceive that his plea traverses our writ; for by his plea he alleges that he did not take our corn; wherefore the court has jurisdiction.—*Claim*. We have shewn that the dispute is concerning tithes, which is a spiritual concern: wherefore the court ought not to have consuance.—*Finch[den]* Your plea amounts to this, that you did not take our corn, which goes to our action; and you plead a composition, of which you produce no proof, wherefore it is for us to maintain our writ.—**THORPE**. Although his plea traverses your writ, it concludes to the jurisdiction.—*Morice*. Though it concludes to the jurisdiction, yet since the plea is a traverse of our writ, by that the court is seised of it, inasmuch as it goes to our action. As if in a *recordari* the defendant plead that the place is *ancient demesne*, and says further that he did not take the beasts, the court shall not be ousted of jurisdiction. No more here.—**MOUBRAY**. In your case the conclusion is not to the jurisdiction.—*Finchden*. But if in a *recordari* the defendant say, that the tenements are *ancient demesne*, and afterwards avow for cause certain; in such case where his plea goes to the action, the court shall not be ousted of jurisdiction; for if it appear to you that in any shape the party has pleaded any matter in affirmance of the jurisdiction of the court, you ought to affirm it. But the case here is stronger than the case I have put; for although there he pleads to the jurisdiction of the court, yet he avows for the sake of having return only. In our case he has traversed our action, and so affirmed the jurisdiction of the court. Wherefore, *quare*, &c.

1365.

In trespass by an abbot against a parson for taking his corn, the defendant pleads a composition, and concludes to the jurisdiction, as being tithes. *Morice* held, that the composition went in bar, and that the jurisdiction was therefore confirmed, but **THORPE** and **MOUBRAY** thought otherwise, as he concluded to the jurisdiction, and not in bar.

The parson held two sheaves in a parish, and an abbot the third.

## M. 39 Ed. 3. C. P. [39 Ed. 3. 23.]

1366.

**JOHN DE P.** brings his writ of trespass against **Nichol de C.**, and declares that he took his corn, to wit, wheat in garbs, and 20*l.* in money.—*Finchden* defends the wrong and injury, and says that the court ought not to have consuance: for the said Nicholas is parson of T. (where he supposes the wrong to be done) and the said corn was our tithe; so the dispute here is between parson and parson concerning tithes, which cannot be tried in this court. Wherefore judgment.—*Belknap*. What do you say to the money?—*Finchden*. That also was our offerings: wherefore the court ought not to take consuance.—*Belknap*. How was it your offerings?—*Finchden*. In whatever manner, inasmuch as it was our offerings, the court ought not to have consuance.—*Finchden* passed over that, and prayed judgment of the

A parson of one parish may have tithes in another parish.

Boundaries are to be tried at common law.

1366.

court; the writ is *asportavit bone et catalla*, and he has counted of money, which ought to be specially mentioned in the writ. Judgment of the court. And for this reason, *Claim* left out the money in his count, and counted only of the corn. And afterwards *Finchden* returned to the [point of the] jurisdiction, *causa qua supra*.—*Belknap*. Sir, we say, that whereas he says that the place is in his parish; it is not in his parish.—*Prest. Finchden*. And since you acknowledge that the dispute is between parson and parson concerning tithes, which in this court cannot be tried; judgment if the court will take consuance. *Chellery*. You say the place is in your parish; and this we have traversed, and say, that it is not in your parish; wherefore now in judgment you are as a layman, for you cannot claim more in our parish than other people.—*Finchden*. Sir, certainly I may have tithes in his parish, and that ought not to be tried here; and if such a dispute as this was in court christian, he should not have prohibition upon it in chancery, as it is concerning tithes. Wherefore since he does not deny that the dispute is between parson and parson concerning tithes; be it in our parish or not, the court ought not to have consuance.—*THORPE*. If you ought to have tithes in his parish, shew it.—*KNIVET*. Do you think, that if you took away his tithes in his parish, he should not have a writ of trespass?—*Finchden*. No, Sir, if I claim them as tithes appurtenant to my church, and certainly if the attorney wish it, I will demur to your judgment on this point; but we will aver in the mean time that the place is in our parish. *Prest, et alii à contra*.

1369.

E. 42 Ed. 3. C. P. [42 E. 3. 12. 19.] Juris. F. 47. St. 2.

In trespass by a layman against a parson, for corn taken, the defendant says he is parson there, and the place within his parish, and the corn tithes severed from the nine parts, the court took consuance; for a layman cannot be intended to have tithes; whereupon he says, there was a dispute in the spiritual court between him and the prior of D. who claimed tithes there, and the defendant said that the prior himself was seised of land, and infeoffed another, so that he could not have tithes in his own lands; whereupon judgment was given for the defendant, and afterwards the plaintiff, claiming through the prior, got possession, and the defendant took them as his tithes; the court took consuance, and compelled the defendant to plead, for that the plaintiff was a layman. Bro. Ab. Jurisd. 6. 11 Co. 13, b.

ONE J. brought his writ of trespass against one W. Constable, clerk, and alleged by his writ, that he carried away his goods, and declared for corn in garbs.—*Kirton*. We say, that these were garbs severed from the nine parts, within the parish of T. of which W. is parson, and his tithes; we conceive the court will not take consuance.—*Belknap*. Sir, you perceive we complain of our lay chattel, to which he says nothing; wherefore judgment, &c.—*Kirton*. You claim nothing but tithes, wherefore we conceive the court will not take consuance.—*FINDCHDEN*. The plaintiff is a layman; therefore it cannot be intended that he can have tithes; wherefore answer.—*Kirton*. We say, that a dispute took place in the court christian between this same W. and the prior of R., when the prior claimed the tithes in the land, where, &c. and W. pleaded that the tithes did not belong to him, for that the said prior had been seised of the said land, and had made a feoffment of it to another, so that even in his demesne lands he could not have tithes; in which court it was adjudged, that W. should (1) have the tithes, and afterwards as the prior could not have tithes in court christian, the prior granted all his tithes to this same J. who is plaintiff, for that he is a great maintainer of inquests and other things *in pais*, in order to try it in this court; by reason of which grant, and by colour thereof, J. took possession of these goods, and claimed them as tithes, and the said W. because they were his tithes, and severed from the nine parts, took them out of his possession, and we pray judgment if the court will take consuance.—*Belknap*. Still you make no answer to us; wherefore, &c.—*Kirton*. If the prior himself were party, the

(1) In the Year Book "Not" is inserted, but omitted in Fitzh.

1369.

court would not have jurisdiction; therefore we conceive that you who have his estate shall not have any action in this court, &c.—FINCHDEN. Sold and delivered they become lay chattels, and moreover he is a layman, and neither in court christian nor in any court than this, can he have redress; wherefore answer.—*Kirton*. We say that these were tithes, viz. corn severed from the nine parts, and in the parish of T. of which W. is parson, and I. claims them by colour and by grant of the prior, and was seised, and W. because they were his tithes, took them, and we pray judgment if wrong.—*Belknap*. Still you answer nothing to us, unless you will say, without this that you took our corn.—*Kirton*. That will not do, for the same/cee must come from you.—FINCHDEN. The issue shall be in this manner, viz. that it was corn severed from the nine parts, and in the parish of T. and the plaintiff claims it by colour and by grant of the prior, and was seised, and W. took it out of his possession as his proper goods, and not the goods of J. the plaintiff, *prest*, &c. and the issue of *Belknap* shall be, that he took his goods as he has alleged by his writ, *prest*, &c.—*Kirton*. We will not take issue, that he took it out of the possession of J. as his proper goods, inasmuch as W. claims it as tithes.—FINCHDEN. If they be tithes, then they are his proper goods when he is in possession.—*Kirton*. Nevertheless we pray, that it be entered in the roll, that W. took it as his tithes, and so took his proper goods, &c. and not the goods of the plaintiff, &c. and the plaintiff, that he took his goods as he has alleged by his writ, &c.—*Belknap*. He must answer to our special matter.—*Kirton*. If you please I will aver, that you took our corn, without this, that they were your tithes, &c.

M. 43 Ed. 3. C. P. [43 E. 3. 34. 44.] Jurid. F. 48, St. 3.

1370.

**TRESPASS** was brought against the parson of the church of A. for garbs taken, wherefore, &c.—*Kirton*. We are parson of the church of A. and the prior of B. is parson of the church of H. which adjoins; and we say, that there is a great field in the parish of H. in which field we have the third garb of tithes severed from the nine parts, and the prior of B. two garbs; and further, that the plaintiff is farmer of the church of H. and the garbs of which, &c. were our tithes, to wit, the third garb; and we contend that this court will not take consuance.—MOUBRAY. If you had said that they were tithes *ut supra*, and that you were parson of one church and he of the other, so that the right of these tithes might be tried in court christian, this court ought not to take consuance, but there is no colour why this court should surcease; therefore as the parson is not party with you here, answer.—*Kirton*. We say *ut supra*, and further that the plaintiff is farmer of the prior of B. of the said church of H. so as this is concerning tithes between us, judgment if the court will take consuance.—FINCHDEN. The parson is not a party with you, so that he cannot claim but for his lay chattel; and the right cannot be tried between you in court christian, if the parson be not a party; therefore answer.—*Kirton*. We say, they were our tithes *ut supra*, so we took our tithes; judgment if wrong.—*Belknap*. You took our garbs in the manner our writ supposes, &c.—*Kirton*. You must say, "Without this that they were your tithes."—FINCHDEN. Whether they were your tithes or not cannot be tried here, for we cannot try the right of tithes here, wherefore the issue shall be, that you took his garbs, as his writ supposes, and on your part that they were your goods, without this, &c.; and so was the issue entered.

A parson claimed the third tithe sheaf in a place, and a prior the other two sheaves, as parson of the parish.

1371.

H. 44 Ed. 3. [44 Ed. 3. 5. 22. Lib. Ass. 288. pl. 25.] Juried. F. 49. Assise. St. 7.

In ancient time everyman could grant the tithe of his land to what church he pleased.

Where a prior claimed the tenth part of all kind of corn and hay in certain land, after the tithes set out and delivered to the parson, such claim was held to be a lay profit, though claimed by a religious person, and that the consuance of it properly belonged to the temporal court.

**T**HE prior of S. brings an assise of *novel disseisin* before LUDLOW and BELKNAP, and makes his plaint by *Tanks*, of profits to be taken, viz. the tenth part of all kind of corn growing in one hundred acres of land, and of all hay mown in ten acres of meadow, after the tithes set out by the party, and delivered by the tenant to the parson.—*Digge*. Sir, you perceive the complainant is a religious person, and complains concerning tithes, we conceive the court will not take consuance.—*Tanks*. We say that the prior of H., and his predecessors have been parsons of the same land, and have had the tithes thereof for time whereof memory runs not, &c., and yet have the tithes; also, we and our predecessors have been seised for time whereof memory, &c., of the tenth part, *ut supra*, after the tithes of the parson, in which case this profit, which we claim, cannot be called tithes, Judgment; and we pray the assise.—LUDLOW. In ancient time every man could grant the tithes of his land to what church he would, and if at that time he who was tenant of this land had granted the tithes to the parson of H. and his successors, as he well could, and afterwards granted to the prior and his successors, the tenth part, &c. *ut supra*, this grant was good, and your predecessor would hold as tithes, and also you. And in this case, what you have is tithe, as well as what the parson of H. has. Wherefore it is good, if you have any thing to enforce your tithes, and you shew it.—*Tanks*. It seems to me, that in the case you put it cannot be called tithe, and if this profit was granted to our predecessor and his successors by deed before time of memory, if such deed be shewn now, it will be to no purpose, because they cannot have an answer to it, therefore we conceive that we have said enough.—*Digge*. If you who are plaintiff were a layman, the plea would be good; but you are a religious person, in which case it will be intended that they are tithes, unless the contrary be shewn, which is not the case here. Wherefore, &c.—*Tanks*. If we would bring our suit in court christian, and the defendant sued a prohibition, we could not have a consultation, because we are not parson, but the prior of H.; therefore since we could not sue in court christian, it behoves us to bring our suit here. Wherefore, &c.—LUDLOW. Your case of consultation and this case is all one, therefore prove that in your case you could not have a consultation, and then you prove your point. And it is adjourned in fifteen days of Easter, at which day *Tanks* says, *ut supra*, that the prior of H. and his predecessors were parsons of the said land, and were always seised of the tithes, and that this which he demands, he demands as lay profit, &c. and he and his predecessors have been seised thereof as of lay profit; and prays the assise.—*Digge* prays judgment, since he is a religious person, and does not shew how it is lay profit. Wherefore much more strongly it shall be intended tithe, &c. than otherwise. Wherefore we conceive that the court will not take consuance, and *non allocatur*; but the assise awarded to inquire the truth.

1371.

M. 44 Ed. 3. [44 Ed. 3. 39. 38.] Juried. F. 37. St. 4.

In trespass the defendant said, that he was servant to the parson, and took the corn as tithes, severed from the nine parts, and pleaded to the jurisdiction, which was not allowed, for he could not try the right of tithes, as his master could, and he therefore pleaded this matter in bar.

**I**N a writ of *trespass* for corn in garbs carried away, against several. *Chellery*, for the defendants, says, that their master was parson of the church of such a place, &c. which adjoined the vill of Asherst, in

which vill this corn was growing, and of which vill their master was parson, whose servants they are; and that this corn was severed from the nine parts, and they took it as tithes of their master, and we do not conceive that the court will take consuance, and *non allocatur*; for they are not such as might try the right of tithes (1), but are altogether as strangers, wherefore such a plea is not allowed them; &c. and they were by the court ousted of the plea. Afterwards *Chellery* says, as before, they took the tithes of their master, without this that they took the corn of the plaintiff. *Prest, & alii à contra.*

(1) See 7 H. 4. 35.

1871.

T. 45 Ed. 3. C. P. [45 Ed. 3. 17. 8.] F. Jurisd. 52.

**JOHN DE C.**, knt., sues a writ of trespass for corn in garbs, carried away, and other goods and chattels, against *N. S.*—*Belknap*, for *N.*, says, that the plaintiff was farmer to one *J.*, of the church of *S.*, of which he is a parishioner, and the corn belonged to him who claimed it as tithes, and we do not conceive that the court will take consuance.—**FINCHDEN.** They complain of goods taken out of their possession as lay chattels, and lay persons, and not as parsons disputing about tithes, in which case the suit would be removed into court christian; and if the corn was not severed, they could not claim it as chattels before seizure, no more than in case of a heriot, what he may distrain for a heriot, &c. Wherefore answer.—*Belknap* says, that the plaint was for wheat, barley, and oats; and afterwards says, that they grew in his own land, and he had taken the corn as his own proper goods, &c. Judgment, &c. *Chellery.* We say that this same *N.* is a parishioner of the vill of *T.* within which parish the land is, on which the corn was growing, and was in garbs severed from the nine parts, and the parson of the said vill sold us his tithes, so that it was our corn, &c.—*Belknap.* They were not severed from the nine parts. *Prest, &c. Et alii à contra.*

1872.

A layman brought trespass, and the defendant claimed as farmer of the parsonage for tithes, the spiritual court shall not have jurisdiction, and they went to issue, whether the corn was severed from the nine parts as tithes, or not severed.

E. 46 E. 3. C. P. [46 Ed. 3. 9. 3.] F. Jurisd. 54.

1873.

**TRESPASS** is brought by one as parson for corn in garbs, taken and carried away, against a prioress, who, by *Hast'* says, that in the said place where, &c. the garbs were severed from the nine parts as tithes, of which tithes she and her predecessors have been seised for time, &c., and she took them as tithes; judgment if the court will take consuance.—**FINCHDEN.** You have given no colour to the plaintiff to claim as tithes, but it shall more readily be considered his lay chattel; for if he had bought tithes in your parish, and you had taken them, this writ would lie, and if a parson had certain tithe garbs in a field, and they were carried away, he should have a writ of trespass, and this court would have consuance; and afterwards, he (*Hast'*) says, that the corn was severed from the nine parts as tithe, and within the parish of the said parson; and for that we and our predecessors have been seised of the tithes issuing out of the said land for time, &c., we took and carried them away, and demand judgment, &c.—*Fulthorp.* You perceive that the defendant does not claim the garbs as parson of any church, nor as annexed to any church, and so he demands judgment whether the court will not take consuance.—*Hast'.* She has claimed as prioress, and the corn as tithes appertaining to the priory, and that she and all her predecessors have had and been used to take the tithes growing in the said land in this parish, and demands judgment.—**FINCHDEN** to

If in an action for trespass, the defendant claim the corn for tithes, but his plea conclude to the action, the temporal court shall take consuance.

A prioress claimed tithes, as appertaining to her priory.

1373.

*Mass.* You claim as tithes, for time, &c. so your proper chattel, so your plea goes too far (1), and although a man plead to the jurisdiction, if the plea at the conclusion goes to the action, the court will take cognisance.—*Kirton*. She pleads as a religious person, and intends to plead to the jurisdiction.—*Fulthorpe*. Our lay chattel, *Prest.*—*FINCHDEN*. This is no answer, nor shall you be admitted to such averment without special matter how your chattel, as by purchase, or growing in your own land, &c. *Vide Stat. 1 Ric. [2] c. 13. [ & 14.]*

(1) "*Issint vous pldes plus haut.*"

1377.

H. 50 Ed. 3. C. P. [50 E. 3. 10. 21.] F. Attach. sur Prohib. 7.

By BELKNAP, *silva cædua* means every kind of wood which will bear to be cut, and will grow again; in a prohibition therefore to a suit for great trees, it is not sufficient to say that he did not hold plea of any thing but *silva cædua*, for by this word priests demand tithes as well of great as smaller trees, and it was never seen that tithes were paid of great trees or timber; therefore she traverses must be, that he did not hold plea of great trees, and to this the court agreed.

In an attachment on a prohibition, it was doubted whether the spiritual judge should take judicial notice of what kind of wood tithes was claimed,

where it was stated in the libel to be *silva cædua*, unless it was surmised that proof was offered that it was demanded of great trees, and the proof refused.

THOMAS FRANKLEY and Hamond P., sued an attachment on a prohibition against Henry Heyning and master John Chelle Lech de Burton, and count that Henry sued in court christian for tithes of great trees, and the said John, the official, held plea of the said trees; whereupon they delivered the prohibition to them at a certain place, and on a day certain, and notwithstanding the prohibition, they continued to hold the plea in contempt of the king, and to the damages of the plaintiff of 100l.—*Bury* for Henry. We make protestation that no prohibition was delivered on the day he supposes, and say, that by reason of the prohibition we surceased, until we came into the chancery and shewed the libel, which stated that we sued for tithes of *silva cædua*, whereupon we had a consultation of our lord the king, and continued the said plea; and so pursued it by reason of the consultation, as we well might, without this, that we sue in court christian of other wood, or other trees than *silva cædua*, *Prest.*—*Tresilian*. We have alleged by our action, that you have proceeded in court christian for tithes of great trees, to which you answer nothing, wherefore we pray judgment, and that you be attainted of the contempt.—BELKNAP. These words, *silva cædua*, mean every kind of wood which will bear to be cut and will grow again; and I say for a certainty, that every tree which is cut, will grow again if it be well protected from injury by beasts; so that, under this name of *silva cædua*, the parsons and vicars of holy church sue for tithes, as well of great as of smaller trees, and it was never seen that tithes should be paid either of great trees or of timber (2), wherefore it behoves you to plead in the form, that you have not sued plea in court christian of great trees, as he has alleged, or otherwise you plead nothing to him: *quod curia concessit*; wherefore, unless you will traverse the contempt, viz. that you have not sued plea of great trees in court christian, the court adjudges against you presently, wherefore decide, and afterwards day was given *prece partium* to fifteen days of Trinity, at which day *Bourgh* tendered an averment, that he sued plea of *silva cædua*, without this, that he sued plea or did any thing else concerning great trees. *Prest. & alii è contra.*

*Holt*, for the official. We say that he libelled before us as for *silva cædua*, and named it specially; and afterwards, by reason of the prohibition, we surceased, till he delivered to us a consultation to pro-

(2) It appears from Bro. Abr. Att. sur Prohib. 5. and Dismes. 3. that "*merisma*" should be read for "*meinders*," which is in the Year Book. *Merisma* properly

signifies wood used for building. Jacob V. Moeremium says, it properly signifies any sort of timber fit for building, *scu quodvis materiamentum*.

ceed, &c.; and we went on as not knowing but by the libel what trees they were, we are not aware that we are bound to know this, so no default in us, wherefore judgment if we shall be impeached.—*Tresythian*. We say that we shewed by *W. Biant*, our advocate there, and he alleged in the presence of certain persons, that the trees of which tithes were demanded, and of which the official held plea, were great trees not *caduous*, and notwithstanding this, you held plea as before; wherefore we pray judgment, and that you be attainted for the contempt, and we pray our damages.—*Holt*. We have alleged that we held plea upon the libel for *sika cadua*, after the consultation, as one not knowing any thing but as judge of the great trees, and he has alleged nothing against us, but that he shewed us by his advocate, that it was concerning great trees, and not *caduous*, in the presence of certain persons, and he has not, in fact, surmised, that he offered proofs, and that we refused to accept the proofs; so have we assigned sufficient cause for us to depart. *Tresythian*. And we judgment, *ut supra*, and *sic ad judicium*.—*BELKNAP*. If you deny the one or the other, your plea will be entire (1), and we will advise of our judgment. *Quære la ley?*

(1) "*Serra entier*."

M. 50 Ed. 3. C. P. [50 E. 3. 20. 1.] F. Jurisd. 15.

**JOHN BEINARD**, parson of the church of Stoutle, brings a writ of trespass for corn in garbs, and hay in stacks (2), taken and carried away, against Thomas H.—*Persey*, We say that John is parson *ut supra*, and this corn was growing within the bounds of the parish of Saltmarsh, and that it was severed from the nine parts, and that we, as bailiffs of the said parson of S., and by his command, took the said corn, as the tithes of our master within his parish; so as this suit is of the right of tithes of one part and the other, it cannot be tried in this court, and we pray judgment, if the court will take consuance.—*Perle*. Since we have brought an action against a person with whom the right of tithes may be tried in this court, as in court christian between his master and us, and he does not answer; therefore, for default of answer, we pray our damages; for the right of tithes cannot be tried between laymen and persons of holy church in court christian, unless the master be named, therefore it is necessary that it should be tried in this court, or it will be tried in none, which is unreasonable; and supposing we should say that he was not his bailiff, but that he took the corn of his own wrong, and without his command, I say it would be no more an answer than it would in replevin. But he ought to traverse the title and the cause of the taking in the right, so the cause in this case being whether the tithes were in one parish or another, it will be an answer to say, that whereas you suppose the place to be within the bounds of your parish, it is within the parish of my master, and it is not in the power of court christian to try the bounds of the parishes.—*BELKNAP*. Certainly, you should have the issue you mention on the bounds of the parish, and I have often seen it here. *Vide* 38 Term Hilary, in trespass. And as to what you say, that it shall not be an answer to say, that he was not his bailiff, but took them of his own wrong, I say, it would in this case, where the plea is but to oust the court of jurisdiction, for if you did it of your authority, and not as bailiff, and were bailiff in fact, the right of tithes should be tried between you in court christian, and not in this court. But if a man avow as bailiff, or justify as bailiff, and plead to the action, it is no traverse to say,

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Boundaries shall be determined at common law.

Although in replevin, if one justify or avow as bailiff, and plead to the action, it is no traverse to say that he is not bailiff; yet in trespass for corn taken, where one says he is bailiff to a parson, and so justifies for tithes, whether bailiff or not, is traversable, as it is only to oust the court of jurisdiction.

(2) See Bro. Jurisd. 19. it is printed in Year Book "stalkes."

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that he is not bailiff, but he ought to answer to the plea in the right, but not in this case; wherefore answer.—*Persay*. The corn was growing in the parish of our master in Saltmarsh, and we took it there as bailiff, as the tithes of our master, severed from the nine parts, without this, that it was growing in the parish of Stoutle, as he has complained, *Prest*.—*Perle*. This corn was growing in our parish of Stoutle, and severed from the nine parts, so our tithes; so you took our corn of your own wrong, *Prest*.—*Persay*. They were growing in our parish of Saltmarsh, where my master is parson. *Prest*, & *alii* *à contra*.

1406.

H. 7 Hen. 4. K. B. [7 Hen. 4. 35. 2.] F. Jurisd. 40.

In trespass by a parson against a layman, who pleaded the lease of a prior who claimed two tithe sheaves, and the plaintiff the third in a vill adjoining the plaintiff's: it was held that the temporal court should be ousted of jurisdiction.

IN a writ of trespass, brought by a parson against a layman, who says that the prior of Seine was parson of a church in a vill adjoining to the vill where the trespass is supposed, in which vill the plaintiff is parson, and the said prior had in the vill aforesaid, in a certain place, after the tithes severed from the nine parts, two of the garbs, and the plaintiff the third; and in a certain place the plaintiff had the two garbs, and the prior the third; and says, that the said prior had leased the said tithes to the defendant for a certain term, &c., and that he took the corn after the tithes severed, &c. *ut supra*; and prays judgment if the court will take consance, &c.—*Pole*. As you are a layman, in which case the tithes cannot be disputed between us in court christian, &c. We pray judgment, if this court ought not to take consance, &c. And allege that the court had had jurisdiction in such case before this.—*Gascoigne*. Although it have been so before this time, it shall not be so done by us here, and you are plaintiff, so that if they be your tithes, you can well enough recover in court christian. *Pole*. The statute of *articuli cleri*, concerning the royal prohibition, says, that "by sale, spiritual things become temporal, and tithes pass into chattels;" so it appears that by the lease *ut supra*, the tithes have become chattels, so that of this chattel prohibition lies, inasmuch as lay chattel is not pleadable in court christian. And afterwards *Gascoigne* to *Pole* answer to what he says. See Mich. 44. fol. 39, (1) where the defendant said, that he took certain corn as servant to a parson, and because he was not a person who could try the right of tithes, but was altogether a stranger, the court had jurisdiction, &c.

(1) Ante, p. 24. M. 44 Ed. 3.

1410.

T. 11 Hen. 4. [11 Hen. 4. 89. 43.]

In attachment on a prohibition an issue was tendered that the wood for which tithes were claimed in the spiritual court were great trees, fit for building a house for the habitation of any one, according to the custom of the country.

ATTACHMENT on a prohibition was sued against the parson of the church of Bolt', for that he sued in court christian, claiming tithes of great trees of the age of forty years and more, against the form of the statute 45 Edw. 3. c. 3, and against the prohibition; and suggests, that he sued for tithes of thirty acres of wood, and states the time of the delivery of the prohibition in certain.—*Norton*. You ought not to have your action; for we say, that whereas you suggest that we sue for the tithes of thirty acres, we sue for the tithes but of twenty-four acres, and of these we say that eighteen acres were cut within eighteen years; before the last fall, when one of the predecessors of the defendant was seised of tithes, and the other six acres were cut within thirty years before the last fall, at which time one A. our predecessor, was seised of the tithes; and on the last fall, we sued in court christian, and you sued a prohibition, upon which we went and shewed our libel in chancery, and had a consultation there; whereupon we proceeded, as



we well might, and we conceive that you can assign no wrong in us.—*Adam*. Protesting that we do not acknowledge the fall of the six acres within thirty years, we will aver, that you sued for tithes of wood growing in the eighteen acres, as we have declared, and since it is ordained by the statute that no suit shall be for the tithe of great trees of the age of twenty or forty years, we will aver that all the wood but the six acres were great trees, fit for the building of a house for the habitation of any one, according to the custom of the country, and that they were of the age of forty years, and this would make an issue; and the consultation says, *Ita quod minime de grossis arboribus agatur*; and as to the six acres, that was a quantity of wood, where underwood was growing among the great trees, of which we have always been ready to pay tithes, and yet are, so that for the remainder you have sued contrary to the statute, and we pray judgment and our damages.—*Norton*. And we pray judgment since you do not deny that the trees in the eighteen acres were but eighteen years old, and the remainder of the age of thirty years; and we will aver that our predecessors had tithes *ut supra*, and after the last fall they are yet growing; and so for trees of such age it is lawful for us to sue, and we demand judgment, if, &c. *Vide* Hil. 50 Ed. 3, fol. 10. (1)

(1) *Ante*, p. 26.

H. 14 Hen. 4. [14 Hen. 4. 17. 14.] *Jurisd. F.* 41. St. 12.

**T**HE parson of E. brings a writ of trespass for his corn taken away in Eastharpter, against the abbot of G.—*Hornby* for the defendant. We say, that we are parson of the church of Westharpter, and hold the said church appropriate; and you are parson of Eastharpter, which churches adjoin, and because the corn was severed from the nine parts, we carried it away as tithes, and you as parson, &c. claim the said corn to be your tithes; and we pray judgment if the court will take consance.—*Strene*. You ought to say, that the place is in your parish, or in ours; for if the place be within our parish, you ought to claim them as a portion.—*Hornby*. That is not necessary.—*HANKFORD, ad idem*. It appears that he has said enough, for he would plead in the right; and, supposing they were neither in your parish nor in his, but in another parish, it is sufficient to oust the court of jurisdiction to say that he took them as his tithes, and you claim them as your tithes.—*THIRNING*. He must *de necessario* say, that he took them in his parish, or otherwise in the parish of the plaintiff, appendant, &c., as a portion, &c.; for I never saw it otherwise done.—*HILL*. The defendant must show some title, as to say that the place where the corn was growing was within his parish, and that he took it as his tithes, or otherwise that the place is within the parish of the plaintiff, and that he had a portion there, &c. And although it were so, he should not plead of the right; and in many cases a man shall plead, and in pleading show divers things which are not traversable. Wherefore, &c.—*Strene, ad idem*. If he show that the place is within his parish, then it will be a good plea for me to say, that it is within my parish; and if he say that it is within my parish, then his demand shall be nought. Wherefore, &c. And afterwards *Hornby, propter opinionem curie*, says, that he and his predecessors have been seized of the tithes in the said place for time whereof memory is not, and he took them as his tithes, and the other claimed them as his tithes, &c. and we pray

consance, notwithstanding the plaintiff said that the defendant had let his parsonage for years unexpired.

*HANK*. said, that a parson might have tithes by prescription in an extra-parochial place.

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Trespass by the parson of E. for corn taken in E., the defendant says he is parson of W. and took it as his tithes, and the plaintiff claimed it as his tithes, and so concludes to the jurisdiction, the court held, that where a parson of one parish prescribes for tithes in another, as appendant to his church, he need not claim them as a portion, although he must declare in certain, in how much land he claims the tithes; but as the question was of the right of tithes, the court would not take consance.

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judgment, if the court will take conuassance.—*Skrene*. Still you do not say whether the place is in your parish, or in ours.—*THIRNING*. He has said enough; wherefore answer.—*Skrene*. I never saw but that he should say within his parish, or that he had them in my parish, as a portion.—*THIRNING*. Say no more of that matter. *Skrene*. We will imparl with your leave. And afterwards at another day he came and took the same exception, and *non allocatur*; for *HANKFORD* said, that it might be that it was in no parish, for Windsor forest is in no parish, wherefore, &c. And afterwards he challenged the pleading, for that he had not declared in certain, in how many acres or in how much land he claimed his tithes, and to this he was compelled (to answer) by the court, *quod nota*, wherefore he says in twenty acres of land, of which the place where the corn was growing is parcel, wherefore, &c.—*Skrene* says, to say that the place is in your parish shall not be, with this which we will aver that the place is in our parish, if it would make an issue; for we say, that you heretofore brought a writ of trespass of certain loads of hay and corn taken from the said twenty acres of land, of which the place where you now claim tithes is parcel, to which we pleaded that the place was within our parish, and that we took the said corn and hay as our tithes, &c.; and you have said that the place was within your parish, wherefore to say now that the place is in our parish shall not be, and shews that the said writ is yet pending, and the said issue to try.—*HILL*. He does not say that the place is within your parish, and you yourselves shew, that the issue is yet to try, &c.—*Hornby*. Since he does not deny the matter alleged by us, we demand judgment, and pray that the court be ousted of jurisdiction, and to the plea pleaded in the manner by him no law compels us to answer, wherefore, &c. And afterwards *Skrene* asked leave to imparl, and he was laughed at by the court for his plea. And afterwards he comes and says, that one *W. E.* was seised of the manor of *Hilton*, of which the twenty acres are parcel, which manor is within our parish of *East Harpter*, of which manor we and our predecessors have had the tithes for time whereof, &c.; and we say, that you are parson of *West Harpter*, and hold the said church appropriate, and that long time before the trespass done you leased your rectory to one *Simond G.* to continue until, &c., which term yet continues, and we say that the aforesaid *S.* sowed the said lands and cut the corn, and severed them from the nine parts, therefore we sent our servants there to collect and gather the said corn, and the said *S.* by your command carried it away, and, since you have acknowledged the carrying away, we demand judgment, and pray that you be attain.—*THIRNING*. What is this to the purpose? for by your plea you are to try the right of tithes here, which cannot be tried in this court, wherefore sue in court christian, if you will. But note, that before this, *Hornby* challenged the double-ness, &c. Wherefore, &c.

1418.

H. 5 Hen. 5. C. P. [5 H. 5. 10. 23.] F. Jurisd. 39.

Questions of boundaries shall be determined at common law.

**WRIT** of trespass was brought against one for his corn in garbs taken and carried away, &c.—*Rolf* demands judgment, if the court will take conuassance, for that there are two vills adjoining, whereof one vill is within the parish of the plaintiff, and the other within our parish, and the place where he supposes the taking, is within our parish, and we took it as our tithes, and the plaintiff claiming it as his tithes, supposing the place to be within his parish, would have taken it, and we would not suffer him, &c.; to which the plaintiff says that

the place where the trespass is supposed is within his parish, and not within the parish of the defendant, and prays his damages, and *Rolf* demands judgment, *ut supra*. And it was determined that *Rolf* should answer, wherefore the issue was taken, if the place where the trespass was supposed was within the parish of the plaintiff, or within the parish of the defendant, &c.

1410.

9 Hen. 5. *The Abbot of Ramsey v. Cook*. [4 Rot. Parl. 153. M. 5.]  
1 Gw. 117.

1422.

**B**E it remembered, that whereas master Wantier Cook, parson of the church of Somersham, in the diocese of Lincoln (1), has sued in the court of arches of London for certain tithes of a meadow or marsh, called Crouland Mede, situate within the bounds and limits of the said church, or the titheable places thereof, as of right belonging to his said church, against one William Whithed, and others, who were tenants of the abbot of Ramesey, regardant to his manor of Chaterys, and occupiers thereof, who would not pay nor yield any tithe thereof; and although the said abbot for this reason made himself a party against the said master Wantier in the said suit, alleging in his plea that the said meadow or marsh was parcel of his said manor, situate within the parish of Chaterys, and in the diocese of Ely, and that he ought not to pay any tithe thereof, for that he was discharged of the payment of all manner of tithes by papal privilege, and by title of prescription; yet the said parson recovered against them his tithes arising from the said meadow or marsh, by sentence given in the said court of arches; as by a libel delivered to the chancellor of England, under the seal of the dean of the same court of arches, and by the same chancellor shewn to this parliament, it more fully appears; whereupon the above-mentioned abbot lately came into the king's chancery, and prayed upon the matters contained in the said libel, the king's writ of prohibition to issue out of the said chancery, to stay execution of the said sentence, surmising among other things, that the dispute between the said parties upon the matters aforesaid in the said court of arches was, by the words of the said libel, concerning the bounds and limits of the soil of the said meadow or marsh, and not tithes only; in which case the court christian had not consueance. And forasmuch as greet altercations and debates were for a long time had and moved in the said chancery, between the counsel for both parties, upon the matters aforesaid, upon which my said lord chancellor, and the king's clerks of his chancery, could not, by reason of the difficulty, be shortly and rightly advised to do what the law would in this behalf, my said lord chancellor adjourned the matter to this same parliament, and adjourned and referred the said parties there to hear what might be determined by the advice of the same parliament, according to the effect of the old statute of Westminster the second. And afterwards, upon the shewing of all the premises in this same parliament by my said lord chancellor, the said parties being then present, and that which by the advice of their counsel, they pleased to say or declare thereupon being heard, by the command of the honorable prince my lord John duke of Bedford, keeper of England, the king's justices as well of the one bench as of the other, and also the chief baron of the exchequer, then present before the said keeper and lords in the same parliament, were firmly charged, that the matters in the said libel contained, being considered and understood by them, upon which the said abbot made his said prayer, they should give their good advice according to

In a case referred from the chancery to the parliament, on account of its difficulty, a prohibition was refused after sentence, upon a surmise that the question was, by the words of the libel, concerning the boundaries of the meadow in which tithes were claimed, and not merely concerning the tithes.

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the exigency of the law, for the more sure exhibition of justice in this behalf. Whereupon good and mature deliberation being had by the said justices and barons, and their several reasons afterwards separately given, being heard and understood; it was the opinion of the said keeper and lords, according to the advice of the said justices and baron, that no prohibition lay upon the matter aforesaid so prayed against the execution of the said sentence, nor could it lie, nor was it grantable in the case.

1423.

M. 1 Hen. 6. C. P. [1 H. 6. 5. 23.] F. Jurid. 1.

In an action of trespass by a parson against a layman, who pleaded that he took the goods as the tithes of his master, and so to the jurisdiction, the court overruled the plea, and took consuance of the matter.

**T**HE abbot of Osney brings his action of trespass against a man; and declares by *Cottesmore* of goods carried away, &c.—*Strangeways*. We say that the abbot is parson of the church of C., and claims the goods as tithes of the said C., and one S. is parson of the church of Stanton, and the defendant as servant of the aforesaid S., and by his command, took the goods as tithes, and that the church of Stanton adjoins the church of C., and the goods were severed from the nine parts, and are tithes appendant of right to the church of Stanton. Judgment, if the court will take consuance.—*Cottesmore*. It appears to me that the court shall have consuance: for if the case were, that the action was brought between parson and parson, then the court would take it to be for tithes, and so between two spiritual persons the law spiritual shall have jurisdiction; but here the defendant is a layman, and there would be no redress elsewhere, and this court shall not be ousted of jurisdiction, unless the court sees that another court has jurisdiction (*quod nota*), and another court cannot have jurisdiction in this case, &c.—*Strangeways*. I think that the court has not jurisdiction, for I put the case that we should now plead our matter to the action; for he says that they are not the tithes of our master, and this issue cannot be tried here by laymen. And in this there is no harm, for if the plaintiff bring his action against the defendant in court christian, the defendant shall have aid of his master, and his master shall be well made a party with him, and between them the tithes shall well be tried. And it was said that this was the spiritual law, and that it had been done thus heretofore. Wherefore, &c. **MARTIN**. I think the court shall have jurisdiction, for the plaintiff has more advantage in law against the servant than against the master: for if I bring a writ of trespass *quare vi et armis*, for taking beasts against a bailiff or a servant, the writ is good, and yet I well know if it was brought against the lord *vi et armis*, the writ is abateable: so in this case if the writ had been brought against the parson of C., I well know the court would be ousted of jurisdiction: but it is brought against the servant, and so a different case.—**CHORKE**, *ad idem*. There is a statute (1) which says, that in an action of trespass brought between parson and parson, the plaintiff shall not be admitted to maintain his writ, and say that the defendant took his lay chattel, without shewing how it is his lay chattel, if the defendant plead to the jurisdiction: but the case here is between an abbot and a layman, so out of the provision of the statute, and at common law, and so the plaintiff shall be admitted to say that the defendant took his lay chattel, without shewing how; and so I think the court shall have jurisdiction. And at last the defendant was compelled to answer over, and plead the same plea to the action. And *Cottesmore* imparled, &c.

(1) 1 Ric. 2. c. 14.

M. 9 Hen. 6. C. P. [9 H. 6. 56. 42.] F. Attach. sur. Prohib. 1.

1431.

**T**HE abbot of St. Mary of York comes in by *attachment upon a prohibition*: (1) and the plaintiff declared, that he caused him to be cited before the ordinary, such a day, year and place, to answer for tithes of great trees cut down, (2) &c. viz. *silva cædua*.—*Fulthorpe*. You lose your writ, for it says nothing of any statute; and we say that no prohibition was delivered to us. *Pres.*—*Martin*. This is no answer: for the statute is a prohibition in itself.—*Fulthorpe*. He has not brought this writ on any statute.—*PASTON*. The common law is a prohibition in itself, wherefore consider, and afterwards *Fulthorpe* justifies to have tithes of great trees, as of *silva cædua* by prescription.—*Cotesmore*. You must allege when you were so seised. Wherefore he did so.—*Newton*. To the plea pleaded in manner, &c.—*Fulthorpe*. This is an important matter; wherefore we pray to imparl to the next term.—*BABING[TON]*. If you will proceed in this matter in the beginning of the next term, and plead no new matter, you shall, &c.—*Fulthorpe*. We will not vary in substance.—*BABINGTON*. On that condition imparl, &c. *Quære*. If one may prescribe against the statute of *silva cædua*, for this statute is made within time of memory: and also *quære*, if by prescription this can be pleaded in court christian.

(1) 12 Co. 59.

(2) "Des diâmes des grès arbres sics."

The common law is a prohibition in itself, that one shall not have tithes of great trees as *silva cædua*, for the 45 Ed. 3., which gives a prohibition, gives it as it was before, which shews that it laid at common law. *Quære*, if a man can prescribe against a statute made within time of memory, as to have tithes of great trees as *silva cædua*.

H. 9 Hen. 6. C. P. [9 H. 6. 61. 12.] F. Attach. sur. Prohib. 2.

1431.

**R**OLF, serj<sup>t</sup>. declared on a prohibition, that the defendant held plea which did not belong to him, and alleged the certain day, year, and place.—*Chantrell*, serj<sup>t</sup>. Judgment of the declaration; for the writ of attachment is "*against such our prohibition*," and he has not alleged any prohibition in his declaration.—*Rolf*. It is not necessary to allege that a prohibition was delivered to him, for the statute is here a prohibition in itself.—*Strangeways*. He need not allege a prohibition, for whether he had a prohibition or not, it is not traversable, and so useless.—*Martin*. In many cases one alleges more in the declaration than is traversable, as esplees; and in formedon in the remainder, one ought to shew a deed, and yet this shall not make an issue.—*BAB[INGTON]* said that the party should not traverse this, yet it is right that the declaration be in the usual form, and the form is to allege a prohibition in the declaration. Wherefore *Rolf* declared that a prohibition was delivered to him such a day, year, and place, in presence of such a one, &c.

Though the declaration in an attachment on a prohibition ought to allege in the usual form that a prohibition was delivered, yet it is not traversable, and the statute of *silva cædua* is a prohibition in itself.

H. 20 Hen. 6. C. P. [20 H. 6. 17. 8.] Jurisd. F. 8. St. 21.

1442.

**I**N trespass the plaintiff declared that the defendant had taken his corn in sheaves in such a place.—*Fortescue*. One A. is parson of the church, &c. in which parish the said place where, &c. is, who leased to us his said church, and for that the said corn was growing in the same place, and severed from the nine parts, we took it; and you who are parson of D. which is adjoining, supposing the said place to be in your parish, took it from us, and we retook it. Judgment if action.—*Portington*. It is true, that the place is in your parish adjoining: but we and our predecessors have had the tithe sheaves in the said place as a portion to our church, for time, &c., and forasmuch as you have acknow-

In trespass for corn taken, the defendant pleaded that a parson had leased to him his church, and that he took the corn in the parish as tithes, to which the plaintiff re-

plied, that he had a portion by prescription as parson of the adjoining parish, and it was said, that such a prescription should be tried in the spiritual court, where forty years might make a good one, but the parties afterwards demurred.

1442.

ledged the taking, we pray our damages. — *Fortescue*. Now, from your own acknowledgment, we pray that the court may be ousted of jurisdiction: for as we have claimed them as tithes, and you claim them as a portion belonging to your church, the dispute between us is concerning the right of tithes, and not the possession. Wherefore, &c. *Portington*. So, if the dispute had been whether the place where, &c. had been in our parish or yours, [it would have been concerning] the right of tithes, and yet such an issue is triable here; and moreover, although it be as you say, yet by your plea you have affirmed the jurisdiction. Wherefore now you have gone too far (1). — *ASCOUGH*, to the same point. You might have said, that the place was within your parish *ut supra*, and that the plaintiff claiming as a portion *ut supra*, took them from you, and you re-took them. Judgment if the court will take consance; and by this way have ousted the court of jurisdiction, which you have not done, but have affirmed the jurisdiction by your plea. Wherefore I think, that now you shall not have the advantage of ousting the jurisdiction, affirmed by you. — *NEWTON to Portington*. If the dispute had been, in which parish the place was, and between two parsons, the law is as you say; but if one of them be a layman it is not so; and here one party is a layman. And as to the other point, although the other party had admitted the jurisdiction, such admission would not empower us to have consance of a thing which belongs to the spiritual court. — *Portington*. If *Fortescue* had pleaded as my master *ASCOUGH* has said, without taking avail of the jurisdiction, and we had taken issue with him, then you would not oust us of the jurisdiction, for that we had gone too far, &c. — *NEWTON*. Yes, Sir, it is all one as to the consance. And moreover Sir, you have claimed this portion by prescription, which prescription shall be intended according to the law of holy church, by which forty years preadventure is sufficient, and by our law prescription for one hundred years will not avail; therefore if this portion be tried in this court, it shall be according to the prescription of our law; in which case perhaps the plaintiff would have a right to the portion, according to the prescription of the ecclesiastical law, and yet it would be found against him in our law. Wherefore, &c. And afterwards the parties demurred.

(1) "*Vous etes or passez le passe.*"

E. 21 Hen. 6. C. P.

[21 H. 6. 43. 20.] Graunt. F. 40. Replication, F. 12.

1443.

A sale of tithes though not in esse at the time of sale, is good. In trespass the plaintiff declared that a parson, 18 H. 6, sold him all the tithes of his parish for seven years, and justified for tithes of the eighteenth and nineteenth years, held to be good, and that there is no difference between a lease or grant and a sale, which is a grant in itself, and thereby a property and possession are vested in the vendee immediately.

**EDMOND FITZWILLIAM** brought his writ of trespass against S., parson of Arcsay, for his goods taken in Bentley, and declared that the defendant, between the feast of the Assumption of our Lady, in the eighteenth year [of the king], and the beheading of St. John, next ensuing, at divers times his goods took and carried away, viz. two cart loads of wheat, and five loads of barley; and between the feast of the Assumption of our Lady, in the nineteenth year, and the beheading of St. John next ensuing, at divers times took and carried away four loads of wheat, and five loads of barley, to his damage, &c. — *Yelberton*. The said defendant is parson of Arcsay, and says that the whole vill of Bentley is within the parish of Arcsay, and that the corn which he has supposed to have been taken, was corn growing in one hundred and twenty acres of land called White Acre, in Bentley aforesaid, and that the aforesaid corn was tithe severed from the nine parts: and the plaintiff supposing that the said vill of Bentley was within his parish of Don-

caster, came and would have taken the corn aforesaid, which he would not suffer. Judgment, if action.—*Portington*. The abbot of York is parson of Doncaster, as he has said, who, long time before the supposed trespass, sold to us all the titheable corn which was or might arise within the said parish of Doncaster during the term of seven years, &c.; and we say that the corn which he supposes us to have taken, was corn growing in the said vill of Bentley, in another place than that which the defendant alleges, viz. in one hundred and twenty acres of land called Black Acre, which are within the parish of Doncaster; without this that the whole vill of Bentley is within the parish of Arcsay. And upon this they were at issue, which was found for the plaintiff. And now *Portington* prayed for judgment, &c.—*Yelverton*. You ought not to proceed to judgment: for the issue taken, is but a jeofail (1).—The court held that the traverse was well taken.—*Yelverton*. Still you ought not to proceed to judgment; for the plaintiff has declared that the trespass was committed at divers times, viz. from the feast of the Assumption to the beheading of St. John next ensuing, in the eighteenth and nineteenth years, which are and shall be intended several trespasses, and cannot be called a trespass; with a *continuando*, as in depasturing or destroying the grass. *Non allocatur*.—*NEWTON*. The declaration states, that at divers times in the eighteenth and nineteenth years, he took the carts with the corn; and for title it is stated, that long before the time aforesaid the abbot of York sold him his goods, &c., wherefore he claimed the tithes of the nineteenth year, by a sale made in the eighteenth; in my opinion therefore, it is to be considered whether such a sale be good, although the abbot of York be parson of Doncaster, and the said land in Bentley, within his parish; for in the eighteenth year he had no title to the tithes of the nineteenth year, either in possession or right; for at that time the tithes of the nineteenth year were not in *esse*, and it might have been that the abbot who made the sale, had died before the nineteenth year, in which case the sale would have been void as to the tithes of the nineteenth year, therefore to this intent the title is uncertain, &c.—*PASTON*. In my opinion several sales shall be intended; and that the sale was good, although there were not several; for tenant for life may sell the profits of his lands for three or four years, and yet at the time of the sale, he had not the profit of two or three years in *esse*: and if a parson of a church at the feast of the new year, in the eighteenth year, sell me the tithe of sheep within his parish, by force of such sale, I shall have the tithe sheep of that year; and yet at the time of the sale none of the lambs were in *esse*.—*NEWT[ON]*. Upon the matter several sales shall not be intended: for the declaration states but one sale: and although if a parson sell me his tithes in the eighteenth year, I shall have the tithes which accrue to him in that year; yet I cannot see how one shall have the tithes of the nineteenth year by force of a sale made in the eighteenth year, &c.—*ASCOUGH*. Suppose one sell me the profits of his court in the nineteenth year, and for three years next ensuing, such sale is good; and yet he who made it had not manual possession at the time of the sale, &c.—*Yelverton*. There is a difference between a sale and a lease or grant; for in a sale, it is necessary that he who makes it have a property, and so by the sale, the property vests immediately in him to whom it is made: but it cannot be so here; for he who makes the sale in the eighteenth year, has no profit in the tithes of the nineteenth, nor shall the property vest immediately in him to whom it is made; but by force of a lease or grant, one may take the profit which was in *esse* at the time of the lease or grant.—*PASTON*. It is all one; for a sale is a grant in itself, &c.—*Yelverton*. Still you ought

(1) I have omitted the argument on this point as irrelevant.

1443.

not to proceed to judgment; for he has not shewn any possession in the plaintiff: for the plea is, that the plaintiff would have taken the goods out of his possession, and he would not permit him: wherefore no possession in fact is shewn in the plaintiff, &c.—*PASTON*. As to this the plea is good; for by the grant which the abbot made, the property and possession were vested in the plaintiff, who has recovered judgment. And *Yelverton* put in a writ of error to prevent the plaintiff's execution, &c.

1453.

M. 31 Hen. 6. K. B.  
[31 H. 6. 11. 7.] F. Jurisd. 10. 4 Gw. 1566.

In trespass by a parson against one for taking corn, if the defendant justify as servant to another parson, as for tithes severed from the nine parts within his parish; and the plaintiff reply, that he is parson of a parish adjoining, and that he has a portion within the other parish; wherefore he took the tithes, the court shall be ousted of jurisdiction, because the right of tithes will come in question.

**T**RESPASS was brought by a parson against one for taking and carrying away his corn in garbs in a certain place. The defendant justified as servant of another parson as for tithes in his parish, severed from the nine parts, and gave colour to the plaintiff. And the plaintiff shewed that he was parson of a church adjoining to the other parish, and that he had a portion of tithes in this place, and that he was possessed of them, and made sufficient title as parson, &c. And forasmuch as the other had acknowledged the trespass, he prayed his damages, &c.—*Hingeston*. Now, from his own shewing, we pray that the court be ousted of jurisdiction.—*Laicon*. And we pray our damages for default of an answer: for we cannot proceed against the servant in court christian, because he is a layman, any more than against the farmer of a church, and therefore the court shall have jurisdiction.—*FORTESCUE*. It now appears to the court that the right of tithes is in dispute, and all that the servant has done was in the right of his master, and if the issue were taken in this court, the servant would have aid of his master; and parsons cannot collect their tithes themselves, so they must of necessity have servants; so it appears that all the servant did was in the right of his master; so the right of tithes would be determined in the court, if we proceeded, which belongs solely to the court christian; therefore by your own shewing sue in court christian by award of this court, &c.

1453.

E. 31 Hen. 6. K. B. [31 H. 6. 13. 1.] F. Indicavit 1.

No prohibition shall be granted to court christian till after *his sit contestata*, which is when the defendant has answered the libel.

According to *Yelverton*, if the vicarage be diminished, the vicar shall have more of the parsonage, and if the parsonage be impoverished, the vicarage shall be at an end and restored to the parsonage, and so but one church.—*Fortescue* thought, that although by sudden accident the vicarage or parsonage might be in such decay that all the vicarage should be rejoined to the parsonage, yet that they were several advowsons.

**I**N an *indicavit* heretofore sued by W. Boteraux, knt. directed to the officers and commissaries of the Bishop of Exeter, prohibiting them to hold a plea which was before them between one Benet the rector, and fellows of the chapel of the Blessed Mary of Salpton, in the county of Devon, owners of the church of the parish of Poundstoke, in the county of Cornwall, plaintiffs, and T. Hoge, parson of the church of Minster, otherwise called Calcarum, in the same county, of which church the said Boteraux was patron; for that the said T. deforces the said rector and fellows of a moiety of the great and small tithes of the manor of Wolbesto', in the said parish of P., which are worth eight marks by the year, by reason of which they surceased. Whereupon for the said rector and fellows *Hingeston* comes now and shews this matter to the court, and says that by the statutes *de regia prohibitionibus* (1) and *conjunctionem feoffatis* (2), it is ordained that no prohibition to prohibit the court

(1) 15 E. 1. st. 4.

(2) 34 E. 1. st. 1.



christian from holding plea of tithes shall be granted before *lis sit contestata* there of tithes; and this be certified to the chief justice or chancellor by inspection of the libel of the same plea to him shewn and certified; and, Sir, no such thing was done, wherefore this *indicavit* was ill granted, and we pray a consultation.—FORTESCUE. If it was as you say, it was ill done, but yet you should not have a general writ, but a special one, shewing, that it was ill granted, for the above cause, and that notwithstanding they went on till it was otherwise commanded by the king, and this shall be, because they may afterwards have a libel, and shew it to the chancellor to have a new prohibition. And at last it was shewn to the court that a libel was shewn to the chancellor, and this was recorded by a master in chancery, who was a doctor of laws, by which it was proved *litem esse contestatam*.—FORTESCUE. What do you mean by *lis contestata* (1).—Newton, doctor. *Lis contestata* is, when the libel is put into court, and the defendant is put to answer it, and he has put in an answer by which it appears that the right of tithes will be determined.—FORTESCUE. You say well; was it so in this libel?—Whert. Yes, Sir.—FORTESCUE. Proceed.—Hingeston. Then we say, that the said rector, &c. is parson imparsones of the church of P., and we further say that the said parsonage and the vicarage of the said church of P., are worth by the year 40*l.*, and the suit, as appears by the libel, is but for tithes of the value of eight marks, so of less value than the fourth part; which matter, &c. And we pray a consultation.—FORTESCUE. The question is now whether it shall be taken at the value of the parsonage by itself, or of the parsonage and vicarage together, &c.—Hingeston. It shall have relation to both; for the two make but one church, and he who is patron of the parsonage is parson and patron of the vicarage also: so in effect but one in him, and therefore it shall have relation to both.—YELVERTON. So it appears to me that if the vicar be impleaded concerning any thing belonging to his vicarage, he shall have aid of the parson; so that if the vicarage be diminished he shall have more of the parsonage if the remainder be not sufficient: and so it is if the parsonage be impoverished, so that neither the parsonage by itself, nor the vicarage are sufficient to support the decay, then the vicarage shall be at an end, and restored to the parsonage, and to this the doctors accord. And if a charge should arise on the vicarage, it shall be recompensed out of the parsonage, and this well proves that it is in effect but one church, and therefore shall have relation to the value of both. FORTESCUE. I think otherwise: for notwithstanding it may be that by sudden accident the vicarage or parsonage may be in such decay, that all the vicarage shall be rejoined to the parsonage: yet this does not prove but that they are now perpetual each one by itself. For the advowson of the vicarage may be granted to another by the rector, or by his fellows, and the advowson of the parsonage remain in them, and a writ of right of advowson of the parsonage may be brought by itself, and another of the vicarage by itself, and so it shall not have relation but to the value of the parsonage only: and so they are several advowsons. And, Sir, in my opinion the stat. of Westm. 2. (2) "*Cum per breve de indicavit, impediatur rector alicujus ecclesiæ, &c.*" was ordained for that, when any plea was holden in court christian concerning tithes, they would in this court grant an *indicavit*, whereby they would surcease in the spiritual court, whether it was of the value of the fourth part or less, and this court would not grant a consultation nor any writ of right of

(1) What the common lawyers call (after appearance, declaration, and the defendant's plea) the issue of the plea, is by the civilians, termed *litis contestatio*,

*causa status, compositio, &c.* Quintilian names it, *litis productio*. Selden's *Fortescue de laud. leg. Angl.* p. 56. n. (a).

(2) 13 E. 1. st. 1. 5.

1453.

tithes to the patron of the rectory so hindered, nor state certainly of what value: wherefore it shall be intended of any value: so in my opinion the value is nothing in this case.—*Hingeston*. I conceive that the writ of right of tithes was at common law.—*FORTESCUE*. Shew that, and then I will believe you.—*Hingeston*. The stat. *de regia prohib.* (1) is, “Where a rector sues another rector for tithes, greater or smaller, so that the fourth part of the value of any church be not demanded, a prohibition lies not:” and so are our books, &c.—*FORTESCUE*. We will be advised: take your day till the next term. And the writ of *indicavit* was in this form—*T.*, official of the bishop of Exeter and his commissary, greeting:—*Indicavit nobis W. Boteraux ducis de Boteraux, Miles*. Whereas Thomas Hogge, parson of the parish church of Calcarum, otherwise called Minster, in Cornwall, holds a moiety of all tithes arising from the manor of Wilkeston, in the parish of Poundston, of his advowson; Benedict Brent the rector, and fellows of the chapel or college of the Blessed Mary of Slapton, owners of the parish church of Poundston, in C., claiming it to belong to their church of Poundston, which they hold appropriate, draw him therefore into suit before you in court christian; but because it is clear to us that the aforesaid W. will lose the advowson of the tithes aforesaid, if the aforesaid rector and his fellows should succeed in that cause; we prohibit you from holding that plea in the court christian, until it shall have been determined in our court to which of them the advowson of the said tithes belongs. And pleas of the advowson of tithes appertain to our crown and dignity, &c.

(1) 13 E. 1. st. 4.

1456.

M. 35 Hen. 6. [Bro. Abr. Jurisd. 3. (2)]  
35 H. 6. 39. 47. F. Jurisd. 11.

A vicar prescribed that he and his predecessors, vicars there, had used to have the tithes of a place for time whereof, &c. A dispute between parson and vicar shall be tried in the spiritual court. It was agreed that in trespass for taking corn where the defendant justified as for his tithes taken, he should allege that he was parson at the time of the severance, as well as of the taking.

**T**RESPASS was brought by the vicar of D. for forty loads of oats taken; the defendant says that he was parson imparsoned of the same church, and that the oats were tithes severed from the nine parts belonging to him as parson, wherefore as he was parson at the time of the trespass, he took and carried them away; and the plaintiff prescribes that he and his predecessors vicars there, have had the tithes of the place for time whereof, &c.; and the court held, that as the right of tithes was in dispute between vicar and parson, who were spiritual persons, and could try the right of tithes, the court should be ousted of jurisdiction; but it was much argued to the contrary, on account of bad pleading, for that the defendant alleged that he was parson at the time of the trespass, viz. of the taking, and did not say that he was parson at the time of the severance, for if he were not parson, as well at the time of the severance as at the time of the taking, he should not have them; so if a man justify by reason of villenage, that he took the goods, and that the defendant took them, and he re-took them, he ought to allege that he was his villein as well at the time of the first taking as of the second; and so if a man justify an arrest by reason of a writ, he shall allege that he was sheriff at the time of the arrest, as well as at the time of the delivery of the writ (3). It was adjourned.

(2) As the report of this case is very long in the Year Book, and its interest is chiefly confined to the special pleader, I

have been induced to give Brook's Abridgment, in preference to the original.

(3) Vide 2 Sa. 5. b.

H. 38 Hen. 6. In Exch. Ch. [38 H. 6. 19. 1.] F. Consult. 1.  
Indicavit. 2. Consult. Stat. 3.

1400.

**T**HE case was thus in chancery. An abbot had sued in the spiritual court a *spoliation* against one R., clerk, and one H., clerk, for that whereas the said abbot and all his predecessors had been seised of the advowson of J., and also of the church, as parson imparsonnee, to hold appropriate for time whereof memory runs not, and had received all the tithes, &c.; the aforesaid H. and R. had come and spoiled him of his tithes, and held him out of his church, and taken the tithes. And thereupon the said H. and R. appeared and said that one was seised of the advowson aforesaid, as in right of such a one his wife, in demesne, as of fee, and moreover that the wife's ancestor was before her seised, and that the husband presented the said R., who upon his presentment was admitted, instituted, and inducted, and took the tithes, and held the church as the parson and incumbent of the said husband until he resigned, &c.; and afterwards the said husband presented the said H., who upon his presentment, &c., and held the church, and took the tithes, *ut supra*: and so each one in his time; and that the advowson never was appropriated by the husband and wife, nor by her ancestor. And we do not conceive that the abbot ought to proceed in the spiritual court in this plea against those who were in by presentment *ut supra*. And thereupon the aforesaid R. and H. came to the chancery with the whole matter in a bill to the chancellor, and prayed a prohibition; which was granted to them. And thereupon the abbot came and prayed a consultation. And this matter was long depending in the chancery, and now came into the exchequer chamber before the justices of both benches, the chief baron of the exchequer, and the master of the rolls, where the matter was well debated.—MARKHAM (1). I think he shall not have a consultation; for they are in a case to have a prohibition, but the abbot may have a good action of trespass: for by his libel he has shewn that he is parson imparsonnee, and held the church appropriate, until the said R. and H. ejected him without any colour; wherefore he may have a good action of trespass against them, who have no title nor colour to put a parson out of his church, and take the profits; and the parson would well have assize for the rectory, church-yard, and glebe of the church, which are his freehold, and trespass for the tithes. Which all the justices granted against a stranger who had no colour; and so here although the defendants afterwards by their answer entitled themselves to the church by the presentment of a stranger, this does not make the first bill or pleading good.—MOILE (2) to the contrary, for the libel of the abbot proves that the said R. and H. had no colour or title to hold the church or take the tithes, and so they are the same as a stranger who has no colour: in which case he may have his action *ut supra*: but if the abbot had given them colour to hold the church by legal presentment, and so forth, then he would be in the situation to have a consultation; but still I think he should have a consultation upon the matter which comes *ex post facto* from the said R. and H. in their answer, which concerns tithes, that would come in dispute, and are merely spiritual, for which reason a consultation should be granted: moreover at common

A parson may have assize for the rectory, church-yard, and glebe, which are his freehold, and trespass for the tithes.

It was said by MOILE, that at common law, if the parson had been impleaded concerning his tithes, the patron had no remedy; but that by st. West. 2. the parson shall have an *indicavit*, and the patron a *writ of right of advowson* for the fourth part of the tithes, and this writ was given by the statute; but MARKHAM said it was not so, for at common law prohibition laid to a plea for any part of tithes, and thereupon a *writ of right* by the patron, but by stat. West. 2, no *indicavit* shall be granted but for the fourth part at least, for to have a *writ of right* for the twentieth or fortieth part was mischievous, and therefore that statute was made.—Fortescue said, that at com-

mon law there was a *writ of right* to render the advowson of the tithes of five acres of land, or one acre of land, and so forth, and therefore the statute was made.

The right of patronage must be in succession before an appropriation can be made, and the question of appropriation shall be tried in the spiritual court.

Spoliation lies where two parsons have colour for their admission to a church, and the right of advowson will not come in question.

(1) Judge, K. B.

(2) Judge, C. P.

1400.

law, if the parson had impleaded concerning his tithes, the patron had no remedy: but now by the stat. Westm. 2. the parson shall have an *indicavit*, and the patron a writ of right of advowson for the fourth part of the tithes, and this writ is given by the statute.—MARKHAM. That is not so: for at common law no plea for any part of tithes could be holden, but prohibition laid, and therefore a writ of right by the patron: but now the stat. of Westm. 2. ordains that no *indicavit* shall be granted, but for the fourth part at least, for to have a writ of right for the twentieth or fortieth part was mischievous, and therefore that statute was made.—FORTESCUE (1) said, that at common law there was a writ of right “to render the advowson of the tithes of five acres of land,” or “one acre of land,” and so forth, and therefore was the statute made: for a writ of right for tithes shall not be granted for less than a fourth part, and therefore the writ is “to render the advowson of a fourth or third part of the tithes,” and so forth, which writ was not at common law. Which was not denied. Note, DANBY (2) said, that the abbot could not have a writ of right of advowson, as he was parson imparsonnee, and held the church appropriate; and so the church could not be void, but in every sense full by the appropriation, and when the church is full with himself, he cannot have a writ of right. Which DANVERS (3) and MOILE allowed. YELVERTON (4). In truth the law is not so: for if a strange patron present his clerk to the bishop who is received, instituted, and inducted, the church is full with the said incumbent, and consequently he may have a writ of right, for by the institution of the clerk, the stranger is put in possession of the advowson. And the words of the writ of right prove this, for there the esplees are laid in the parson, and not in himself: therefore of consequence the possession of the incumbent is the possession of the patron who presented him; and if so, then he is in possession and the other out; in which case he shall not well have a writ of right, but the prior who holds the church appropriate shall have a special declaration, and lay the esplees in himself, as parson imparsonnee, for that he is prior and incumbent. And he shall have spoliation as parson, and a writ of right as prior or patron, and a writ of right lies against him, and he shall not plead plenarty of himself for six months before the writ purchased, nor after: for as against a stranger the church is always void, for he is not in by presentment; but he shall not have *quare impedit*, for, by using that writ, the church would be disappropriated, but not so by a writ of right. Note the difference.—PRISOT (5). It has been adjudged a good plea in *quare impedit* against a prior who held a church appropriate, to say, that it was full with himself a year and day before the writ purchased as parson imparsonnee, for that the church shall be intended full; and if the church was legally appropriated, then it is legally full, wherefore I think *quare impedit* lies against him.—FORTESCUE. Matter of fact proves that *quare impedit* lies against a parson imparsonnee; for there are now two or three *quare impeditis* depending before you (naming them). And in my time I know ten or twelve *quare impeditis* have been returned, and therefore *quare impedit* well lies; but if it did not, yet reason proves it is not full: for the pleading at common law is determined by the statute of Westm. 2., and the pleading is now by that statute. For at common law it was a good plea to say, that the church was full the day of the writ purchased: and now it is no plea, unless he say, that the church was full of his own presentment six months before the writ purchased, and it is necessary to say that it is full of his own presentment, for if the church were full of the pre-

(1) Ch. J. K. B.

(2) Judge, C. P.

(3) Judge, C. P.

(4) Judge, K. B.

(5) Ch. J. C. P.

sentment of a stranger this will not abate the writ, unless he say, of his own presentment six months before the writ purchased: and so in this case, he cannot say that the church is full of his presentment, for it is not full of any presentment: wherefore against strangers, as to this act, the church shall always be adjudged void. And although this pleading, which he would allege was heretofore, yet it was not a plea by reason, but I well know it was held a plea for long time past. *Quod nota.* And then he said he should not have a consultation, for that the right of advowson would come in question, and the pleading is for the whole tithes of the church; and in all cases where tithes, amounting to the fourth part or more, are disputed between parsons in the spiritual court, and they are in by different presentments of different patrons, so that the right of patronage comes in question, the prohibition lies, and no consultation thereupon: for there spoliation does not lie, but it lies where one incumbent ejects another out of his church, and takes the profits, and the right of advowson does not come in question between them. As if a parson be made a bishop, and has licence from the Pope to keep his benefice, if then the patron present another, who is received, instituted, and inducted, the other parson shall have spoliation: for in such case the right of advowson would not come in question, for both incumbents claim in right of one patron; but whether the church became void or not would be the question in such case. And so is the law if my incumbent accept other benefices; and therefore I present another, who is admitted, instituted, and inducted; if my first parson have a licence for plurality, he shall have spoliation, and the plurality shall come in question there. So is the law in case of deprivation, or if one come and tell me my clerk is dead, when he is alive, and I present him, the other shall have spoliation: and so spoliation lies always where two parsons have colour for their admission, and where the right of advowson will not come in question. *Quod omnes concesserunt*, and so their opinion was clear in this case, that no consultation lay *causa supra*. And so was the opinion of the master of the rolls (1), and he said, that an advowson could not be appropriated without succession, and it is necessary that the right of patronage be in succession, or otherwise the appropriation avails nothing; for though the incumbent purchase the appropriation by licence, this appropriation avails nothing; for it is first necessary that he should have the advowson to him and his successors, and then by licence to purchase, to hold the church appropriate. For if the prior of an hospital, college, or such like, be seized of an advowson, to him and his heirs, which has descended to him as heir, and he purchase a licence of appropriation that he and his successors may hold the church appropriate, and dies, yet the advowson descends to his next heir, notwithstanding the appropriation; for he could not appropriate to him and his successors, when he had the advowson by descent to him and his heirs; but in such case if he would make the appropriation good and sure, he must alienate the advowson, and re-purchase it to him and his successors, and then appropriate the church, and then is the appropriation good. *Quod nota*, and it was said, that the question of appropriation should be tried in the spiritual court.

(1) Thomas Kirkeby,

1460.

H. 38 Hen. 6. K. B. [38 H. 6. 21. 2.] F. Jurisd. 12. Br. Jurisd. 60.

As soon as it appears by the pleadings that the right of tithes will come in question, the temporal court shall be ousted of jurisdiction, although it did not appear at first, in the same manner as the spiritual court, if the right of advowson come in debate.

**P**ORTESCUE said, in "an action of trespass, if the defendant justify for tithes as parson, and give colour to the plaintiff as parson of an adjoining church, this goes to the jurisdiction of the court; for it appears that the right of tithes will come in debate between parson and parson: but if the defendant justify *ut supra*, and give colour to another, who is a common person, he gives jurisdiction to this court; for it does not appear now by this pleading that tithes will come in debate. But if in his replication he entitle himself as parson to the corn, for that he, and his predecessors parsons, have had such a portion of tithes out of the parish of the defendant as appropriated to his church, now, by this pleading, if it be confessed by the defendant, the court shall be ousted of jurisdiction; so, as soon as it appears that the right of tithes will come in debate, the court shall surcease. In the same manner, the court christian, as soon as the right of advowson comes in debate, although it did not appear at first. *Quod nota, fuit concessum.*

1462.

M. 2 Ed. 4. C. P. [2 E. 4. 15. 7] F. Jurisd. 13.

If a lessee of a parsonage bring an action of trespass for tithes severed from the nine parts, the temporal court shall not be ousted of jurisdiction till the right of tithes come in question by some plea pleaded. So, if a parson lease his parsonage, rendering rent, if he bring an action for the rent, as soon as it appears by the parties own shewing, or by some plea pleaded, that the right of tithes will come in question, (whether it be between a layman and a spiritual man, or two laymen) the temporal court shall be ousted of jurisdiction.

**T**RESPASS for entering his close, and two loads of barley taken and carried away, against the parson of a church.—*Billing.* As to the loads of barley, we say that we are parson of the church of T., and the corn, &c. was growing in one hundred acres of land, which is within our parish, and that the corn, &c. was our tithe, severed from the remaining nine parts: and we say, that Edward, abbot of Westminster, claims a certain portion of tithes in the said land, &c. and that he and his predecessors, &c. for time whereof, &c. have had a portion of tithes there, and that before the supposed trespass, the abbot ordered the said plaintiff to bring to him the said tithes, by force whereof, &c. he took and would have carried them to the said abbot, and we at the time of the supposed trespass took them out of his possession, of which matter, &c. We demand judgment, if the court will take consuance.—*Littleton.* What do you say as to entering the close? for of that you may make full defence and justification, and yet not confirm the jurisdiction as to the remainder.—*Billing.* We will defend, and plead over as to that, and he did so.—*Littleton.* Sir, it appears to me, that as to the corn, the court shall not be ousted of jurisdiction; for if the plea be between two spiritual persons, I will grant that, [this court shall be ousted] inasmuch as it shall be intended *prima facie* that both plaintiff and defendant claim as tithes; but, Sir, here the plaintiff is a layman; wherefore, &c. And if this court be ousted of jurisdiction, you ought to give us an action in court christian, and otherwise I contend that this court shall not be ousted. And the plaintiff, who is a layman, cannot have an action in court christian; and if he bring his action there, the defendant shall have a prohibition. And, Sir, supposing that a parsonage, with the tithes, &c. or otherwise the tithes, &c. are let to farm to a man, and the lessee brings his action here for carrying away his corn, shall this court be ousted of jurisdiction? I say, no, for the lessee had them as his lay chattel, and in his own right, and the lessor shall have an action of debt against him upon such lease in this court; in the same manner he shall have trespass in this court against him who carries them away, &c.—*Billing.* But here we have proved that the plaintiff did every thing in right of the abbot; and also in the case of the lessee of tithes, I contend

the law is contrary.—DANBY. Why do you talk thus? How often has this case been determined? *quasi decret*, very often, and it appears to me here, that inasmuch as it is proved that the plaintiff did every thing in right of the abbot, and that the property is altogether in the abbot, that the court shall be ousted of jurisdiction, and the plaintiff ought not by law to have an action here, but in court christian.—*Littleton*. I understand clearly, if I deliver goods to a man to keep, and they are taken out of his possession, that he may well have an action of trespass; and so here, for I contend, there is no difference whether I say to my servant “Bring me such goods,” which are in such a place, and as he is bringing them to me they are taken out of his possession; and where I give goods to one to keep, and afterwards they are taken out of his possession. DANVERS. Here they are not his goods, but he is merely charged by the abbot with them.—DANBY. For this reason he may the more readily have trespass, inasmuch as he is chargeable in detinue with respect to the abbot.—*Littleton*. Suppose he had been robbed, I say he should have appeal of robbery, inasmuch as he would be chargeable over, which was granted.—DANBY. It appears to me that in no case shall this court be ousted of jurisdiction, unless you give an action in another place, as has been said; and Sir, as to what you say, that he did *ut supra*, but in right of the abbot, wherefore, &c. as to this, it comes but from you in giving your colour, and may be, it is not so, and that in making title he will claim the goods in his own right, &c.; but in this case, and also in the case which was put of the lessee, if it shall afterwards appear that the right of tithes will be tried; I will readily grant that the court shall surcease.—*Billing*. Sir, in your case the plaintiff has no remedy elsewhere. DANBY. I will readily grant, that when it shall appear *ut supra*, it cannot be tried here; but, Sir, here we are not yet in that case; and it was said by the serjeants at the bar, that notwithstanding both parties be temporal men, if it afterwards appear by the shewing of the parties that the issue will be upon the right of tithes, the court shall surcease. And it was also said by *Littleton*, that if a parson have the tithes of another parson to farm, and the tithes are carried away by the lessor, against whom the other brings his action; here if it shall appear by the pleadings that he claims them as farmer, and that no issue is taken on the right of tithes, that the court shall not surcease, notwithstanding both be religious persons.—NEDHAM agreed with the opinion and reasons of DANBY *ut supra*; so that the opinion was, that for any thing yet shewn, the court should not be ousted of jurisdiction. And afterwards DANBY to *Billing*. Answer. And then *Billing* pleaded the general issue, &c.

M. 6 Ed. 4. C. P. [6 E. 4. 3. 7.] Jurisd. B. 75. F. 36.

**TRESPASS** was brought by a vicar for goods carried away; the defendant said that W. was parson of the church of D.; and that he had the tithes of the said, &c. and that the goods were severed from the nine parts, and he, as servant of the said parson, took them, &c. and gave a colour to the plaintiff, &c. to which the plaintiff said that he was vicar of the said church, and that all his predecessors had received the tithes, &c. without this, that the said goods were the tithes of the

Where trespass is brought against a servant who claims nothing in the tithes, the temporal court shall have jurisdiction; but if

the action had been brought against a farmer of a parson, then the court shall be ousted, because the action is maintainable against a farmer in court christian, for the same action that may be maintained against the parson shall be maintained against the farmer, and the farmer shall have the same action as the parson.

*Prescription* by common law is of time whereof memory runs not, &c.; but by the spiritual law, where one is seised of tithes for twenty or forty years, it is a prescription.

*Boundaries* shall be determined at common law.

1467.

parson in the manner he had supposed.—GENNEY. Upon your own shewing, it appears to me that the Court should be ousted of jurisdiction, for where the right of tithes comes in dispute, the Court has no power to hold plea: for this belongs to the spiritual law, &c.; but if one say that the place is in his parish, and the other that it is in his, this may be tried, &c. and, Sir, prescription by our law, and by the spiritual law is not the same, for prescription by our law is of time whereof memory runs not, &c.; but by the spiritual law, where one is seised of tithes for twenty or forty years, it is a prescription by the spiritual law.—YOUNG. I think the court shall have jurisdiction, for if this court have not, then the plaintiff will be greatly injured, for that he cannot have an action against him in the spiritual court, &c.; but if this action were between two parsons, then I grant that the court shall be ousted of jurisdiction, because they may proceed in the spiritual court, &c. but it is otherwise in this case, &c.—MOILE. To the same effect, for that the defendant claims nothing in the tithes, &c. But if this action had been brought against a farmer of a parson, then the court should be ousted of jurisdiction, for that the action is maintainable against a farmer in court christian, for the same action which may be maintained against the parson shall be maintained against the farmer; and the farmer shall have the same action as the parson, &c.—NEDHAM, of the same opinion, for the court shall not be ousted of jurisdiction, but where the party may have an action in another court, and the plaintiff cannot have one in this case, for if he were to bring an action of trespass against the defendant in court christian, he would have a prohibition, &c.

1468.

M. 8 Ed. 4. C. P. [8 E. 4. 13. 13.] Br. Dism. 11. F. Prohib. 9.

By CHORKE, a man may not prescribe in *non decimando*, but in *modo decimandi* he may well prescribe.

*Prescription* by the spiritual law is a continuance of possession for ten or twenty years.

The serjeants said that the spiritual court would not accept any plea in discharge of tithes.

An action upon the case lies for suing in court christian for tithes, where there is a discharge by real composition, and it is one of the few cases where a man may recover damages for vexation of suit.

If a parson grant to A. that he shall be discharged of tithes, and afterwards sue him for tithes, and A. bring his action of covenant in the temporal court, A. shall not have prohibition: for the action is, for that he has done contrary to his deed, which is a temporal thing, &c. for which A. shall recover damages.

ONE brought an action on the case, for that whereas he is lord of the manor of Dale, and he and his ancestors tenants of the said manor, had been quit of the tithes of the meadows, lands, &c. of the said manor, for time whereof memory runs not, for certain land which was given to one of the predecessors of the defendant, and that the defendant drew him into plea in court christian for the tithes of the said manor, &c. and upon this matter he said that the defendant yet continued his process in court christian, and thereupon prayed a prohibition.—*Nels.* A man shall not have prohibition, but where the suit is in court christian for a thing which is determinable in this court, and this matter which is sued in court christian cannot be determined here, for it is concerning the right of tithes.—*Catesby.* I deny your principal case, for if a man be indebted to me 20*l.*, and make his executors, and I sue them in court christian, they shall have prohibition; and yet for this I shall not have an action here, for it was upon simple contract, &c.—LITTLETON. If it be as the plaintiff has said, the defendant has done him a wrong to sue in court christian, and by this action he can only recover damages for the time past, &c., then it is reasonable that, pending this suit, he shall have a prohibition, and if it be found for the defendant, then to grant a consultation, as where a parson impleads another parson for certain tithes, amounting to the fourth part of the church, and the patron of the clerk defendant brings a writ of right of tithes, he shall have an *indicavit* to cause the judges in court christian to surcease, until it be



determined here, and a consultation shall be granted, when the matter is determined here, &c., so in this case.—MOILE. In your case it is by statute, &c.—GENNEY. When a man is impleaded in court christian for a thing which may be determined here, there prohibition lies, as in the case LITTLETON puts, when the parson is impleaded for tithes, if it be found for the plaintiff, the advowson of the party is recovered there, and the right of advowson ought to be determined here; but if I and another are made executors, and I grant to my companion by deed, that I will not take administration upon myself, and afterwards I apply to the ordinary to be charged, &c., and my companion bring an action of covenant against me here upon the deed, he shall not have prohibition, &c., for his suit here is founded upon a temporal act, and my application to the ordinary is but for a spiritual act; wherefore, &c. And so if I grant to a man by my deed, that I will not sue in court christian to have such an one for my wife, and afterwards I do sue there for that purpose, and the other brings covenant against me here, he shall not have prohibition, *causâ quâ supra*, and so here the suit in court christian is for a spiritual thing, and the suit here is upon my temporal composition.—CHOKE. A man may not prescribe *in non decimando*, but *in modo decimandi* he may well prescribe; and in this case, if the parson had tried for tithes, then he is satisfied, for he had *quid pro quo*, and, Sir, if a parson lease to me by deed all the tithes of his benefice, and afterwards I am sued for the tithes of my demesne lands in court christian, and I bring an action of covenant against him here, I shall not have prohibition, because I may plead the matter in bar against the parson in court christian for his tithes. In this case the composition was made before time of memory, and such prescription they cannot try, for their prescription and ours are different, for prescription by the spiritual law is a continuance of possession for ten or twenty years, &c.; but if this action was brought upon a composition made within time of memory, so that it might be pleaded there in bar, I think they should not have prohibition; but as this was made before time of memory, and they cannot try this prescription, &c. therefore I think prohibition lies, and that it shall be tried here, &c.—DANBY. We cannot know whether this be a sufficient discharge of tithes or not, &c., and, Sir, if a parson grant to me that I shall be discharged of tithes, and afterwards he sue me for tithes, and I bring an action of covenant against him here, I shall not have prohibition; for my action here is, for that he has done contrary to his deed, which is a temporal thing, &c., for which I shall recover damages; and if it be true that he has land for his tithes, you may plead it in court christian, &c. and the serjeant said, that they would not accept any plea in court christian in discharge of tithes, &c. MOILE. There are but few cases in which a man may recover damages for vexation of suit, &c.; but this and others which are given by especial law, as appeal and *quare impedit*, &c.

1469.

M. 9 Ed. 4. C. P. [9 E. 4. 47. 35.] Feffement, F. 92.

1470.

**N**OTE by *Catesby*, that a man cannot lease his warren for years without deed, notwithstanding it is a chattel, no more than a man may grant his presentation *àdc vice* without deed, &c.—CHOKE. In your case, a man cannot bind his presentation without deed, but yet a parson may well lease his tithes without deed, &c.

CHOKE said a parson might lease his tithes without deed.

1473.

E. 12 Ed. 4. [12 E. 4. 6. 16.] Br. Dism. 12. Trespas, 325.  
Travers. 242. Trespas, F. 129.

Of common right, every person may enter to gather his tithes, and to turn them till they are dry, and what shall be reasonable time for that purpose shall be tried.

**I**N trespass, for his close broken in Dale, plaintiff declared that the trespass was committed on the 8th of July, &c.; the defendant says that the place is six acres, &c. and that he was parson of the said vill, and in that year the land was sown, &c., and therefore when the tithes were severed from the nine parts in August, on such a day, &c. he entered the said close to gather his tithes, and carry them, &c., without this, that he is guilty of any entry at any time, but after the tithes severed, &c., and till they were carried; and it was clearly held, that of common right, every person may enter to gather his tithes, and to turn them till they are dry, and [what shall be] reasonable time for that purpose shall be tried.

1473.

M. 12 Ed. 4. C. P. [12 E. 4. 12. 3.]

The severance of the tithes must be by the owner, for if a stranger sever them, the parson cannot take them.

**I**N trespass for goods, plaintiff declared for certain loads of corn, &c. the defendant said, that one R. was parson of the vill of L. where, &c. and that the corn was there growing, and severed from the nine parts; and the defendant, as servant of the said R. and by his command, took them, &c. Judgment, &c.—*Pigot*. This is no plea, for he gives no colour to the plaintiff; and if a man bring trespass for a horse taken, the defendant says he is a parson, &c. and the custom is, that he shall have a mortuary, &c.; and that such an one possessed the horse and died, and he seised it as a mortuary, &c. this is no plea without giving colour to the plaintiff, &c.—*Fairfax*. I think the plea good, for in whatever person the property of the corn was, by the severance of the tenth part, this parson is entitled to them as his tithes, and it is not denied by the defendant that the property of the corn was in the plaintiff before severance; and if a man justify by purchase in a market, he need not give colour to the plaintiff, because it is not denied that the property was in the plaintiff, but by the purchase, &c., the property is in the defendant, &c., and so it is of waif, &c., therefore I think the plea good, without colour, &c.—*GENNEY*. If a man justify by custom to have tithe of corn growing in such a place, he shall not give colour to the plaintiff, for whether it was the corn of the plaintiff or any other, he had cause to take it, &c.—*Catesby*. In trespass for goods carried away, the defendant justifies for damage feasant, &c. he shall not give colour, &c. *causâ quâ supra*.—*Pigot*. There he himself does not claim them, but it is otherwise here, &c.—*BRIAN*. This case is not like that of buying in a market, and the other cases, for there whosoever the goods were, by purchase between the defendant and a stranger the property is gone, &c. but here an act must be done by the owner, &c. *scil*: the severance, for if a stranger sever them, the parson cannot take them, which *Littleton* denied.—*CHOKE*. It shall not be intended that the severance which is alleged, &c. is good and sufficient, &c.

M. 22 Ed. 4. C. P. [22 E. 4. 23. 3]. Br. Jurisd. 79: Property, 35.  
F. Consult. 2.

1483.

**I**N trespass, *Briggs* for the plaintiff, declared, that the defendant broke his close, and his goods, &c. viz.: two loads of underwood, and one load of reeds, &c.—*Sulyard*, for the defendant said, as to the breaking of the close, that the plaintiff is parson of the town of S., where, &c. and the defendant is vicar of the same parish, and that the place where he supposes, &c. is a close containing twenty acres, which is parcel of his glebe, by reason whereof he committed the trespass, in manner, &c., and prayed judgment if action. And as to the two loads of underwood, he says, that he ought not to maintain this action against him, for the said defendant, and all his predecessors, have used for time whereof, &c., to have tithes of underwood severed from the nine parts, as of lamb and wool, and of other tithes in the said parish, and says that in fact these two loads were severed from the nine parts, and the plaintiff came and claimed them as parcel of his tithes, and the defendant took them as his tithes at the time of the trespass, which is the same trespass, which he is ready to verify, &c., and prays judgment if action. And as to the reeds, he pleads the same plea.—*Briggs*. It appears to me that this colour is not sufficient, for he has not confessed possession in us, so neither property nor possession.—*CATESBY*. The colour is sufficiently good; for instantly upon the claim, the property was in the plaintiff, and the possession also, although he had not carried them, if he had made claim, &c. (1).—*CHOKE* and *BRIAN* agreed, and *NELA* was out of his place, &c.—*CATESBY* said, that he had seen it adjudged in 33. that it was good colour to say that the plaintiff came to claim it as his tithe, and the defendant would not suffer him, which was the same trespass.—*Quere*. *CHOKE* asked *Sulyard* why he did not conclude to the jurisdiction of the court, as it was between the parson and vicar for tithes.—*Sulyard*. Because, Sir, we have imparled from last term, and I apprehend we cannot plead to the jurisdiction after imparlance, for, by the imparlance, we have confirmed the jurisdiction.—*CATESBY*. Although you will not plead to the jurisdiction, we will act according to our discretion, for, if it appear by the pleading before us that it is out of our jurisdiction, although you have not taken advantage of it, yet we will not hold plea of it.—*Pigot*. I think the court shall not be ousted of jurisdiction, and I make a distinction between a private issue between party and party, and where an issue is taken on the right of tithes; for, if an issue be taken between party and party in this form, the defendant says the place where, &c. is in his parish, and the other says it is in his, it shall be tried in the temporal court. And so, if an abbot, or other religious person, claim the garbs, &c., or other, &c., as a portion, &c. in such case it shall be tried in the temporal court, so it appears to me in this case, inasmuch as a private issue is taken, viz. whether it has continued in him and his predecessors beyond time whereof memory runs not, or no, therefore, I think this court shall have jurisdiction, and the other not.—*Townsend*. I think this court shall have jurisdiction, and not the spiritual court, for the issue joined is not whether the underwood belongs to the parson or to the vicar, but whether the vicar and his predecessors had continued for time whereof, &c.; then I conceive, that since the court is legally seised, and the lay persons can as well know, as the persons

If it appear by the pleadings, that the court has not jurisdiction, it will not hold plea, although the parties have not taken advantage of it, as in case of imparlance, after which, in common cases, a party cannot plead in abatement to the jurisdiction.

Prescription for tithes by a vicar, for time whereof, &c. A question of tithes by prescription, between parson and vicar, shall be tried in the spiritual court, for the prescription of the common law is eighty years, &c., but in the spiritual court, possession for twenty or thirty years makes a prescription.

There can be no augmentation of a vicarage, but by parson, patron, and ordinary, and that but for an insufficiency of the endowment before, and such augmentation is a spiritual act. Boundaries shall be determined at common law.

(1) This law is recognised in *Graysbrook v. Fox*, Plowd. 281, by Dyer, who says, "If the tenth part of corn be severed for tithes, the parson shall have an action of trespass, before any seizure,

against him that takes it away, for the property and possession was in him before seizure, because the thing is certain by the severance of the tenth part."

1483.

of holy church, whether he and his predecessors had continued to have, &c., then there is greater reason, that it should be tried here than elsewhere, as is the common case, if in a *quare impedit* the defendant say that the church was not void for six months before, &c. and, the plaintiff say void, &c. so when void or not is to be tried, it shall be tried by the temporal court, but if the question were whether full or not full, or of the ableness of the clerk, &c., it shall be tried by the bishop, for it is spiritual; so, here if the issue were taken on the one part, that the tithes were the right of his church, and the other say they belong to his church, then this court shall be ousted of jurisdiction, and the other shall have it; but as the issue is not taken upon this, but upon the continuance, viz. the prescription, therefore I think, that the court shall not be ousted of jurisdiction, &c.—*Tremaile*. I think otherwise; for although nothing is to be tried but the prescription, yet the court shall be ousted of jurisdiction; for if I can prove that the prescription is spiritual, then I think that the spiritual court shall have jurisdiction; and that the prescription is spiritual, I prove thus, every prescription had a commencement, and if the commencement were spiritual, then the continuance, viz. the prescription thereof, shall be spiritual, for the continuance shall not make it temporal; then since the vicar who first claimed them to be his tithes did an act, that is, claimed them, which was spiritual, therefore, the continuance by his successor, who claimed, shall not make it temporal, but spiritual, of which this court has no jurisdiction, but the spiritual court, wherefore, I think that this court shall be ousted, &c.—*CATESBY*. I think the court shall be ousted of jurisdiction, and as to what is said, that the right of tithes is not to be tried, but the prescription, I say, that although it were so, yet it would be against reason and all right to try it here, for supposing it were tried here, it might be found against him, who had entitled himself in this way, and yet of right he ought to have them, for the prescription of the common law is eighty years, &c. And perhaps the law of the spiritual court is, that if he had continued in possession for the space of twenty or thirty years, it is a good title by prescription; then, if this prescription were tried here, if the laymen should find that he and his predecessors had not continued for the space of eighty years or more, then they would say that he and his predecessors had not continued for time, &c.; whereas, if it had been tried in the spiritual court, they would have found his title good by reason of the continuance which had existed, and so by this trial, he would be greatly injured; whereas, if it were tried in the spiritual court, he would have them, and so by reason of the mischief, I think this court shall be ousted of jurisdiction.—*BRIAN*. I am of the same opinion, and, Sir, I conceive the issue taken is, that the defendant, who is vicar, and his predecessors have been used to have the tithes of underwood in such a place, severed from the nine parts, for time whereof, &c.; and I will grant the case of *Pigor*, that if they had traversed, if the place where, &c. were within the parish of the plaintiff or defendant, that in such case the court should have jurisdiction to try it, and yet in this case it should not, for in the other case, the issue taken is not directly on the right of tithes, but goes inclusively to the right, viz. if it be found in the parish of the one, then it is his right, and *à contra*, so incidentally the right of tithes is in dispute. And so it is in a writ of annuity brought by one parson against another, or against an abbot, &c., and the plaintiff counts that the predecessor of the abbot, by deed sealed with the seal of the convent granted, &c. if the defendant traverse the deed, as not his deed, &c., this shall be tried in the temporal court. So, in a writ of annuity brought by one parson against another, or against an abbot, and count by prescription, &c., it shall be tried in this court, and the

cause is that in all these cases, the issue is not taken directly upon the right, but upon such issue the right shall be tried incidentally, viz. by reason of that which is tried, so in such cases where incidentally by the issue found one shall be bound, this court shall have jurisdiction, but in this case the issue is, that he and his predecessors in right of their church have been used to have the tenth part severed from the nine parts of the underwood in such a place, whereof, &c. so upon this title the right of the tithes is directly in dispute, and therefore I think the court shall be ousted of jurisdiction.—*Pigot*. Sir, I think this court shall have jurisdiction, and that it shall be tried here, as in case where a vicar is endowed and the endowment is too small, and afterwards it is augmented by assent of the parson and ordinary by a portion by composition, &c. of more than he had before, in such case, I think, that if such augmentation afterwards come in dispute, that it shall be tried in this court.—*CARESBY*. This case cannot be law, for this reason, for there can be no augmentation unless it be by the parson, patron and ordinary, and by their assent; and moreover none shall be made, but for insufficiency of the endowment before; and when such augmentation is made, it is a spiritual act, which act is a perfect judgment in the spiritual court; then since it is a judicial thing in the spiritual court, it shall not be by any means defeated in this court by matter of fact, viz. by verdict; and so in the case of *Pigot*; but a portion claimed of a parson cannot be tried in this court; and afterwards the court was ousted of jurisdiction, *quod nota*, &c.

1483.

1 Ric. 3. A. D. 1484. [6 Rot. Parl. 258.]

**F**ORASMUCH as the said late King has taken and inclosed in the old park of *Fodrynghey* ten acres of meadow and certain acres of land, and also has closed in the new park there certain land and meadow which before the said inclosures pertained to the said college: therefore in exchange, recompence and satisfaction of all the said land and meadow, and also in satisfaction for yearly tithes due to the said college of 245 acres of land and meadow inclosed now in the said parks, our said sovereign lord of the assent and authority aforesaid wills and grants to the said master and college two pieces of land, lying in the west field of *Fodrynghey* aforesaid, whereof one is called *West mede Wong*, and another piece is called *Westmedeley*; which both pieces contain by estimation twenty-six acres; to have and hold to the said master and college, and to their successors, in pure and perpetual alms for ever; saving, &c.

1484.  
Twenty-six acres of land given by the king as a composition real in lieu of the tithes of *Fodrynghey* park.

Tr. 8 Hen. 7. A. D. 1493. [8 H. 7. 2.]

**P**ROPERLY the offerings and tithes make the parsonage; and yet if any glebe land belong to the parsonage, and this be leased for a term of years, the land passes by this general name [parsonage.]

if there be any glebe it shall pass by lease under the general name

1493.  
Properly the tithes and offerings make the parsonage, yet

E. 10 Hen. 7. A. D. 1495. [10 H. 7. 21. 19.] Br. Counte. 96.

**I**N debt brought by *Faringdon* he declared that he leased certain tithes to the defendant rendering to him a certain sum. *Keble* took two exceptions, one for that no lease by deed was shewn; the other for that he had conveyed no interest to himself in the tithes, for he is not parson, nor has he shewn that the parson leased to him, and he leased over. And as to the first exception nothing was said by the justices: and as to the other, it was clearly without question adjudged that the declaration was not good. *Keble* afterwards suffered him to amend this, for otherwise he could not, as the declaration was of another term. *Quod nota*.

parson leased to him, and he leased over; but the declaration was allowed to be amended. To an exception that no lease by deed was shewn, nothing was said by the court.

1495.  
A declaration in debt for tithes was held to be bad, as the plaintiff had conveyed no interest to himself, inasmuch as he was not parson, nor had shewn that the

E. 15 Hen. 7. A.D. 1500. K. B. [15 H. 7. 8. 1.]

Br. Lease, 15. Incident 7.

1500.

A lease of a rectory for a term of years without deed was held to be good, and that by such lease the tithes and offerings pass as incident thereto, although there was no parsonage-house but only a church and churchyard. Bro. adds, yet it seems tithes or offerings only cannot be leased without deed, no more than a rent. Ejectment lies if the lessee be ousted of the offerings, &c.

**NOTA**, that the parson of *St. Dunstan's in the West* by the Temple leased to the wardens of that church his rectory of *St. Dunstan's in the West*, without deed, for a term of years. And it was held to be a good lease by the justices in the King's Bench. And by this lease of the rectory they shall have the tithes and offerings of that church, for they are incident thereto. And although he had no parsonage-house, but only the church and churchyard, yet it is a good lease, and they pass by it. And if the wardens be ousted of the offerings, &c. they shall have *ejectment*. And all this was agreed by all the justices of the King's Bench, and the law is the same if one lease a hundred, for it is a freehold.

1500.

M. 16 Hen. 7. A.D. 1501. [16 H. 7. 3. 8.]

In debt for arrears upon lease of a parsonage, after verdict it was moved in arrest of judgment, that the lease was made without deed; but the court held that every parsonage should be intended to have glebe, and so consisting in a manner part in demesne and part in services, by lease of the parsonage, all that makes the parsonage passes without deed.

**I**N debt the plaintiff declared for arrears upon a lease of a parsonage for a term of years. After verdict for the plaintiff, the defendant moved, in arrest of judgment, that the lease was made without deed, and a parsonage is a thing not in demesne, but another profit grantable, of which livery and seisin cannot be made. And also issue was joined upon *levy by distress*, and a parsonage properly consists of tithes, so not distrainable. *Et non allocatur*, for every parsonage shall by intendment have glebe land, and so seised in a manner, part in demesne, and part in services: so, by lease of the parsonage, all that makes the parsonage passes without deed, &c. *Quod nota*, &c.

1505.

M. 20 Hen. 7. A.D. 1505. K. B. [20 H. 7. 12. 22.]

A parsonage which consists wholly of tithes and oblations, and which therefore lies in grant, cannot pass without deed. By *Rode*, J.

**REDE**, J. The count is not good; for he has declared on a parol lease, whereas a county cannot so pass, for it is a thing which lies in grant; as a parsonage which consists wholly of tithes and oblations, or rents, commons, and such like; and therefore he ought to have declared on a deed.

1506.

E. 21 Hen. 7. A.D. 1506. K. B. [21 H. 7. 21. 11.]

Br. Lease, 20. Trespas. 210.

The court held that the church, the churchyard, and the tithes, make the rectory, and that the whole would pass by parol under the name of rectory; but they were of opinion that the parson could not lease the tithes only, without deed. Bro. adds, *quere* if the parsonage-house, the glebe, and offerings, would not pass by a demise of the rectory only without other words.

**NOTA**. *Pigot* came to the bar of the King's Bench and asked this question of the judges, whether if a parson lease his rectory without deed, the tithes will pass? *FINEUX* and *TREMAILE* said they would; for the church, the churchyard, and the tithes make the rectory, and the whole will pass by parol under the name of rectory, and the parson shall have trespass for trees cut and carried away from the churchyard; for breaking and entering the church. But they were of opinion that the parson could not lease the tithes only without deed. *Quod nota*.

1539.

M. 30 Hen. 8. A.D. 1539. [Dy. 43. a.] 1 Gw. 118.

Tithes suspended by unity of possession with the land, upon severance of such pos-

**I**F the parson of a church purchase a manor within his parish, now by this purchase and unity of possession, the manor which was tithable before is made untitheable, because he cannot pay tithes to himself; but if the parson make a lease of his parsonage and rectory to a stranger, then the parson himself shall pay the tithes of his manor to the lessee of the rectory; and if the

person make a feoffment of the manor, the feoffee shall pay tithes to the parson so enfeofing, because tithes cannot be extinguished by any unity of possession, as a rent-charge may which is issuing out of the land; but tithes are due by the law of God *ex debito* for the occupation and tillage of the occupier in whose hands soever the land come, if it be not the hands of the parson himself. And all this matter was agreed by the judges and serjeants; but they differed in opinions, whether if the parson let parcel of his glebe for years or life, reserving rent, the lessee should pay tithes, or not? *Quære inde*.

sells the manor. Tithes are due by the law of God, for the occupation and tillage of the occupier in whose hands soever the land comes, if it be not in the hands of the parson himself. *Quære*, whether the lessee of the glebe of the parson for years or life shall pay tithe thereof?

1539.

session, are received, as where a parson purchases a manor within his rectory, and he afterwards lets the rectory or

32 Hen. 8. A. D. 1541. [Mar. N. C. 92. Br. Dism. 17.]

**I**T was said that if a parson demise his glebe to a layman, there he shall pay tithes; otherwise of the parson himself who keeps them in his own hands. And that lands before discharged of tithes, shall be ever discharged of them. Yet if he who has purchased a manor and rectory, which is discharged of tithes, leases part of his demesnes, the lessor shall have tithes thereof, because he has the parsonage.

1541.

Glebe demised to a layman shall pay tithe. Lands before discharged of tithes shall be ever discharged of them.

H. 6 and 7 Edw. 6. A. D. 1552. [Dy. 79. a.]

**A** MAN had used to pay for the tithes of a close, for the space of sixty years or more, only twelve-pence by the year, to the parson or vicar for the time being; and the parson now had a farmer, who sued in court christian for the tithes in kind; and he pleaded this payment of twelve-pence for tithes, and it was not allowed by the ecclesiastical judge, but sentence given there for the farmer. A prohibition was granted in this case in K. B. upon good advisement, with the said averment in the surmise, that the court christian would not admit the said plea there. And although this rent was issuing out of the land, so that it is such rent as he could have assise, or distress for, yet prohibition shall be granted by the opinion of the court. Yet *quære* 8 E. 4. [13. 13.] (1) and the court christian would not allow such matter as above as a *modus decimandi*; and therefore in reason a prohibition shall go.

1552.

A prohibition to the spiritual court after sentence, which had refused to allow a modus of 12d., which had been pleaded in lieu of tithes in kind of a close.

(1) Ante, p. 44.

E. 7 Edw. 6. A. D. 1553. [Dy. 83. a.] 1 Gw. 119.  
The Dean and Chapter of Bristol's or The Serjeants' Case.

1553.

**T**HE case of the new serjeants was, the assize brought by the dean and chapter of Bristol against a parson for a portion of tithes in North Cerney, in the county of Gloucester, in which divers exceptions were taken to the writ, and to the plaint which comprehended the title of the plaintiffs, upon which was a demurrer in law. 1. The first was, because the writ was of "freehold" where it should be of a "portion of tithes." 2. Also, that the writ ought to have been brought as well against the tenant of the land as against the disseisor, as in assize of rent charge. But see statute 32 H. 8. c. 7. [s. 7.] which answers this exception. 3. Also, for that the plaint is uncertain, *s.* "of a certain portion of tithes of garbs, hay, wool, and lambs, annually arising, renewing, and growing of and in two hundred acres of land, twenty acres of meadow, and one hundred acres of pasture, with the appurtenances, in North Cerney." 4. Also, that the statute 32 H. 8. c. 7. which gives temporal actions for tithes and spiritual profits ought of necessity to be recited in the plaint. 5. Also, for that the form of pleading, which was, *s.* "of a portion of tithes, &c. in his demesne as of fee," is not good; for tithes are not in demesne any more than an advowson. 6. Also, that the title was double, because it is alleged that "one I. late prior of S. was seised, &c. in fee in right of his church," and that "he and all his predecessors were seised, &c. from

Portion.  
Assize.

A portion of tithes is where a man has any profit of tithes within the parish of another parson or vicar, and its origin was before the council of Lateran, at which time it was lawful for every one to distribute and pay his tithes as he chose, or any portion thereof to any church, according to his best

1553.

THE DEAN OF  
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CASE.

devotion. In  
assize, plaint of  
"a certain por-  
tion of tithes"  
is good.

Assize of a por-  
tion of tithes by  
a dean and  
chapter, and de-  
murrer thereto;  
because,

1. The writ was  
*de libero tenem-  
mento*.

2. The terre-  
tenant was not  
joined with the  
disseisor in the  
writ.

3. A plaint of  
"a certain por-  
tion," &c. is  
uncertain.

4. The statute

32 H. 8. c. 7. is not set out. 5. The writ was of tithes in demesne as of fee. 6. For that the title was pleaded double, s. "that I. late prior, &c. was seised, &c. in right of his church; and that he and all his predecessors were seised, &c. from time, &c." 7. It is uncertain to what the words "by virtue whereof" in the title refer. 8. The king is not stated to be seised of the tithes in right of his crown. 9. The christian name of the dean is omitted. 10. For that the tithes in suit are not averred "to be parcel of the demesnes of the archbishop of York, late in the tenure of E. T." as they were described in the king's grant of them.

Answer to 1st  
objection.

In an assize for  
tithes, the writ  
shall be *de libero  
tenemento*, and  
the plaint and  
title therein  
shall be special.

"time immemorial;" and so the prescription carries a double face. 7. Also, for that the words in the title, s. "by virtue whereof," are uncertain to what thing they shall be referred. 8. Also it is alleged that king H. 8. was seised of the said portion by reason of the suppression of the said late priory, which was under three hundred marks in his demesne as of fee, without saying in right of his crown, and in fact by the act of suppression, in 27 H. 8. [c. 28.] the possessions of such little abbeys and monasteries are annexed to the crown. 9. Also in the conveyance of the said portion of tithes by the grant of king H. 8. to the said dean and chapter, the christian name of the said dean is omitted. 10. Also it is alleged that the said king H. 8. gave and granted the aforesaid portion of tithes among other things by the name of all that portion of tithes arising, &c. out of the demesne lands of the archbishop of York, lying and being in North Cerney, in the said county of Gloucester, to the said late monastery, lately belonging, &c. and then, or lately in the tenure of E. Tame, knight, &c. and there is no averment in fact that the lands put in view of which, &c. were demesne lands of the archbishop, and in the tenure of E. Tame. And this was the most doubtful and material exception, by the judges. Also, the matter in law is, 1. Whether the dean and chapter, being a body politic, of whom the statute makes no mention, but only of a person or persons, be within the benefit of the statute? and also, 2. Whether the tithes in their hands, being spiritual persons, can be demanded in the temporal court, as lay or temporal things, or not? and, 3. Whether the tithes, by the statute of 27 [H. 8. c. 28.] (which is the statute of this suppression), or by the 32 [H. 8. c. 7.], are made lay or temporal by any words in the said statutes?

As to the first exception, it seems that the writ is good; for when a man has a special remedy at the common law provided for by writ in the register, which serves only for one case, and for one thing, and afterwards a like remedy is provided by the statute in another case, and for another thing than there was any help for at the common law, the general writ ready framed shall serve in the new case, and the special matter shall be shewn in the count, unless a special writ be expressly provided in the statute; as the writ of *cui in viâ* at common law served only upon a discontinuance in which the demise of the husband is supposed by the writ, and by the statute of Westm. 2. c. 3. a *cui in viâ* is given upon a recovery by defendant, and no form of writ there framed, wherefore the common writ supposing a demise, which is false in fact, shall serve, &c. So divers writs of *precipe quod reddat* are now by statute against *cestuy que use*, and pignor of the profits, although he is not tenant of the land; and the form of the writ at common law is not altered by that: so the statute of 4 H. 7. [c. 17.] gives a writ of right of ward for the heir and land of *cestuy que use* of land holden by knight-service; as if the ancestor had died seised in demesne, the writ of ward at the common law shall serve, which supposes that the ancestor held his land by knight-service, which is false, but the special matter shall be declared in the declaration. So the tenant by *elegit* or statute who hath only a term and chattel shall have assize if he be ejected, by the statute, as of freehold, and the form of the writ is of freehold, and not of a term, &c. Then if a general writ shall serve in a new case where the writ in its supposal is false, *à fortiori* the general writ of assize in this case, which is not false but true (for tithes are now at this day made lay and freehold by reason of the said statute), shall well serve. And although the said statute of 32 H. 8. that a man shall have original writs for tithes as the case shall require to be devised and granted in the king's court of chancery, yet if the chancellor think this general form of writ of assize of novel disseisin good without devising a new form, that is well enough in this court; but we have a doctrine, that if a man have a writ framed in the register for his special case besides the general



writ, and he use the general writ for his special case, it shall abate, as in assize of common the writ shall be of common of pasture, and there are no forms of writs of assize except those two, wherefore, &c. And see 7 H. 7. [2. a.] in trespass by the husband and wife of a close broken and his goods taken, and count of a trespass done to the wife while single, that shall abate the writ, &c.

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CASE.

As to the second exception, s. Whether the tenant of the land shall be named in this case, or not?—it seemed that he needs not, for the words of the statute 32 [H. 8. c. 7. s. 7.] are, "That if any one be disseised, deforced, wronged, or otherwise kept from their lawful inheritance, state, seisin, possession, &c. by any other person or persons claiming, or pretending to have interest or title in or to the same, that then the person so disseised, deforced, wronged, &c. shall have their remedy in the king's temporal courts, &c. as the case shall require, for the recovery, getting, or obtaining, &c. by original writs of *præcipe quod reddat*, assize of novel disseisin, *mort d'ancestor*, &c. in like manner and form as they should or might do, for lands, tenements, or hereditaments, in such manner to be demanded;" wherefore it is not necessary to name the tenant of the land, as in assize of rent charge or seck, which are things against common right, &c. And besides, for any thing that is yet shewn, the tenant in assize may be tenant of the land, &c. for he hath demurred in law to the title, and no plea is offered that there is no tenant of the land named in the assize, wherefore it seems that this point ought not to be argued in this case. It seems also that no man can be tenant or pignor of a tithe but he who takes it; and there is a difference between rent and tithe, for tithe is not issuant out of the land as rent is, nor to be paid by the hands of the tenant, as rent is. See for that, the case 40 E. 3. [24. pl. 25.] that great default is in the tenant if the rent be not paid, and he shall be adjudged a disseisor. Also, note the last proviso in the statute of 32 [H. 8. c. 7. s. 8.] that against him who refuses or denies to set out his tithes, or detains them, remedy is only given in the ecclesiastical court.

"Of a certain portion of tithes, &c." This seems good enough, and cannot be devised any better. And first, It is common learning in the Book of Assize in divers places, that a man needs not use such precision and certainty in the plaint of an assize as in other writs of *præcipe quod reddat*; for in 8 Ass. [1.] wood was put before pasture in a plaint, which is contrary to the order and form of a *præcipe quod reddat*, according to the verse; and a plaint was of the annual rent of one robe, or twenty shillings, in the disjunctive, which would not have been good in a *præcipe quod reddat*; and of a certain piece of land, and that is good in assize without any contents certain. So one brought a plaint in D. only, and there were two D.'s in the county, and neither of them without an addition, yet the assize and plaint was well enough; and the reason as I understand is, that the judgment in assize differs from other writs, for he recovers seisin of the thing put in plaint by the view of the recognitors, and it is sufficient if the thing in plaint be so certain and plain that the recognitors can put the plaintiff in possession. And now because this term "portion of tithes" is uncertain, and unacquainted in our law, it is necessary to consider its nature and quality for the ministers of our law now, because it is incorporated and made parcel of the body of our common law. I understand a "portion of tithes" to be where a man has any profit of tithes within the parish of another parson, or vicar, and its origin was before the Council of Lateran, at which time it was lawful for every one to distribute and pay freely at his will his tithes, or any portion thereof, to any church, according to his best devotion; and there was no restraint to any church or parish in certain; so by continuance that grew to a right and title, and this was so given for prayer, or devotion, &c. Then to consider the certainty here, in every word of the plaint is certainty. First, The word "certain" is an adjective or relative which expresses a certainty and particularity, and especially in the singular number, unless it be coupled with an adjective or substantive uncertain, as "a certain person unknown," and "of the death of one unknown," &c. for then it does not make any demonstration; but being joined with a substantive certain, as

Answer to 2d  
Obj.

Assize lies of  
tithes in the  
hands of the  
pignor without  
naming the  
terre-tenant.

Answer to 3d  
Obj.

In assize, plaint  
"of a certain  
portion of  
tithes," is good  
and certain  
enough.

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"in a certain place called," it is otherwise; so here "portion" is a substantive, and by the words following, "s. of tithes of sheaves of corn, hay, wool, and lambs," the kind and quality of the tithes are named and expressed; and here the measure or quantity of tithes cannot be expressed; for although the defendant, in the year of the disseisin committed, took one hundred sheaves of corn, two cart-loads of hay, two stones or pounds of wool, and ten lambs, yet the disseisin is made of the entire tithe, which is a thing uncertain in number, for the goodness and fruitfulness of the year is casual and uncertain, and for that reason it is impossible to limit the portion more certainly. And besides, it is alleged and declared that this portion of tithe is a thing of long continuance and antiquity, and in the country there the certainty and quantity is well known, so that the plaintiff may well recover his seisin of this portion of tithes by the view of the recognitors, &c. wherefore, &c. And see H. 11 H. 4. [40. 4.] In debt—*precipe quod reddat* a certain portion of land is good by SKENE, and allowed by HILL, without shewing how much that portion consists of. And besides the statute 32 H. 8. is plain, that assize and *precipe quod reddat* lie for a portion of tithes; wherefore, &c.

Answer to 4th  
Obj.

32 H. 8. c. 7.  
is a general  
statute, and in  
assize for tithes  
need not be  
recited.

The statute of 32 H. 8. needs not to be set out; and that for two reasons: 1. Because that statute is general and universal, and runs over the whole kingdom, and concerns every person or persons who have any such spiritual profit: then the Judges of every court are bound chiefly to take notice of this law, inasmuch as it gives them jurisdiction and power to hold plea of that, which, before the statute, the common law took no cognizance of; and such general law is not of necessity to be alleged: and this was ruled in error 37 H. 6. [15 pl. 5.] *sub fine*, in the Exchequer Chamber. Also in 4 E. 4. [22 a. b.] in the case of Lord Hungerford, in traverse, and other books: and so it is, when a man is acquitted by a general pardon, by parliament; and he, being arraigned, does not plead it, but puts himself upon trial, and is acquitted; he shall not have conspiracy, for he was not legally acquitted; since the Judges ought to have allowed him his pardon without pleading it. And further, this statute doth not give any new writ or action which was not before at common law; but joins and annexes other things which are to be demanded by writs original at common law; by which they were not demandable before. And therefore it may be well likened to the case of 14 H. 4. [20. a.] in maintenance; where the case was, that cognizance of plea was granted to Bristol of all pleas; and afterwards, there was an action of debt given by statute for a thing, for which no action of debt lay before; they shall have cognizance of this action, because the same action was before at common law: but if the statute had given a new action which never was before, it is otherwise; so here, &c. And this statute also gives a power and jurisdiction to the temporal courts to hold plea of tithes in these cases: and I never understood, that the plaintiff shall be compelled to shew the power and authority of the Judges and court in his writ or declaration; but that is for the defendant to allege, and to take exception to the jurisdiction of the court, as of disability of the person of the plaintiff, and things of that sort: and, for these reasons, I think that he is under no necessity to allege the statute, any more than it hath been usual for the statute of R. 3. [1. c. 1.] to be alleged, when a man plead a feoffment of *custody que use*; or at this day, if a man plead a feoffment to an use, it is more than is necessary to allege the use, executed by force of the statute of uses 27 H. 8. [c. 10.] And so at this day, if a man will plead a devise by will, shall he be forced to allege the statute of wills? It seems clearly he shall not. Wherefore, &c.

Answer to 5th  
Obj.

Assize of tithes  
in demesne is  
good.

Answer to 6th  
Obj.

In assize for a

It seems also, that tithes are demesne, for they are tangible and visible; and also the explees alleged in a writ of right of advowson of a church, or of tithes, are by taking great tithes and small tithes, and oblations, &c. therefore it is not like a reversion, suit, fealty, or such like, which are not manurable or tangible. Wherefore, &c.

It seems also, that the prescription does not make the title double, for the seisin of the portion only does not make a good title in the prior of S. any more than of a rent, or any other thing or profit in the soil or fee of another, which

commenced against common right: for, in all these cases, the commencement of it ought of necessity to be alleged by him who is to make title to it, whether he be a privy or stranger thereto; for it is contrary to reason to charge the inheritance or freehold of another, without shewing a substantial foundation for it. Then here admit, that the prior had been seised of this portion, which ought to be intended to be in the parish of which the prior himself was neither parson nor vicar, shall this seisin make him a title to this portion without prescription? I think not: and then the seisin is not material, nor traversable, but only the prescription; for the king cannot make other title to it than the prior himself, who could by no means make out a good title to himself, but by grant or prescription. Wherefore, &c. Besides, the prescription declares the manner in which the prior was seised, s. "from time whereof," &c.; and there, this only is traversable, and not the seisin, for he cannot allege the prescription unless he allege the seisin also: as in a *scire facias* to execute a fine, the seisin of his ancestor with a feoffment is not double, for he cannot allege the one without the other; so here, &c.

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portion of tithes,  
demandant pre-  
scribes in the  
prior of S.  
This is not a  
double title.

"By virtue whereof." It seems that these words should, of necessity, be referred to all the mean degrees and steps before expressed; by which the said portion is conveyed to the possession of the king; of which, the first degree is the seisin of the prior by prescription: the second, the suppression of the priory by act of parliament in 27. with the averment that it was under the value of two hundred pounds *per annum*, and also one of the three orders or habits of religion, s. "monks, canons, and nuns;" the third step is, that the king by the act is deemed and judged in actual and real possession of the portion: and all these matters are degrees and means to induce title to the possession of the king, and no one of them is sufficient to do this without the other, but altogether are. And the nature of these words, "by virtue whereof," is well explained and declared in 7 H. 7. [3, 4.] in trespass for trees cut and carried away, where it is holden, that the "by virtue whereof" *non auget nec minuit sententiam sed tantum confirmat promissa*: as if the defendant there pleaded a feoffment of the soil where trees grow made to the plaintiff for the use of a stranger, "by virtue whereof" the stranger granted the trees to the defendant, that is bad; for the feoffment to an use did not make the grant good, without averring the continuance of the use until the grant of the trees, which thing is not implied by the "by virtue whereof;" wherefore, as I understand it, a better form of pleading could not be devised than was in this case.

Answer to 7th  
Obj.

"In his demesne as of fee." This seems good enough, without saying "in right of his crown," and is the best mode of pleading; for it appears before, by the statute, that the king ought to have the said monasteries, to do with them according to his good pleasure, for the honour of God, and the weal of the kingdom: and then to make the law clear, and without any doubt, this is better pleaded than to say "in right of his crown;" for this might create an argument and doubt, whether he could sever it from his crown or not, although it seems sufficiently clear that he might; yet to allege that which is dubious and disputable, when it may well be alleged fully and clearly, would be impolitic in pleading. And let us grant also, that it were necessary to allege "in right of his crown;" still the manner of pleading before is such, that the king necessarily must be seised, as if the act gave it him by intendment, although it is not expressly alleged, for the statute annexed it to the crown. And see E. 34 H. 6. [34. b.] in *quare impedit*, this exception over-ruled, where conveyance was made of an advowson of King Hen. 6. who came to it by descent, and it was parcel of the possessions of alien priors, which were annexed to the crown by parliament in the time of Hen. 4th or 5th.

Answer to 8th  
Obj.

It is sufficient to say in *assize* for tithes come to the king by the suppression of an abbey, that he is seised thereof "in his demesne as of fee," without saying, "in right of his crown."

(1) It seems that it is not necessary to mention the dean by his name, any

Answer to 9th  
Obj.

(1) Hil. 32. El. [1 And. 248.] *Carter v. Crumwell*, in *ejectione firme*, the plaintiff declared upon a lease made by the warden and college of All Souls in Oxford, and exception was taken because the christian name of the warden was omitted, and it was adjudged un-

necessary: and a difference taken where the corporation consists of one person only, as a bishop, there he should be named; otherwise, if of many, as a dean and chapter, mayor and commonalty.

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CASE.

Dean and chapter bringing assize for tithes, need not mention the dean by name.

more in the conveyance of the title for the portion made to the dean and chapter, than in the original writ of assize. And no one will deny, but when a dean and chapter, who are an entire body politic, are to commence an action, the best way is to omit the name of the dean, for fear of a change of the dean by death, or otherwise, by which the writ may abate, as is adjudged in 21 E. 4. fol. 19. [15. a. b.] And I take a great diversity between where one is sole seised in right of his deanery, and where in common with the chapter; for it may be agreed for law in the first case, that if the dean alone be entitled to an action real, he must call himself by his christian name, that it may appear whether the cause of action commenced in his time, or in the time of his predecessor. As if a disseisin be made to a dean, or an erroneous judgment, or false oath, and he die, his successor shall not have an assize of novel disseisin, but a writ of entry upon disseisin in the *quibus*, or a writ of error, or attain, and name himself, because he was not a party to the judgment; but in the other, *s.* where the dean is seised in common with the chapter, there, although he die, still his successor, and the chapter together, shall have assize of novel disseisin, or error, or attain, as the case is, without naming the dean in certain, because the dean is not dead, but hath always continuance. And therefore in 14 H. 7. [31. b.] it is holden, that a dean and chapter, or a prior and convent, without naming the superior by his proper name, granting by their common seal an annuity until promotion to a benefice by the aforesaid dean or prior, their successor may tender a benefice; but if they be named, there the contrary is holden, because the aforesaid dean or prior shall refer only to the dean or prior by name, and to no others. And here the proper name of the corporation and body politic is "the dean and chapter of B." &c.; and by this name they are enabled to purchase, sue and be sued, and not by any christian name. And also the truth in this case is, that the dean, who was the plaintiff in the assize, was the first dean of this corporation, the commencement of which was only in the 24th of Hen. 8. which is only seven years since the erection; wherefore it can no otherwise be intended but the same dean to whom the first grant was made: and see 13 E. 4. 8. b. holden by CROKE, that although it is usual to allege the name of the mayor, who is the head of the corporation, yet he had seen such general pleading, without naming the head, adjudged good. And see a good case of that, H. 17 E. 3. [1. b.] of a *scire facias* brought by the successor of a dean and chapter, upon a recovery against an abbot, since dead, without naming the proper name of the dean, but of the abbot; he shewed a diversity between the late abbot and the present abbot, but that cannot be of a dean and chapter.

Answer to 10th Obj.

In assize of tithes, plaintiff that king H. 8. gave them *per nomen* of those tithes, arising out of the demesne lands of the archbishop of York, and lately in the tenure of T. it is not necessary to aver that the lands put in view were "the demesne lands of the archbishop in the tenure of T."

It seems too, that no averment is necessary; and that for divers reasons: 1st. The plaintiffs, in the premises and commencement of their title, shew that the portion of their tithes now in plaint, is issuant out of two hundred acres of land, &c. in N. whereof the late prior was seised in fee by prescription; and that before any title of seisin in the king; and then they proceed in their title, and convey it by dne and legal means to the king; and that the king was seised of that in fee, and so being seised, made a grant to them of the portion aforesaid, by the name, &c. so that the foundation of their title was not of the king only, but they also make conveyance of the king's title, *s.* from the prior: and then it much varies the case, whether the title have its origin of the king only, for then perchance all the words in the king's grant ought to be verified, and especially when it wants certainty. As where the king granted "all his "lands which he had by the attainder of I. S." if a man would convey by such grants, he ought to aver that "I. S. had such lands," &c. The law is the same in the case of a common person who releases "all his right in all such "lands as descend to him of the part of his mother in D." there ought to be an averment that "the lands, &c. descend of the part of his mother;" for otherwise the release is void, by reason of the generality and uncertainty, &c. And see this 2 E. 4. fol. ult. And yet in 1 H. 7. [28. b. 29. a.] in assize, it was ruled by all the Judges, that if a feoffment be made by deed of lands by the name of "all the lands which he hath of the gift of such a one," the tenant ought to plead this feoffment by deed, without taking any averment: as

if it were made to him by the name of I. S. where his name is also I. D. because he may be known by one or the other; otherwise is it of a christian name; but there it is holden, that the best pleading is by the name comprized in the deed: and therefore in 26 Ass. [119. a. pl. 2.] it was ruled in an assize brought in D. the tenant pleaded jointenancy of the land in plaint, by a deed of land in S.; and that was good enough, without averment that S. is an hamlet in D. because the vill may have two names, the one true, and the other a nick-name. (2) So when any certainty is in the grant, although there be a superfluous addition in the grant, that is not material, nor shall impair it: as is the case in 20 Ass. [8.] a man made a grant of twenty cart-loads of wood in the wood of "D. which he had of the gift and grant of his father;" the grantee was not driven to shew any writing of the father, because by the premises the soil was sufficiently charged, &c. And so in the case of 9 H. 6. [12.] of an annuity granted by the queen, *percipiend' de magna custumar'* of London, the grant was ruled good, and the *percipiend'* void, &c. And so in 2 E. 4. [29. b.] a man released all his rights in Whiteacre in D. which he had "by hereditary descent" from his father, although he had it "by purchase or disseisin," it is well enough, &c. Then here, at the time that the king granted this portion of tithes which appertained to the said late prior, it may be that the said two hundred acres whereof, &c. were the demesne of the archbishop of York; and then the king inserted these words in his grant to make it more certain, and to give another name to the portion which he had before; for before it was known by the name of a portion of tithes in N. belonging to the priory of S., and by that name it appears that the king in his grant assented; but he added more to that, as above, which addition is peradventure false, and perhaps true: and so "of the tenure of E. Tame." And if neither of them were true, yet by the statute 34 and 35 H. 8. c. 21. this mis-recital of "late farmer or occupier," does not make the patent void. Then if the portion passed by the patent, that sufficeth for the plaintiff; for it would have been folly to take an averment of this title to a thing which was false, and which is immaterial whether false or true, as the case is here. And the counsel of the plaintiff would ill have deserved their fee (of whom I was one), had they alleged this averment of the title in the plaint, which had it been found false, ought to destroy the entire title of the plaintiffs, &c. Wherefore, in my opinion, as it is here pleaded, the portion of tithe is conveyed sufficiently from the prior to the king, and from the king to the plaintiff by name, &c. And the pleading is "the aforesaid portion," which cannot be any new one, or other portion derived from the king; and since the defendant hath demurred in law upon this plaint, he hath acknowledged that the king's grant was of the same portion that issued out of the land put in view, &c. And, therefore, I think the pleading good without averment, &c.

(2) Customs and subsidies have been formerly assigned over by our kings to their subjects, as H. 6. did to Cardinal Beaufort, ann. 22. for his security for a debt of sixteen hundred pounds due to him, assign over to him the

customs of London and Southampton. So Edw. 4. ann. 12. secured his debts by assigning over the next subsidy and aid that should be granted from the church or laity. Act. Cons. 22 H. 6. Bill Signat. 12 E. 4.

M. 1 & 2 El. A. D. 1558—9. B. R.

*Pelles v. Saunderson.* [(1) Dy. 170. b.] 1 Gw. 130.

1558—9.

**T**HE farmer of a rectory sued one of his parish in the ecclesiastical court for tithes of wheat and rye growing in sixty acres of land, and the defendant sued a prohibition upon the statute 2 and 3 E 6. [c. 13.] suggesting that all the sixty acres were barren heath and waste grounds, and by reason of the barrenness, have not been charged within time of memory with any tithes until the plaintiff had improved thirty acres of it, and converted it to tillage, &c.; so that by the intendment of a proviso in the said statute (although by express words such ground is not discharged of tithes for seven years after the improvement), he ought to pay no tithes within seven years, &c., and proved that

On a prohibition to a suit for tithes of wheat, the land being suggested to be lately improved, was proved so, but that tithes of wool and lambs had been

(1) The cases usually cited as "the marginal notes in Dyer," will be found according

to the chronological arrangement adopted in this work.

1558—9.

PELLES .

v.

SAUNDERSON.

always paid for it; though by the statute the same tithes continue payable for seven years, the parson cannot have a consultation, for he has not sued for tithes of these.

that suggestion within the six months by witnesses according to the act. And upon the attachment the parties appeared, and the defendant in it defended the contempt, &c. but he took no traverse to it; for it is not the practice in B. R. as it is said; and pleaded that the said sixty acres were *fruitful, and not barren*, as the plaintiff supposed, and upon this joined issue with the plaintiff; and it was found by verdict, that as for thirty of the said acres, they were barren, as the plaintiff had suggested; and as to the residue, they found that it had paid tithes of wool and lambs at all times, &c. And by the opinion of the Judges of both benches (except WYNDHAM), the party who sued in the spiritual court shall have a consultation for the said revenue: to which SAUNDERS, Chief Baron, agreed. Note, the above statute was mistaken, for the parliament was supposed to commence on the 4th day of November, in the 2d year of E. 6., which was false, for it was a session by prorogation. And yet afterwards, upon better advisement and examination of the verdict, which in the premises of it is found for the plaintiff in the prohibition, s. that it was barren, as the plaintiff had supposed, and that it was so barren, that on account of the barrenness thereof, none had paid tithes, although afterwards they find that for thirty acres they had paid wool and lambs. And because by another proviso in the same act, such tithes as were paid before shall be paid within the seven years after the improvement, &c. and not any tithes of other nature; and because the libel was not for other tithes in the said sixty acres, but only for wheat and rye, the party could not have a consultation; but he was told that he might commence a new suit in court christian for tithes of wool and lambs in the thirty acres not improved.

1563.

If a parson lease his glebe for years, the lessee shall not pay tithes, for the glebe never was chargeable with them.

More unity of possession is no discharge under 31 H. 8. it being assumed in this case that they were once chargeable, but if they are discharged in right, it is otherwise.

E. 5 El. A. D. 1563. Anon. [Moo. 46.]

**A**N abbot was parson imparsonnee of a church where the scite of the monastery and demesnes were; the abbey was dissolved, and the king granted the demesnes of the monastery to one, and afterwards the parsonage and rectory to another: the question was, whether the patentee of the parsonage should have the tithes arising upon the demesnes of the monastery, or the patentee of the monastery should be discharged by the stat. 31 H. 8. c. 13. s. 21. the words of which are, that the king and his patentees shall hold them *discharged and acquitted of payment of tithes, as freely, and in as large and ample manner* as the abbots did. — *Dyer*. It appears to me that the patentee of the monastery shall be discharged of tithes, for that the lands were discharged in the hands of the abbots: and there were some religious persons, as the white monks and cistercians, who were discharged of tithes by the privilege of their foundation; wherefore so shall the patentees here. — *Brown and Weston*. If the land of the abbey was the glebe of the parsonage at any time before the appropriation, then such land is discharged of tithes, for it remains glebe notwithstanding the appropriation; for the glebe of the parsonage cannot be gained (1) by prescription of the parsonage, and the glebe never was chargeable with the payment of tithes; for if a parson lease his glebe for years, the lessee shall not pay tithes. Which was granted. But the demesnes of the abbey were other lands, not parcel of the glebe, and shall therefore be charged in the hands of the patentee, for that they were once chargeable, and they were not discharged in the hands of the abbot, but merely by unity of possession. But if they were discharged in right by composition, then it is otherwise; for then they shall be discharged afterwards, as they were in the hands of the abbot.

(1) *Quere*, "but" by prescription.

1563.

An abbot had entered into a composition with a rector to pay a certain quantity of

E. 5 El. A. D. 1563. C. B. [Anon. Moo. 50.]

**A** COMPOSITION was made between an abbot and a parson, that in lieu of all tithes of wood growing within the manor where he was parson, and of which the abbot was owner, he should have to him and his successors certain loads of wood, to be taken yearly in twenty acres of the said manor, to burn and spend in his house: afterwards the parsonage was appropriated to

the abbey; and upon its dissolution the king granted the parsonage to one, and the twenty acres to another: the question was, whether by this the estovers were revived, or extinct by unity of possession. — *Brown*. I think the estovers are not extinct by the unity of possession, for the abbot had them in different capacities; for he remained parson whether he were abbot or not, and he could not take them but for one purpose; viz. the use of his house; for if he presented to the church by the name of parson, the church would be disappropriate; and he shall be named parson in a writ of annuity, and shall have a *juris utrum* as parson. And *Cates* said, that it had been adjudged in the duchy that the king might have common in right of his duchy of *Lancaster* in lands of which he was seised in right of his crown: and if he granted the land to another, then the common was revived; for there cannot be unity where there are different rights in different respects, for the possession is not united; but the unity is only by reason of the unity of the person, and so was not extinct but as to the demand, and not in the right. — *Dyer*. I doubt if these estovers were tithes; for if they were tithes, then they could not be extinct, for tithes are of common right, as a seignory, for the land must be holden of some one; so tithes run with the land, for tithes, of divine right and canonical institution, belong to the parson; and if a parson be seised of titheable lands by purchase *in jure ecclesie*, and afterwards he alienate these lands, the feoffees shall pay tithes, and shall not be discharged by the unity in the hands of the parson.

inct tithes, unity of possession does not destroy them. Tithes are of common right, and belong divine right and canonical institution, and so run with the land.

1563.

wood to be taken in twenty acres of land, in lieu of all tithe wood in his manor: the rectory was afterwards appropriated to the abbey; and after the dissolution, the king granted the parsonage to one, and the twenty acres to another: it was doubted whether the composition was revived by the severance, or extinct by unity of possession.

When things are held by dis-

T. 10 El. A. D. 1567. *Stathome's Case*. Dy. 277, b. 1 Gw. 192.

THE prior of the dissolved house of St. John of Jerusalem had this privilege from Rome, s. "That the cistertians, templars and hospitalers "should not be bound to pay the tithes of their farms, which they cultivate "with their own hands, or at their own expense;" but their farmers and all other occupiers paid tithes according to the statute 2 H. 4. c. 4. The said prior with his brethren made a lease of a manor for years, two or three years before the dissolution, which lessee paid tithes to the church of Rochester, to which they were appropriate. And after the dissolution, the king granted the reversion of the manor to one Stathome and his heirs in as ample manner as the prior, &c. The lease is expired: whether he and his heirs, having the manor in their own hands, shall be discharged of tithes or not, was in question in the chancery. And upon considering the statute 31 H. 8. c. 13. it seemed before the lord keeper to CATLYN, SAUNDERS, SOUTHCOT, and DYER, and to his lordship himself, that they shall be discharged until they let and set it to farm, &c.

This privilege of the cistertians extends to their woods and meadows and pastures; as *Foster* cited to have been adjudged that pasture near London, which was in the hands of the hospitalers was discharged of tithes. So 5 Ja. C. B. it was held, that (*colere*) shall not be understood merely of agriculture: and *Coke* vouched 6 E. 3. that a carve of land contained not only arable, but wood and pasture. *Dy. in M. and Ms.*

1567.

A manor of the prior of St. John of Jerusalem was exempt *dum propriis manibus, &c.* He makes a lease, and the farmer pays; during the term the house is dissolved, and the king grants the reversion; after the lease his patentee shall hold the manor in his own hands, discharged from tithes; but if he lease it, his lessee shall again pay.

M. 14 & 15 El. A. D. 1571.—C. P. *Tottenham v. Bedingfield*. [Ow. 83.]

IN an account the defendant pleaded he was never his bailiff to render account.

*Gawdy* prayed the opinion of the court if the action would lie, for otherwise he would not trouble the court. The case was, the plaintiff had a lease of a parsonage, and the defendant being no lessee, nor claiming any interest, takes the tithes being set forth, and carries them away: if the plaintiff could have this action was the question.

*Manwood*. It will not lie; for an account lies where there is privity, but wrongs are always without privity: but I agree, that if one receive my rents,

1571.

Account does not lie against one who, claiming no interest, takes away tithes set out by a parishioner, for there is no privity.

When tithes have been set out by a parish-

1571.

TOTTENHAM  
v.  
BEDDINGFIELD.

ioner, the law says they are in the possession of the parson, and if a stranger takes them away, he does it wrongfully, and no action of account will lie against him, for there is no privity, but an ejectment.

I shall have an account against him, for by my consent afterwards I make a privity; for although he has received the rent, he has not done wrong to me, inasmuch as it is not my money until it be paid me: but otherwise it is where a man disseises me of land, for that is merely a wrong, and so it is in this case; for when the tithes were set forth by the parishioners, the law says they are in the possession of the parson; and therefore when the defendant took them away, he does it wrongfully, and therefore no account will lie against him; and so was it adjudged in *London* in the case of one *Monax*, who, under colour of a devise, did occupy land for twenty years, and after the devise was adjudged void, he that had right to the land brought an account against him, and adjudged that it does not lie.

*Harper, contra.* For an account does lie against a proctor, and the plaintiff may charge him as proctor, and it is no plea for him to say that he did not occupy as proctor, no more than it is a plea for him who occupies as Guardian, to say he was not the *prochein amy*.

*Dyer.* There are three actions of account. 1. Against a bailiff. 2. Against a receiver. 3. Against a guardian in socage. And if an account be brought against one as receiver, he ought to charge him with the receipt of money, and I conceive that there ought to be a privity to charge one with the receipt of money: but if one claim as bailiff, or as guardian in socage, he is chargeable in account: but an abator as a disseisor is not, because they pretend to be owners, and in this case, because by the setting forth the tithes the property is in the parson, therefore he being lessee for years, he shall have an *ejectio firmæ*, and not an account.

H. 17 El. A. D. 1575.—K. B.

1575.

*Soby v. Molins* [PLOWD. 468.] Rast. Ent. 489. b. 1 Gw. 133. pt.

*A report of a judgment given in K.B. in Hil. Term in the seventeenth year of the reign of Queen Elizabeth, in a bill of attachment upon a prohibition sued by William Soboy, for himself and the queen against John Molins, parson of the church of Thaidon-Garnon, in the county of Essex, for suing him in court-christian for the tithes of the branches above twenty years old, growing upon great trees called Horn-beams, of the age of twenty years and more. And the record was entered in Hil. Term 16 Eliz. Rot. 354, and was as follows.*

Hornbeam-pollards, though of the age of twenty years, are not such great wood as is intended by the statute 45 El. 3. c. 3. for they are not timber, nor serviceable in building, but only fit for fuel; and therefore if they are cut down at that, or any greater age whatever, tithes shall be paid for them, and by the same reason tithes shall be paid for the lop-pings and branches of them, though they are of the age of twenty

**B**E it remembered that otherwise, viz. in the term of St. Michael in the 14th and 15th years of the reign of the lady Elizabeth now queen of England, before the same lady the queen at Westminster came William Soboy of Thaidon-Garnon otherwise Garnish in the county of Essex, who as well for the lady the queen as for himself prosecutes, by Richard Best his attorney, and brought here into the court of the said lady the queen then there his certain bill against John Molins, rector of the parochial church of Thaidon-Garnon otherwise Garnish aforesaid, in the custody of the Marshal, &c. of plea of trespass and contempt against those who prosecute in the court-christian contrary to the royal prohibition to the contrary thereof to them first directed and delivered. And there are pledges of prosecuting, viz. John Doe and Richard Roe. Which said Bill follows in these words, viz. Essex, viz. William Soboy of Thaidon-Garnon otherwise Garnish in the county of Essex, who prosecutes as well for the lady the queen as for himself, complains of John Molins, rector of the parochial-church of Thaidon-Garnon otherwise Garnish aforesaid, in the custody of the marshal of the Marshalsea of the lady the queen before the queen herself, for this, to wit, whereas in a statute made in a parliament of lord Edward late king of England, the third from the conquest, in the 45th year of his reign, held, among other things it was ordained, that tithes shall not be given of great trees of the growth of twenty years and more, nevertheless the aforesaid John, not ignorant of the premises, but contriving him the aforesaid William, contrary to the due form of the law of the realm of England, and contrary to the tenor and effect of the statute aforesaid, unduly to aggrieve, oppress, and fatigue,



him the said William in the court-christian, before the reverend and excellent man John Hammond, doctor of laws, of the consistory court of the bishop of London official lawfully constituted, the 20th day of April, in the fourteenth year of the reign of the lady the queen now, at Thaidon-Garnon otherwise Garnish aforesaid, of and for the withdrawing of tithes of the branches, called loppings, of certain great trees in a certain place, called Gine's park, within the parish of Thaidon-Garnon otherwise Garnish aforesaid, and the bounds, limits, and places titheable of the same parish, lately growing, and by him the said William lately cut and felled down, hath drawn in plea, craftily and subtly libelling against the said William, in the court-christian aforesaid, for the withdrawing of the tithes of 100 cart-loads of combustible wood, called the loppings of trees, in and of a certain wood called Gine's park, growing, arising, and happening within the aforesaid parish of Thaidon-Garnon otherwise Garnish, where in truth the aforesaid trees by the aforesaid William cut down, from which the branches aforesaid came, and the branches aforesaid in form aforesaid cut off, were of the growth of twenty years and more. And the same John him the said William, by the officer of the court-christian aforesaid, on that occasion to be cited, and before the aforesaid judge spiritual in the said court-christian to appear, and to the same John of and for the withdrawing of the tithes aforesaid, of the branches of great trees aforesaid to answer, hath unjustly compelled, and that plea in the same court-christian then and there hath prosecuted, and him the said William to make payment to the same John, for the tithes of the branches of the said great trees, by the definitive sentence of the said court-christian, with all his might hath endeavoured and contrived, in contempt of the said lady the queen now, against the form of the statute aforesaid, and to the damage of him the said William Soby 100*l*. And therefore as well for the lady the queen as for himself he produces the suit, &c.

And now at this day, viz. Saturday next after the octave of St. Hil. in this same term, until which day the aforesaid John had leave to imparl to the bill aforesaid, and then to answer, &c. before the lady the queen at Westminster, came as well the aforesaid William by his attorney aforesaid, as the aforesaid John by William Stamp his attorney. And the same John defends the force and injury when, &c. all contempt and whatever, &c. and says that he hath not prosecuted in the court-christian aforesaid after the royal prohibition to him therein directed, in manner and form as the aforesaid William Soby above against him complains: and of this he puts himself upon the country, and the aforesaid William likewise. But for obtaining the writ of the lady the queen of consultation in this behalf, the same John says that the branches, called loppings of trees, for the tithes of which branches, he the same John the said William in the court-christian aforesaid drew in plea, were the branches of trees, called Hornbeam-pollenger trees, growing in the aforesaid place called Gine's-park, within the parish of Thaidon-Garnon otherwise Garnish aforesaid; and that the aforesaid trees, upon which the branches aforesaid grew, were topped and lopped before any of the branches aforesaid, for the tithes of which he the same John Molins drew in plea the said William Soby, of the trees aforesaid grew. And because the aforesaid William Soby the same tithes of the branches aforesaid withdrew, he the same John, then being rector of the parochial church aforesaid, the said William in the court-christian aforesaid, before the prohibition aforesaid, in form aforesaid, thereof directed and delivered, for the withdrawing of the tithes of the said branches, drew in plea, as it was well lawful for him to do. And this he is ready to verify, wherefore, he prays judgment, and the writ of the lady the queen of consultation in this behalf to be granted to him, &c.

And the aforesaid William Soby says, that, by any thing by the aforesaid John Molins above by pleading alleged, the same John the writ of the lady the queen of consultation by no means ought to have, because he says that the plea aforesaid, by the said John in manner and form aforesaid, above by pleading pleaded, and the matter in the same contained, are insufficient in law to obtain the writ of the said lady the queen of consultation, to which he the same William has no necessity, nor is by the law of the land in anywise bound to

1575.

SOBY v. MOLINS.

years and more, but if the tree itself is privileged from tithes, so shall the germins above twenty years of age which grow from it be privileged, as the germins of that age of oak and ash and such like, for a branch of above twenty years of age may be of service in building, and therefore it shall be exempt from tithes as well as the principal tree shall. —Form of declaration in prohib. &c. *scire facias quare consultatione non, &c.*

1575. *SOBY v. MOLINS.* answers, wherefore for want of a sufficient answer in this behalf he the same William Soby prays judgment, and his damages aforesaid by the occasion aforesaid to be adjudged to him, &c.

And the aforesaid John Molins says, that the plea aforesaid by him the said John in manner and form aforesaid above by pleading pleaded, and the matter in the same contained, are good and sufficient in law to obtain the aforesaid writ of the said lady the queen of consultation, which said plea, and the matter in the same contained, he the same John is ready to verify and prove as the court, &c. And because the aforesaid William Soby to that plea hath not answered, nor the same hitherto in anywise denied, he the same John as before prays judgment, and the writ of the said lady the queen of consultation to be granted to him, &c. And because the court of the lady the queen here is not yet advised of giving their judgment of and upon the premises, day is given to the parties aforesaid before the lady the queen at Westminster until Wednesday next after eighteen days of Easter, to hear their judgment of and upon the premises, because the court of the lady the queen here thereof not yet, &c.

And so there were further continuances, because the court would advise until

H. Term, 17 El.

**I**T appears by the record, that the plaintiff complains against the defendant for, that whereas by the statute of 45 Ed. 3. cap. 3. it is ordained that no tithes shall be given of great trees of the growth of twenty years and more, yet the defendant hath drawn him into the court-christian, the 20th day of April, in the 14th year of the present queen, for withdrawing the tithes of branches, called loppings, of certain great trees, growing in a place called Gine's-park, within the parish of Thaidon-Garnon, and cut down by the plaintiff, where, in fact, the said trees and also the branches cut down, were of the growth of twenty years and more. And to this the defendant has pleaded in bar, that the branches called loppings of trees, for the tithe whereof he sued, were branches of trees called Hornbeam-pollengers, growing in the said place called Gine's-park, within the said parish, and that the said trees upon which the said branches grew, were topped and lopped before any of the branches for which the tithes were demanded, grew, and therefore that he (the defendant) being parson at the time of cutting them down, drew the plaintiff into suit for the tithes, as it was lawful for him to do. And upon this they demurred in law.

And the matter was argued at large at the bar, by *Atkinson* on the one side, and by *Anderson* on the other side. And *Bell*, an apprentice, was also of counsel in the case. And he spoke to the matter the same day with the other counsel, after their arguments on both sides. And it was said against the defendant, that he ought not to have tithes here, because the trees are old trees above the age of twenty years, in which case they are an inheritance, and for cutting down trees above the age of twenty years a man shall have an action of waste, and shall say therein that the termor has cut them down to his disherison. And if a man has an inheritance in the trees, and they themselves are an inheritance, from thence it follows that no tithe shall be paid of them, for tithes are payable of the increase of the inheritance, as of hay, apples, and such like, which are chattels, but not of that which is an inheritance in itself, as trees above the age of twenty years are. And this is proved by the said statute of 45 Ed. 3. c. 3. which ordains that "touching tithes of great wood of the age of twenty years, or of greater age, a prohibition in such case shall be granted upon attachment, as hath been used before this time;" which words (as hath been used before this time) shew us what the common law was, and that at the common-law tithes were not payable for great wood before the said statute, so that the statute is made in confirmation of the common law. And to this purpose was cited the opinion of *Belknap* in 50 Ed. 3. In the case of an attachment upon a prohibition for a suit in the spiritual court for the tithes of great trees, where he says, "it never was seen that tithes were demanded of great trees, nor of timber," which saying of his was within five years of the making of the said statute of 45 Ed. 3. So that he, who lived in the time before the act was made, testifies that there never was an instance before the act, where tithes had

been paid of such great trees, and the reason thereof is, because they were an inheritance of themselves. And as tithes shall not be paid of the trees themselves, so shall not they be paid of the branches which come of the loppings and topplings of the great trees, for if the tree itself, which is the principal, be excused from paying tithe, so shall the branches thereof, which follow the degree of the principal, be also excused, and especially in this case, because the branches are of the age of twenty years and more, which age makes them to be accounted great trees themselves. And for these reasons it was prayed that the defendant might be convicted of the contempt.

And the justices did not argue the matter openly, but at last they agreed among themselves that tithes were due to the defendant in this case, and they granted him a consultation. And because they did not openly declare the reasons of their judgment, I afterwards enquired them of WRAY, chief justice of England, who told me, that the reason upon which he and his companions gave the judgment was, because the trees are of a base nature, and are not timber, nor can be of any service in building, for they cannot in their nature endure long, but they are only fit for fuel and other trifling uses. And therefore if the Hornbeams themselves had been cut down, tithes should have been paid for them, and by the same reason they shall be paid for the boughs and branches of them; for the branches, which are of the age of twenty years and more, shall be of the same nature with the trees out of which they spring and grow, and of no other nature. For if the tree itself is privileged from tithes, so shall the germins above twenty years of age which grow from it be privileged, as the germins of that age of oak and ash, and such like, shall be exempt from the payment of tithes, as well as the oak or ash itself shall, for he said that a branch above twenty years of age of an oak, or ash, or the like, may be of service in building, and therefore it shall be exempt from tithe, as well as the principal tree shall. But Hornbeams shall pay tithes, though they are of the age of forty or fifty years, as hasels, or willows, and the like, shall do, and the "great wood" specified in the said statute is to be intended of wood which consists of trees of value, as of oaks and ashes, and elms and such like, but not of hornbeams, willows, hasels, maples, and the like, which in all ages ought to pay tithes, and so shall the branches which sprout from them, of what age soever the same be. And all this he said to me, and for this reason they granted the consultation, as he said. And the judgment and consultation, after divers continuances, were as follows.

At which day, before the lady the queen, at Westminster, came the parties aforesaid, by their attorneys aforesaid, whereupon all and singular the premises being seen, and by the court of the said lady the queen here more fully understood, and mature deliberation being thereupon had, for that it seems to the court of the said lady the queen here, that the plea of the aforesaid John Molins above by pleading pleaded, and the matter in the same contained, are good and sufficient in law to preclude the said William Soby from having his action aforesaid against the same John, and to obtain the writ of the lady the queen of consultation to the same John, it is considered that the aforesaid William take nothing by his bill aforesaid, but for his false claim therein be in mercy, &c. And the writ of the lady the queen of consultation to the same John in this behalf is granted, &c.

And the writ of consultation was thus:

"Elizabeth, by the grace of God, of England, &c. To the reverend and excellent man John Hammond, doctor of laws, official of the consistory court of the bishop of London, lawfully constituted, greeting. Hath shown unto us John Molins, rector of the parochial church of Thaidon-Garnon otherwise Garnish, in the county of Essex, that whereas he in the court-christian before you had impleaded William Soby of Thaidon-Garnon otherwise Garnish aforesaid, of this that the same William the tithes of 100 cart-loads of combustible wood, called loppings of trees, in and of a certain wood called Gine's-park, growing, arising, and happening, within the aforesaid parish of Thaidon-Garnon otherwise Garnish, and to him the said John

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The judgment.

The writ of consultation.

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" Molins in right of the rectory aforesaid belonging, to the same John Molins  
 " had refused to pay, the aforesaid William Soby late in our court before us  
 " suggested, that whereas in a statute made in a parliament of lord Edward  
 " late king of England, the third after the conquest, in the 45th year of his reign,  
 " held, among other things it was ordained, that of great trees of the growth of  
 " twenty years and more, tithes should not be given, and thereupon a certain  
 " prohibition at the petition of the aforesaid William to the same William we  
 " granted, and the same to you caused to be directed, by reason whereof you  
 " have delayed and yet do delay to proceed in that cause; and because, upon  
 " examination of the suggestion aforesaid, it manifestly appears to us that the  
 " suggestion of the aforesaid William in our court before us, as aforesaid, is  
 " wholly contrary to truth, we therefore being willing that what justice  
 " advises in the premises be done to the parties aforesaid, signify to you that  
 " in the cause aforesaid, as far as concerning the tithes of the combustible  
 " wood aforesaid, called loppings of trees, before you is only litigated, our  
 " royal dignity, and the laws and statutes of our realm of England, in that  
 " behalf wholly unhurt, you may lawfully proceed, and further do what to the  
 " jurisdiction ecclesiastical you shall know to appertain, our said prohibition  
 " to you before directed to the contrary in any wise notwithstanding.  
 " Witness, &c."

*Nota bene* by  
 reporter.

That the modern  
 form of proceed-  
 ing to attain a  
 consultation by  
 way of a bill of  
 attachment up-  
 on a prohibition  
 is not so regular  
 and good as the  
 ancient method  
 upon a writ of  
*scire facias qua-*  
*re consultatio*  
*non debeat conce-*  
*di post prohibi-*  
*tionem.*

From this record, which is agreeable with the common practice at this day, the reader may observe the method of proceeding now made use of to attain a consultation in these cases, which differs much from the ancient method, as I take it; and as it differs much therefrom, so it seems to me to be the worse order and form of proceeding in these suits. For at this day upon a surmise to have a prohibition, it is usual for him who makes the surmise to be bound in an obligation or recognizance to exhibit a bill of attachment against the party who sues in the court-christian, and against whom the prohibition was awarded, if he against whom the prohibition was awarded requires it; which is done to the end that the party who sues in the court-christian may be brought into court, and answer to the effect of the surmise, which is contained in the body of the bill of attachment, and avoid it, if he can, either for falsity or for any other matter, and thereupon the parties may join issue or demur in law, and if upon trial or demur the matter passes for the defendant (who sued in the court-christian), then he shall have a consultation directed to the spiritual judge to proceed, which grant of a consultation seems to me to be very strange. For in such attachment upon a prohibition the defendant is not actor in the king's court against the plaintiff, but is merely a defendant, as other defendants are in personal actions, or in suits founded upon other contempts, and the attachment is sued against him as against an offender who has proceeded in the spiritual court contrary to a prohibition, in which case if it is found or confessed that he has done so, he ought to be convicted of the contempt, and be imprisoned and fined; and if it be found that he has not proceeded in the spiritual court contrary to the prohibition, then he ought to have judgment to go without day. But to plead upon the attachment touching the right of the tithes, and, if it is found for the defendant, to grant him a consultation, as the effect of the judgment, is not (as I apprehend) consonant to the ancient form and course of law; and to make use of such a circumstance as to have him, at whose suit the prohibition was granted, bound to exhibit an attachment without any process awarded, and so to bring him in voluntarily, where in appearance he is compelled involuntarily to answer, seems rather to be a confederacy than a due and fair suit; and also to surmise that he has proceeded contrary to the prohibition, where in fact he has not, is a falsehood and a lie. And if he who is bound to exhibit his bill upon an attachment will not do it when he is required, but will forfeit his bond, then the king shall have the forfeiture, inasmuch as the bond is usually made to him, and not to the party; and then the party has no way to bring him, who had the prohibition, into court to plead with him, which would be a great defect in the law, if there were no other means to bring the party into court, and to proceed to trial upon the matter. But there

is

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is in the register a writ which is called a *scire facias quare consultatio non debeat concedi post prohibitionem*, (1) which writ the party who sued in the spiritual court, and was delayed by the prohibition, shall have against him who obtained the prohibition; and this writ recites the surmise and the prohibition granted thereupon, which is to the hurt or disherison of him against whom the prohibition was granted, and it requires the sheriff to warn the party to shew "if he have or know any thing to say for himself why our said writ of prohibition ought not to be revoked, and our other writ of consultation be awarded to the aforesaid official or other judge spiritual, &c. to proceed in the cause aforesaid, and to do further and receive what our court hath considered in this behalf." And as it may not be improper to recite the writ, it here follows word for word.

"The king to the sheriff of Essex greeting. Whereas we lately, at the prosecution of Thomas and Roger suggesting to us that the chapel of Roger is situate within the manor of the said Thomas, that the said Roger holds the chapel aforesaid of the advowson of the aforesaid Thomas, and that the said Roger and all his predecessors, parsons of the chapel aforesaid, all tithes, as well greater as lesser, arising from the demesne-lands of the said Thomas of the aforesaid manor, and of certain his tenants of the said manor, of the gift of the ancestors of the aforesaid Thomas, sometime lords of the same manor, from time immemorial had perceived and had, and that L. Spark, parson of the church of Roger, claiming those tithes to belong to his church aforesaid, the said Thomas and Roger thereof had drawn in plea before the official of the bishop of Lincoln in the court-christian, and for that the plea aforesaid, as it was said, touched us and our crown and dignity, because the advowson of the chapel aforesaid to us might devolve by reason of wardship or escheat, because also the like tithes in certain our demesnes we have bestowed, and hitherto have used to bestow, and also many great men of our realm of England such tithes in their demesnes have likewise used to bestow, we prohibit the same official that he should not hold that plea in the court-christian, nor any thing which might turn out to the derogation of our royal dignity in this behalf attempt, by reason of which prohibition the same official, as we have heard, hath delayed and yet doth delay to proceed in that cause to the no small loss and grievance of the said L., and to the manifest danger of the disherison of his church aforesaid. And now, on the behalf of the said L. it is humbly prayed unto us, that whereas in the articles to the prelacy and clergy of our realm of England lately granted it is contained, that in tithes, oblations, obventions, and mortuaries (when they are pounded under these names) our royal prohibition shall hold no place, we would be willing to order our said writ of prohibition to be revoked, and to award our writ of consultation to the aforesaid official to proceed in the cause in this behalf, we being willing that what shall be just be done to the parties aforesaid in the premises, command you that you make known to the aforesaid Thomas and Roger, that they be in our chancery on the morrow of the Epiphany of our Lord next coming, whosoever it shall then be, to shew if they have or know any thing to say for themselves why our said writ of prohibition ought not to be revoked, and our other writ of consultation to be awarded to the aforesaid official to proceed in the cause aforesaid, and to do further and receive what our court shall consider in this behalf. And have you there the names of those by whom you shall make this known to him, and this writ. Witness, &c. the year, &c."

This writ *Fitzherbert* makes mention of in his *Natura Brevium*, (2) at the end of the writ of consultation, and he seems to allow of it. And as the writ above was returned into the chancery, so one may have the like writ in every other court which grants writs of prohibition, returnable before the judges of the same court, and upon every cause sufficient to annul the prohibition. And when the defendant appears upon the writ, he may answer to the matter contained in the *scire facias* (for it comprises the substance of the matter), or if it is necessary to make a declaration, the plaintiff may declare upon the writ,

(1) Register, 71.

(2) F. N. B. 123. c.

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and the defendant may answer to the matter which the plaintiff in the *scire facias* has objected against the surmise upon which the prohibition was founded, and thereupon they may proceed in plea, and by that means the right and title of the tithes may be tried; and if it is found for the plaintiff in the *scire facias*, then he shall have judgment to have a consultation according to the request of his writ of *scire facias*, and if it is found against the plaintiff, then the prohibition shall stand in force, and he shall be barred from having a consultation. And this method of proceeding seems to me to be more agreeable with the law than the other, and therefore I would advise the student to put in practice this writ and to leave the other form.

1575.

Chancery has jurisdiction of tithes.

17 El. A. D. 1575.—Canc.  
*Windham v. Norris*. [Toth. 184.] 1 Gw. 136.

**A** DEMURRER because the matter concerns tithes over-ruled and ordered.

1575.

M. 17 El. A. D. 1575.—B. R. *Anon*. [Godb. 1.]

Where an abbot held a rectory appropriate, and afterwards purchased land in the same parish, the tithes which were suspended while the land was in the abbot's hands, will, if it be severed from the rectory, be revived, and the land charged as before the purchase of the abbot.

**T**HIS case was moved to the court. If an abbey has a parsonage appropriate in D. which is discharged of payment of tithes, and afterward the abbot purchases part of the land in the same town and parish where the parsonage is: that this land so purchased is discharged of tithes in the hands of the abbot; for the tithes were suspended, during the possession of the abbot, in his own hands. But after that, the abbey was surrendered into the hands of the king, Anno 30 Hen. 8. And afterwards the same possessions, &c. were given to king Henry VIII. by the statute of 31 H. 8. cap. 13, as they were in the hands of the abbot. The question was, Whether the land so purchased by the abbot before the surrender, were discharged of payment of tithes by the statute or not. And the opinion of Mr. *Plowden* was, that they were not discharged of tithes by the statute: for that no lands are discharged by the statute, but such lands as were lawfully discharged in right, by composition, or other lawful thing. And the lands in this case were not discharged in right, but suspended during the possession of the abbot, in his own hand. And so he said it is, when the land is purchased by one, and the parsonage by another, the right of tithes is revived, and the lands charged as before the purchase of the abbot. And so, he said, it had been adjudged.

1576.

E. 18 El. A. D. 1576.—B. R.  
The Parson of *Peykirke's* case. [Dy. 349. b.] 1 Gw. 136.

Where a parson sued for tithes of hay and corn out of the demesnes of a manor which had formerly belonged to the abbot of Peterborough, whose farmers by lease or at will being lay persons, for time immemorial before and at the dissolution of the abbey (31 H. 8.) had paid no such tithes, but only of wool and lambs, &c. it was held that a prohibition upon the 31 H. 8. c. 13. s. 21. by virtue of the word discharged would lie.

**T**HE parson of *Peykirke* and *Elmeton*, near *Peterborough*, of which the abbot of *Peterborough* was patron, and also owner of the manor of *Elmeton*, being a hamlet of that parish, at this day demanded tithe of hay and corn out of the demesnes of *Elmeton* manor, of which the present dean and chapter of P. are both patrons and owners; whereas within time whereof memory runneth not to the contrary before the dissolution of the abbey, and at the time of the dissolution, no such tithes, but only other tithes, as of wool and lambs, &c. were paid by the farmers by lease, or at will, being lay persons. Whether a prohibition upon the statute of 31 H. 8. c. 13. by virtue of this word discharged, will lie or not? And by the opinion of the justices and clerks of B. R. prohibitions in this case are common, &c.

before and at the dissolution of the abbey (31 H. 8.) had paid no such tithes, but only of wool and lambs, &c. it was held that a prohibition upon the 31 H. 8. c. 13. s. 21. by virtue of the word discharged would lie.

E. 19 El.—C. P.

1577.

*Grendon v. the Bish. of Lincoln and the Dean and Chapt. of Worcester.*  
 [Plowd. 493.] 1 Gw. 136. Rast. Ent. 497. b. N. Bendl. 293.

**T**HOMAS, bishop of Lincoln, and the dean and chapter of the cathedral church of Christ and the blessed Mary the Virgin, in Worcester, were summoned to answer Roger Grendon, gentleman, of a plea, that they may permit him to present a fit person to the church of Dean, which is vacant and belongs to his donation, &c. And whereupon the same Roger, by Roger Gisse his attorney says, that whereas lord Edward, late king of England, the sixth, was seized of the advowson of the church aforesaid as of a gross by itself, as of fee and right, in right of his crown of England, and he being so thereof seized, to the same church, being vacant, presented one William Chamberlain, his clerk, who on the presentation of him the said late king was admitted, instituted, and inducted into the same in the time of peace, in the time of him the said late king. And he the same late king being so seized of the advowson aforesaid, died of such his estate thereof seized, without heirs of his body issuing, after whose death the advowson aforesaid descended to lady Mary, late queen of England, as sister and heir of the said late king, whereby the same late queen was seized of the advowson aforesaid, as of a gross by itself, as of fee and right, in right of her crown of England. And she being so thereof seized, she the same late queen, the 30th day of June, in the first year of her reign, at the castle of Farnham, in the county of Surrey, by her letters-patent (which the same Roger Grendon here produces in court, sealed under the great seal of the same late queen of England, the date whereof is at the aforesaid castle of Farnham the same day and year) gave and granted to one George Rotherham of Farley, in the parish of Luton, in the county of Bedford, gentleman, and to Roger Barber, of the same town and county, yeoman, the advowson aforesaid, by the name of the advowson, donation, free disposition, and right of patronage and presentation of the rectory and parochial church of Dean aforesaid; to have, hold, and enjoy the aforesaid advowson, donation, free disposition, right of patronage and presentation of the said rectory and parochial church of Dean aforesaid, to the aforesaid George and Roger Barber, their heirs and assigns for ever. By reason of which said letters-patent they the same George and Roger Barber were seized of the advowson of the church aforesaid as of a gross by itself, as of fee and right. And the said George and Roger Barber being so seized thereof, they the same George and Roger Barber, the 28th day of September, in the first and second years of the reign of lord Philip and the said lady Mary, late king and queen of England, at Dean, in the said county of Bedford, by their certain writing (which the same Roger Grendon here produces in court, sealed with the seals of the aforesaid George and Roger Barber, the date whereof is the same day and year) granted to one Thomas Grendon, the aforesaid advowson of the church aforesaid, by the name of all the advowson of their rectory of Dean aforesaid, and the advowson, free disposition, right of patronage and presentation of the said parochial church of Dean aforesaid, with its rights and liberties whatsoever; to have, hold, and enjoy the aforesaid advowson, donation, free disposition, right of patronage and presentation of the said rectory and church aforesaid, to the same Thomas Grendon, his heirs and assigns for ever, to the proper use and behoof of the said Thomas, his heirs and assigns for ever, by reason of which said grant the aforesaid Thomas was seized of the aforesaid advowson of the church aforesaid as of a gross by itself, as of fee and right, and he being so thereof seized, he the same Thomas, at Shefford in the county of Bedford aforesaid, died of such his estate thereof seized, after whose death the aforesaid advowson of the church aforesaid descended to the same Roger Grendon, as son and heir of the aforesaid Thomas, whereby he the same Roger Grendon was seized of the aforesaid advowson of the church aforesaid, as of a gross by itself, as of fee and right, and afterwards the church aforesaid became vacant, by the deprivation of the aforesaid William Chamberlain, and yet is vacant, and on that account, to him the said Roger Grendon it at present belongs to present a fit person to the church aforesaid; and the aforesaid bishop and dean

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dean and chapter him the said Roger do unjustly hinder. Wherefore, he says that he is injured and has damage to the value of 100*l*. and therefore he produces the suit, &c.

And the aforesaid bishop and dean and chapter, by William Paine, their attorney, come and defend the force and injury when, &c. And the same bishop says that he has not, nor claims to have any thing in the church aforesaid, nor in the advowson of the same, unless admission, institution, and destination of persons to the same church, as ordinary of the said church; and this he is ready to verify, wherefore he prays judgment if the aforesaid Roger Grendon, without a special hinderance in the person of him the said bishop in this behalf to be assigned, his action aforesaid against him ought to have, &c. And the aforesaid dean and chapter say, that the aforesaid Roger Grendon, his action aforesaid against them ought not to have, because, they say, that long before the aforesaid late king Edward the sixth had any thing in the advowson aforesaid, lord Henry, late king of England, the eighth, was seized of the same advowson, as of a gross by itself, as of fee and right, in right of his crown of England. And he being so seized thereof, to the church aforesaid, being vacant, presented one Edmund Haltman, his clerk, who on the presentation of him the said late king Henry the eighth was admitted, instituted, and inducted into the same in the time of peace, in the time of the same late king Henry the eighth. And he the same late king being so seized of the advowson aforesaid, died of such his estate thereof seized, after whose death the advowson aforesaid descended to the aforesaid late king Edward the sixth, as son and heir of the same late king Henry the eighth, whereby the same late king Edward the sixth was seized of the advowson aforesaid, as of a gross by itself, as of fee and right, in right of his crown of England. And being so thereof seized, he the same late king Edward the sixth, the 22d day of May, in the first year of his reign, at Westminster, in the county of Middlesex, by his letters-patent (which they the same dean and chapter produce here in court, sealed under the great seal of the same late king Edward the sixth, the date whereof is at Westminster aforesaid, the same day and year) of his certain knowledge and mere motion, gave and granted to the same dean and chapter the advowson aforesaid, by the name of the advowson, donation, right of patronage and presentation of the aforesaid church and rectory of Dean, in the county of Bedford, among other things; to have, hold, and enjoy the advowson aforesaid to the same dean and chapter, and to their successors for ever. And further, the same late king Edward the sixth by his same letters-patent, of his special grace, and certain knowledge, and mere motion, and by his royal authority, supreme and ecclesiastical, which he then enjoyed, for himself, his heirs and successors, granted and gave licence to the same dean and chapter, and to their successors, that they the same dean and chapter, and their successors, the rectory of the church aforesaid, whensoever by death, resignation, or deprivation, or in any other manner whatever, it should happen to be vacant, immediately to their own proper uses, should and might hold to them and their successors for ever, without molestation or hinderance of the same late king, his heirs or successors, and this without any presentation, induction, or admission of any incumbent to the same rectory from thence forwards to be made. And further, the same late king by his same letters-patent willed, and of his certain knowledge and mere motion, and by his authority aforesaid, which he then enjoyed, for himself, his heirs and successors, the aforesaid rectory and church of Dean aforesaid, as from thenceforth it should happen to be vacant, as it is said above, and all and singular manors, messuages, lands, tenements, rents, reversions, services, glebes, tithes, oblations, pensions, portions, fruits, profits, commodities, emoluments, possessions, and hereditaments whatsoever, with all their appurtenances, as well spiritual as temporal, to the same rectory and church, so as is aforesaid being vacant, in anywise belonging or appertaining, to the same dean and chapter and their successors, and to their said cathedral church appropriated, consolidated, united, and incorporated: To have, hold, enjoy, and convert the same rectory and church of Dean aforesaid, and all and singular the premises to the



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same rectory and church belonging and appertaining, to the same dean and chapter and their successors (as is aforesaid) to their own proper uses, without any presentation, nomination, induction, or admission of any incumbent or incumbents to the same church, from thence forwards to be made, as by the same letters-patent, among other things, more fully appears. By reason of which said letters-patent, they the same dean and chapter were seised of the advowson aforesaid as of a gross by itself, as of fee and right, in right of their cathedral church aforesaid. And they the said dean and chapter being so seised thereof, the aforesaid Edmund Haltman, the 6th day of November, in the fourth year of the reign of the aforesaid King Edward the Sixth, at Dean aforesaid, died, after whose death, the church aforesaid became vacant, whereby they the same dean and chapter immediately after the death of the same Edmund Haltman, became parsons of the same church, and the aforesaid rectory and church of Dean aforesaid, to their own proper uses, held and yet bold, and thereof then immediately and always afterwards have been and yet are seised in their demesne as of fee, in right of their cathedral church aforesaid. And after the death of the aforesaid Edmund, the aforesaid late King Edward the sixth presented the aforesaid William Chamberlain as his clerk to the church aforesaid. Which said presentation, admission, and institution of the same William to the same, in the declaration aforesaid above specified, were void and of no effect in law, because the aforesaid church then was full of them the aforesaid dean and chapter. And this they are ready to verify, wherefore they pray judgment, if the aforesaid Roger Grendon his action aforesaid against them, ought to have, &c.

Vide Hob. 167.

And the aforesaid Roger as to the aforesaid plea of the aforesaid bishop above pleaded, for that the same bishop claims nothing in the church aforesaid, nor in the advowson of the same, unless admission, institution, and destitution of persons to the same church, as ordinary thereof, prays judgment, and a writ to the bishop, &c. Therefore it is considered, that the aforesaid Roger recover his presentation against the aforesaid bishop to the church aforesaid, and have a writ to the same bishop, that notwithstanding the claim of the said bishop, he admit a fit person to the church aforesaid on the presentation of the said Roger, &c. And nothing of mercy of the said bishop, because he excuses himself of hinderance, &c. But let execution thereof cease until the aforesaid plea between the same Roger and the aforesaid dean and chapter be determined, &c. And as to the aforesaid plea of the aforesaid dean and chapter above in bar pleaded, he, the same Roger says, that that plea is insufficient in law to preclude him the said Roger from having his action aforesaid, against the same dean and chapter, and that he to that plea in manner and form aforesaid pleaded has no necessity, nor is by the law of the land bound to answer. And this he is ready to verify, wherefore for want of a sufficient plea in this behalf made, he the same Roger prays judgment, and a writ to the bishop.

And the aforesaid dean and chapter, for that they have above alleged sufficient matter in law to preclude the aforesaid Roger from having his action aforesaid against them, which they are ready to verify, which said matter the aforesaid Roger does not deny, nor thereunto in anywise answer, but that averment wholly refuses, they the same dean and chapter pray judgment, and that the aforesaid Roger may be precluded from having his action aforesaid against them, &c. And because the justices here will advise themselves of and upon the premises before they give judgment thereon, day is given to the parties aforesaid here, until from the day of Easter in fifteen days, to hear their judgment thereon, because the same justices here thereof not yet, &c.

It appears by the record, that the plaintiff has declared that king Edward 6. was seized of the advowson of the church of Dean as of a gross by itself, as of fee and right, in right of his crown; and the same being vacant, he presented to it one William Chamberlain, his clerk, who was admitted, instituted, and inducted. And the king died, and the advowson descended to queen Mary, who in the first year of her reign granted it to George Rotherham and Roger Barber, and to their heirs, who granted it over by deed in the first and second years of Philip and Mary, to Thomas Grendon and to his heirs, who died

The king being seized of an advowson in right of his crown, grants it by his letters-patent to dean and chapter, when the church is full, and that they

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may hold the rectory of the said church, immediately after it becomes void, to their proper use, to them and their successors for ever, without presentation, &c. of any incumbent to the same rectory at any time after, and appropriate, consolidates, unites, and incorporates the same rectory and church, and all, &c. belonging to it, to them and their successors, to hold to their proper use; if this is a good appropriation.

thereof seized, and the advowson descended to Roger Grendon, the plaintiff, as his son and heir; and afterwards the church became vacant by the deprivation of the said Chamberlain, whereby it belonged to the plaintiff to present, and the defendants disturbed him. To this the bishop pleaded that he claimed nothing but as ordinary. And the dean and chapter said, that long before the said king Edward 6. had any thing in the advowson, king Henry 8. was seized of the said advowson as of a gross by itself, as of fee in right of his crown; and being so seized, he presented one Edmund Haltman, his clerk, who on his presentation was admitted, instituted, and inducted; and the king died seized, and the advowson descended to the said king Edward 6., and he being seized thereof, the 22d day of May, in the first year of his reign, by his letters-patent shewn forth, of his certain knowledge and mere motion gave and granted the said advowson to the said dean and chapter, to have and to hold, to them and to their successors for ever. And further the same king of his special grace, certain knowledge, and mere motion, and by his royal authority supreme and ecclesiastical, which he then had, for himself and his successors granted and gave license to the same dean and chapter and to their successors, that whensoever by death, resignation, deprivation, or in any other manner the said church should be vacant, the same dean and chapter and their successors might immediately hold the parsonage of the said church to their own proper use to them and to their successors for ever, without molestation or hindrance of the same king, his heirs and successors, and that without any presentation, induction, or admission of any incumbent to the same parsonage from thenceforth. And further the same king willed and granted of his certain knowledge and mere motion, and by his authority aforesaid, which he then had, for himself, his heirs and successors, to the same dean and chapter and to their successors, and to the said cathedral church appropriated, consolidated, united, and incorporated the aforesaid parsonage and church of Dean, as it should afterwards happen to be void, as is aforesaid, and all messuages, lands, tenements, glebes, tithes, and hereditaments whatsoever, as well spiritual as temporal, to the same parsonage and church, so as is aforesaid being vacant, in any manner appertaining; to have, hold, enjoy, and convert the same parsonage and church of Dean, and all other the premises, to the said dean and chapter and to their successors, as is aforesaid, to their own proper use, without any presentation, nomination, induction, or admission of any incumbent to the same church from thenceforth, as by the same letters-patent, among other things appears. By force of which letters-patent the said dean and chapter were seized of the said advowson as of a gross by itself, as of fee, in right of their cathedral church. And they being so seized, the said Haltman died the 6th day of November, in the 4th year of the reign of the said king Edward 6. by whose death the church became void; whereby the said dean and chapter, immediately after the death of the said Haltman, became parsons of the said church, and the said parsonage and church of Dean to their own proper use held and yet hold, and thereof then immediately and ever since have been and yet are seized in their demesne, as of fee, in right of their cathedral church. And after the death of the said Edmund Haltman, the said king Edward 6. presented to the said church the said Chamberlain, as his clerk, which presentation, admission, and institution of the said Chamberlain, thereto specified in the count, was void and of no effect in law, because the said church was then full of the said dean and chapter. And thereupon they demanded judgment. And the plaintiff, as to the bishop's plea, prayed judgment, and had it, but execution thereof to cease until the plea between the plaintiff and the defendants was determined. And as to the plea of the dean and chapter, he demurred in law.

And the matter was argued at the bar, and also at the bench, in Michaelmas term, in which the 18th year of the reign of queen Elizabeth ended, and the 19th year of her reign began. And I heard the whole argument of DYER, Ch. J. and a great part of the arguments of each of the other justices. And exception was taken to the bar, because the plaintiff, after the presentation of king Edward 6. has alleged a dying seized in the same king, and a descent to queen Mary, which, although it was a thing material, is not traversed by the plea

Where a thing is materially alleged in the count, and the defendant in his

plea in bar, nor fully answered, but only by a matter which amounts to no more than an argumentative answer, viz. by the grant of king Edward 6. and the appropriation, which is an affirmative plea, and does not confess and avoid the dying seized, nor traverse it, but is only an argument that king Edward 6. did not die seized, for which reason the plea in bar is not sufficient.

But the whole court was of opinion against this exception. For whether upon the matter disclosed king Edward 6. died seized, or not, is matter of law. For if his presentation of William Chamberlain was no usurpation, nor gained any patronage to him, from thence it follows that he did not die seized; and if, on the other hand, it did gain him any patronage, then it follows from thence that he did die seized. So that this is matter which is properly to be cleared up by the court. And if the defendants had taken a traverse in their plea in bar, they would have brought the trial of this matter to a jury, who are to try matters of fact, and not matters of law, as this is here; for that which would come before a jury to prove the descent in this case, is matter of law, which is more proper to be tried by the court than by a jury. For which reason the plea in bar is good. And so in all cases where a thing is materially alleged, and the other party comes in, and shews matter of law, which, when the law shall come to be known, proves that the matter before alleged is true or false, a traverse shall never be taken for the reason above given. Wherefore the whole court held that the bar was good as to this point.

And as to the matter in law, it was digested into divers points. First, what person is capable of an appropriation; secondly, what persons may make an appropriation, and how many ought to assent to it; thirdly, at what time an appropriation may be made, viz. if it may be made as well when the church is full as when it is void; fourthly, if an usurpation may be had upon a parson imparsonnee, and if, by the usurpation of a stranger, the church may be disappropriated; and lastly, if all the things requisite concur in the appropriation here pleaded.

And as to the first point, the justices were of opinion that none but a spiritual body politic or corporate, which has succession, is capable of an appropriation: for the effect of an appropriation, as to its original institution, was to make somebody perpetual incumbent, and as such, to have the rectory, and the houses, glebe, and tithes which are parcel thereof. And in that he is made parson, he has the cure of the souls of the parishioners, in which case he ought to be a spiritual person: for as a patron ought to present to a church a spiritual and not a temporal person, so for the same reason an appropriation ought to be made to a spiritual and not to a temporal person; for the one has cure of souls as well as the other; and there is no difference between them, but that the one is parson for life, and the other and his successors are parsons for ever. And therefore appropriations were originally made to abbots, priors, deans, prebendaries, and such others who could minister the sacraments and perform divine service, and to none else. And upon this principle it was originally taken, that such parsons imparsonnees could not grant over their estates to any other; for at this day an incumbent of a parsonage presentable, cannot grant over his incumbency to another, although he may make a lease of the glebe and tithes; but he ought to resign, and then the patron and bishop may make a new incumbent; so that the incumbency, which is a spiritual office, cannot be granted over to another; and by the same reason a perpetual incumbent could not originally grant over to another his estate, which contains the incumbency and the rectory itself, which was the revenue of the incumbent. And upon this ground is the saying of Herle, in 3 E. 3. where a *quare impedit* was brought against the prior of St. John's Jerusalem in England (to whom the possessions of the dissolved order of templars, who had certain parsonages appropriated to them, were conveyed), upon a disturbance to present to a church which was appropriated by the earl of Richmond to the said templars, and there Herle said, if the templars after their appropriation had granted over their estate of the appropriation to hospitallers, the hospitallers should not thereby have had the appropriation, for it was granted only to the templars, who could not by their deed make an appropriation to others: and he said

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bar shews matter of law, which, when it shall be determined by the court, will prove the allegation in the count to be true or false; in such case the defendant shall never traverse the matter so alleged.

The division of the matter.

1st point.

By the common law none but a spiritual body politic or corporate is capable of an appropriation, and not a natural person, nor a lay-man.

At first appropriations were made to sole corporations spiritual, who could administer the sacraments, and perform divine service, as abbots, priors, deans, prebendaries, &c. Appropriations not grantable over.

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Afterwards appropriations were made to spiritual corporations aggregate, who cannot all together say divine service, as to dean and chapter, and at last to nuns.

further, that that which was appropriated to the templars, was become disappropriate by the dissolution of their order; wherefore it was thereupon said to the court, that the same estate which the templars had was conveyed to the prior of St. John's by the grant of the pope, and of the king, and by parliament. So that by the opinion of Herle, an appropriation could not be transferred from one to another: and not without great reason, for it contains a perpetual incumbency (which is a spiritual function), appropriated to a certain spiritual person, which could not by law be removed from them to whom the church was first appropriated, by any grant afterwards to be made by them.

And although originally appropriations were only made to such spiritual persons as could minister the sacraments, and perform divine service, as abbots, priors, deans, and such like; yet in process of time they began by degrees to shake off that restraint, and were afterwards made to others, as to dean and chapter (which is a body corporate, consisting of many persons, which body together cannot say divine service), and to nuns (who were prioresses of any nunnery, and could not minister the sacraments, nor say divine service to the parishioners), which was *grande nefas*, as DYER termed it; and this was done under the pretence of maintaining hospitality. And in order to supply these defects in the persons to whom such appropriations were made, who could not themselves perform divine service, a vicar was afterwards devised, who was deputed to priors, or to dean and chapter, and at last to abbots themselves, and to others, to say divine service for them; and he had but a small portion allotted him, and they to whom the appropriations were made retained the great revenue, and did nothing for it; and as the revenue decayed, so did preaching and hospitality in the parsonage, and other good works, which was a great misuse, as it seemed to the judges. And all this was done under pretence of hospitality, which in fact was the ruin of hospitality, and especially in the parish, where it should chiefly be kept up. But yet such appropriations were never made but to a spiritual body, and which had successors and not heirs; in which succession the patronage, incumbency, and the fruits of the benefice might for ever remain; and a marriage was made between them (as the lord DYER termed it), so that the one should not be divorced or separated from the other at any time. And in order to perfect such marriage, it was requisite that the patronage, which is another thing than a spiritual body, should be in such spiritual body politic or corporate, which should be perpetual incumbent, for the patronage is a thing temporal, to which the incumbency, which is a thing spiritual, ought to be conjoined; and that cannot be if they are in several hands, for separation and conjunction are directly opposite and contrary to each other. Wherefore a spiritual body politic or corporate, being the patron, is only capable of an appropriation.

2d point.

Appropriations ought to be with the assent of the ordinary, the patron, and the king.

As to the second point, viz. what persons may make an appropriation, and how many in number ought to assent to it; all the justices unanimously agreed that the ordinary, the patron, and the king ought to agree to it; and these are *actores fabulæ*, as DYER termed them. And first, the ordinary inferior or supreme ought to agree to it, because he is the principal agent in it, for he has the spiritual jurisdiction, and the act of appropriation is a spiritual thing; and the ordinary says, *appropriamus, consolidamus, et unimus*, as principal actor in the cause (as MANWOOD, Justice, said), because the cure of the church principally concerns the souls of the parishioners, of whom the bishop hath the charge within his diocese; for which reason the law has attributed to him the principal part in the appropriation. And, it was said, it appears in a case in 6 H. 7. (which then commenced, but was not adjudged until 11 H. 7.), that a union and an appropriation belong to the bishop to do, and where a union was there made of a chapel in one diocese to a college in another diocese, the assent of both the bishops was pleaded; and a great number of cases and precedents in the book of entries were cited, where the bishop of the diocese had made appropriations, (which cases I will not here recite, my intent being only to make a brief report of the matter, *sed summa sequor fastigia rerum*).

And that which the ordinary of the diocese might do, the same was used to be done within the realm by the pope, as supreme ordinary, who claimed to himself

The pope used to be looked

himself a supreme jurisdiction above all ordinaries, and was long suffered to be done by him; so that he used to make visitations, corrections, dispensations, and tolerations within every diocese of this realm, as the ordinaries used to do (as MOUNSON said); and he took from the bishops of this realm whatever and as much as he pleased. In consequence of this custom, he used to make appropriations, without the bishop, which were taken to be good; and the bishop, who was only looked upon as inferior ordinary, never contradicted or opposed this practice, but it was submitted to and accepted as good; for (as MANWOOD said), *in presentia majoris cessat potentia minoris*. And so an appropriation made by the pope alone, without the ordinary, was taken to be good. And hereupon MANWOOD cited the case in 29 Ed. 3. in a *quare impedit* brought by the earl of Salisbury against the prior of Mountague, where an appropriation was pleaded to be made by the apostle, with the assent of the king, without mention of the ordinary; which appropriation was allowed to be good; and he said that the pope was called by the name of apostle. And many other cases were cited to the same purpose. And the pope used to make provisions until he was restrained by the statute of 25 Ed. 3. which provision was a designation of the person who should be incumbent, and an admission, institution, and induction of him, without going to the bishop. So that his authority was looked upon as absolute, and bound the bishop as his inferior in all his acts. And so it was agreed by the whole court.

And such authority and jurisdiction as the pope used to exercise within this realm, was acknowledged by the parliament in 25 H. 8. and in other statutes to be in the said king Henry 8. So that he might lawfully exercise such jurisdiction as the pope used or was accustomed to exercise within this realm. And from him this authority descended to king Edward 6. who made the appropriation here; so that he being supreme ordinary, might make an appropriation of his own authority and jurisdiction without the bishop; for which purpose he inserted in his charter these words, "by our royal authority supreme and ecclesiastical which we enjoy." And other like acts of jurisdiction and authority he might do, which the bishop of Rome was used to do in this realm. And hereupon DYER said, that in a late case in the common bench, between Sir John Pollard and Watford, he and all his companions declared the law to be, that a resignation which the dean of Wells had made to the king was good and effectual, inasmuch as the king was head of the church of England,—and that it was as good as if it had been made to the bishop; and thereby the deanery became void. Wherefore all the justices agreed that an appropriation made by the king alone, without the bishop, is as good as if the bishop had made it, or as it was taken in ancient time to be when the pope made it.

But although the ordinary, inferior or superior, is the person who ought to make the appropriation, yet he cannot do this without the will of the patron. For the patron has a temporal inheritance in the advowson, viz. a fee-simple, which neither the ordinary, nor in ancient time the pope, could take away from the patron, nor alter without his will and assent. And therefore in all appropriations the patron is a party, for he ought to accept it; and the ordinary is the agent, and the patron is the patient; and his assent in submitting himself to the will of the ordinary, and in accepting his order, and in executing that which he ordains, is a declaration of his will; and the whole shall be intended to be done at his request, for the benefice is his own. So that the ordinary and the patron are two actors in this drama.

But besides these there is a third who has a part to act herein, and that is the king, as king, for he might be hurt by this marriage or appropriation, because the advowson is held of him mediately or immediately. And if it is held of him immediately, then all possibility of having any advantage of wardship, relief, or the like, accruing from the tenure, is taken away by this conjunction; for then it cannot be expected that the patronage will ever come again into lay-hands, or that the king, who had the patronage, if he was the founder of the abbey, priory, or other spiritual place, shall in any mean vacation have the presentment. And if the advowson is held immediately of a sub-

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upon as supreme ordinary, and made appropriations without the bishop, who was only deemed inferior ordinary.

The authority which the pope exercised in this realm being acknowledged by parliament to be in the king, consequently he, as supreme ordinary, may make an appropriation of his own authority without the bishop, where he himself is patron.

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ject, yet it is held mediately of the king, for all lands within this realm are held either mediately or immediately of the king; and before the church was built, the land upon which it stands was held of the king, and so shall the advowson be held of him, which is reposed in the patron in lieu of the land upon which the church is built; and this patronage may possibly come to the king by escheat or otherwise; and if it does not, yet the king may have the benefit of it by lapse. For if the patron does not present within six months, then the ordinary may present within the next six months, because it is his duty to see that the parishioners have divine service performed; and if he does not present within these six months, then the metropolitan may present within six months next after, in respect that it lies upon him to see that the parishioners have divine service; if the ordinary is remiss in providing it, and if the metropolitan does not present within these six months, then the king may present when he pleases; for in respect that the land is held of him, the presentment accrues to him by lapse, for default of the other three, as supreme patron (as DYER called him; and HARVEY and the other justices called him supreme patron as king, and not in respect of the supreme jurisdiction which the realm had acknowledged in him by the statute, with reference to that which was before exercised by the pope). And all this benefit which might accrue to the king from the advowson, is lost by the appropriation, because it will never come out of the hands of the incumbent again; so that the king can never have any hopes of presenting an incumbent by lapse or otherwise. And therefore in respect of the loss which the king sustains by an appropriation, the law has given him a prerogative that he shall be privy and shall give his consent to every appropriation, as well where the church is of the patronage of another, as where it is of his own patronage. So that the king is the third actor in this drama.

*Nota bene* by the reporter.

Where an advowson (whether held of the king or of a common person) is appropriated without the king's license, the advowson is not thereby forfeited, but the king may seize it, and present to the avoidances in the name of distress, until a fine is made to him; and he shall not have an estate of inheritance or freehold in the advowson, for the appropriation without license, is not mortmain.

[But *quare*, if the appropriation be made without the king's assent, what damage the parson imparsonce shall sustain by it. For the appropriation is not mortmain, as it appears in 21 Ed. 3. 5. in a *quare impedit*, where the lord of whom an advowson was held, brought a *quare impedit* upon an avoidance, and took his title upon an entry for an appropriation as for mortmain; and there it was said against him, that the lord had no damage by the appropriation, for the advowson was held of him afterwards as well as before, and the appropriator purchased no lay-fee nor thing temporal, but tithes, and oblations, and things spiritual; so that the case was not within the statute of mortmain; and there the justices were of opinion to give judgment against the plaintiff, for which reason he was nonsuited. So that it appears from this case that an appropriation is not mortmain. But in P. 19 Ed. 3. the king brought a *quare impedit* against the prior of Bentsay, and counted that the prior held the advowson of the king as of his crown, and presented, and afterwards without his license appropriated it, whereby the right of the advowson by the law of the land, accrued to the king. And the prior pleaded that the king by his charter there shewn forth, gave him license to appropriate it, and he said that the advowson was held of one W. And it was there held by STONE, that if the advowson was held of the king as of his crown, or as an escheat, the charter which did not make mention of the tenure, should be void, and that the king should not be foreclosed of his presentment. And afterwards they were at issue whether the advowson was held of the king, or not. By the purport of which case, and by the said words (that the right of the advowson by the law of the land, accrued to the king), and also by the words of STONE (that the king should not be foreclosed of his presentment), it seems that they took the law to be, that for such offence, viz. for an appropriation without the king's license, the king should present. But what estate the king shall have in the advowson is not there expressed. And inasmuch as it is not mortmain, I do not see that the king can have any estate of inheritance or freehold, or that he can have more when it is held of him immediately, than when it is held of a subject; for the advowson remains as it was before, and there is no transmutation of the possession, nor any subtraction of the services of the tenure, nor any damage in the one case more than in the other; but the king shall have as great

an estate in the one case as he shall have in the other, and the offence to the prerogative is the same in the one case as it is in the other. And it seems to me that the advowson shall not be forfeited to the king, either in the one case or in the other; but I am of opinion with SHARD, in the case of 21 Ed. 3. above cited, where, upon WILBY's saying that if the advowson had been held of the king, and it had been appropriated without his license, although another had been the founder, the king might have seized the advowson, and yet it was a damage to none: to that SHARD replied, "What you say is the king's prerogative, and has always been adjudged as well touching advowsons which are not held of him, as touching those which are held of him; for he who appropriates a church, ought to have the king's license; but if the king in such case seizes the advowson, it is not forfeited, but he shall present to the avoidances in the name of distress, until a fine be made to him for making the appropriation without license." These are the words of SHARD, which I thought proper to cite at large, and the more so because I did not hear the judges speak to this matter.]

And so all the justices unanimously agreed, that the ordinary, inferior or superior, the patron, and the king, ought to assent to every appropriation.

As to the third point, viz. At what time an appropriation may be made, that is, if it may be made when the church is full: As to this, all the justices unanimously agreed that an appropriation may be made by apt words when a church is full, that is to say, by words which serve to appropriate it afterwards when it shall be void. For the most proper time to make an appropriation is, when the church is void, because then the appropriation may be executed presently. But if the church is full, then, if proper words are used, as that the patron, who is a spiritual person, after the church shall be void, shall be parson, and may retain the glebe and the fruits to his own proper use; this shall make a good appropriation when the present incumbent is dead, or an avoidance happens. So that the effect of the words shall be there executed afterwards, when the church is void. And the reason whereupon some have heretofore doubted of this, is, because the present incumbent has a fee-simple in the mansion, and in the glebe, and in the tithes; and there is no reversion or interest in any other besides the incumbent, when there is an incumbent. In which case it has been said that the ordinary, and the patron, and the king cannot grant to a stranger that he shall retain in time to come the glebe and tithes, in which they have then no estate or interest, but which another is seized of in fee; and that they cannot unite, annex, or consolidate to the patron and his successors the rectory, in which they have no estate; but as to this, true it is that neither the patron, nor the ordinary, nor the king, have any estate in the parsonage, but the whole estate and inheritance thereof is in the incumbent; and therefore neither the patron, nor the ordinary, nor the king, have any thing to do with it in the life of the incumbent. But the matter rests upon another point,—for although they have nothing to do with the parsonage, yet the ordinary, inferior or superior, may with the assent of the patron and of the king, assign the patron, being a spiritual body, to be incumbent, when the present incumbent shall be dead, or an avoidance happens. And in this case there is a diversity between the presentation of an incumbent by the patron, and this assignation of an incumbent by the ordinary. For when the church is full, the patron cannot present one to the bishop to be incumbent after the church shall be void, but he ought to wait until the church is void; and before the avoidance happens, he has no title to present, nor is the ordinary bound to accept the person presented to be parson at a time to come, but such presentation shall be void. But the ordinary, with the assent of the patron and of the king, may assign the patron, being a spiritual body, to be incumbent, when the present incumbent shall die, or an avoidance happen; for this is prejudicial to none, and the person assigned may be so fit for it, that it may be beneficial to the church and to religion. And upon this reason the pope, before he was prohibited by the act of 25 Ed. 3. used to make provisions to the benefices of other patrons, and especially to the benefices which the clergy had; which, although injurious to the patrons, yet such provision as to incumbents, was undoubtedly

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3d point.

The most proper time for making an appropriation is when the church is void, yet it may be made when the church is full, by such apt words as will serve to appropriate it when it becomes void.

Diversity between an appointment of a perpetual incumbent (by way of appropriation) by the ordinary with the assent of the patron and of the king, when the church is full, and the presentation of an incumbent by the patron, when the church is full.

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An appropriation made when the church is full, is not precisely a grant of the glebe and tithes, but an appointment of a spiritual body to be incumbent when the present incumbent shall die, or an avoidance happens: and in such case the spiritual body being appointed to the function, and made parson, has thereby in him the right of the possessions, and may enter into the parsonage after the death of the present incumbent, or at an avoidance, without admission, institution, or induction.

*Nota bene* by the reporter.

4th point. No disappropriation of a church by usurpation upon the parson imparsonnee.

doubtedly allowed in the law as good; and such provision was nothing more than a designation of one to be an incumbent after the present incumbent should be dead, or an avoidance should happen, and that such person assigned might enter into the rectory, and retain the profits during his life without admission, institution, and induction. And if the pope could do so in such case where it was injurious to the patron, and the clerk so appointed was, after the death of the incumbent, adjudged in law a sufficient incumbent, without admission, institution, or induction, *a fortiori* he might have done this to the patron himself, in which case no injury would have been done to the patron, and such patron should have been adjudged incumbent without any other admission or institution, and might have entered without induction. And if the pope used to do this, then the king, in whom such power as the pope exercised is acknowledged by parliament to be, may do it; and then if the spiritual body so assigned shall be adjudged incumbent without other admission or institution, and shall thereby have the spiritual function, and be parson in deed; then he may enter into the rectory, because the king, who has sufficient authority to enable him so to do, has dispensed with the induction. So that when he is appointed to have the spiritual function, and to be parson, he is thereby made owner of the possessions of the parson; for as he who is made abbot, has thereby the possessions of the abbey, so he who is duly made parson is implicatively made possessor of the parsonage, for the spiritual office draws with it the right to have the possessions belonging to the office. Wherefore the making of a spiritual body to be perpetual parson, when the church is full, is not precisely a grant of the glebe and tithes; but in that such body is made parson, he may, after the death of the present incumbent, or when an avoidance happens, meddle with the glebe and tithes as things annexed to his office of parson. So that the reason before-mentioned, which has inclined some to think that an appropriation cannot be made when the church is full, is of no weight, but falls to the ground. And all the justices agreed that an appropriation may be made in the life of the incumbent, with apt words which will serve to appropriate it at the time when an avoidance happens, at which time it will be a good appropriation. And MANWOOD, Justice, said, that in 6 H. 7. KEBLE, who argued that an appropriation could not be made in the life of a present incumbent, admitted that an appropriation might be made after his death, as well as a union, but then there must be other words; which words intended by him (MANWOOD said) are words *in futuro*, viz. that he shall be parson from the time of the death or avoidance of the present incumbent.

[It seems to me in this case, that if the dean and chapter, after the letters-patent made, and in the life of Haltman, had made a lease for years of the rectory, the lease should have been void, because in the life of Haltman they had nothing in the rectory, and the appropriation was not executed until after the avoidance, at which time by their entry they had an estate in the rectory, and not before.]

As to the fourth point, viz. whether a usurpation may be made upon a parson imparsonnee, all the justices unanimously agreed that it cannot, because the church has an incumbent, and is full, for he to whom the appropriation is made is incumbent, and as complete a one as any other incumbent should be, who came in by presentment, institution, and induction, and then there cannot be two incumbents of one and the same church at one and the same time, for to be incumbent is the office of one body, and if there is one incumbent, and another is presented, admitted, instituted, and inducted, all this is void. As if A. is an officer of an office for life, as steward of a manor, or the like, a patent made to B. of the same office during the life of A. is void, and if B. is admitted, instituted, and inducted, A. shall have an action of trespass against him. So if a parson imparsonnee has a church appropriated to him, and another is presented, instituted, and inducted into the same church, he shall have an action of trespass against him, if he meddle with the glebe and tithes, as it is agreed by all the justices in 38 H. 6. And the like case was cited in 39 H. 6. where a prior was parson imparsonnee, and a stranger presented his clerk, who was admitted, instituted, and inducted, and in by six months, and made a lease of the parsonage,



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parsonage, and the lessee ousted the prior, and the prior brought an action of trespass, and the matter was there well debated, and it was the opinion of the whole court that the action of the prior was maintainable, for when the church was full of the prior, the presentation, institution, and induction of the other did not oust the prior, but was void, because the prior shall be adjudged always in possession, and therefore he could not have had a writ of right of advowson, for none shall have that writ but he who is out of possession, for which reason his action of trespass or assize should lie. But a parson imparsonnee cannot, in a *quare impedit* brought against him, plead plenarty (as MANWOOD said), because the statute of Westminster 2. cap. 5. gives such plea to the patron, viz. that the church is full of his own presentation by six months before the writ purchased, which a parson imparsonnee cannot say; and that statute destroys the pleading of plenarty at the common law, which was, that the church was full the day of the writ purchased, as it is said in the said case of 38 H. 6. Wherefore a usurpation cannot be made upon a parson imparsonnee, nor can the church be disappropriated by such means.

But if a parson imparsonnee present another, thereby he has disappropriated the advowson, and made it presentable ever after, as MANWOOD said; for, he said, *volenti non fit injuria*, but against his will no one can tortiously disappropriate it. And if a corporation, to which a church is appropriated, is dissolved, the church is thereby disappropriated, (as the Lord DYER said) and the lord of whom the advowson is held may present to it.

*Quere* if dean and chapter, or other spiritual corporation, is seized of a manor to which an advowson is appendant, and the church is appropriated to them, and afterwards they make a feoffment or a lease of the manor *cum pertinentiis*, shall this disappropriate the church? For it seems to some, that by the course of the common law the advowson shall pass as appendant to the manor, but now by the statutes, which have made the King and lay-persons capable of parsonages appropriate, the advowson is in such case severed from the manor by the intent of the acts, and in the grant of the parsonage appropriate, which may now be granted and transferred to common persons, the advowson shall pass.

*Quere* by the reporter.

So it was held by all the justices that no usurpation can be made upon a parson imparsonnee, as it is said before.

And as to the last point, viz. if there are all the necessary ingredients in the appropriation here pleaded. And the three *puisse* judges, viz. MOUNSON, MANWOOD, and HAMPDEN, held that there were, and that the words of the charter of King Edward 6. are sufficient to convey the advowson to the dean and chapter, and to make the appropriation, and that the said king's charter serves for three purposes, viz. to convey the advowson to the dean and chapter, and to make the appropriation as supreme ordinary with his ecclesiastical jurisdiction, and also to give his assent as king of this realm, and that the church was full of the dean and chapter immediately after the death of Haltman, and that the presentation, institution, and induction of Chamberlain was void, and that upon the whole matter the plaintiff ought to be barred. But as to the Lord DYER, although he agreed with them in the first four points, yet in this last he varied from them, and he took four exceptions to the matter and the form contained in the bar.

5th point.

If there is every thing requisite to make the appropriation here good.

The first was, because in the grant of the advowson to the dean and chapter, and to their successors, there is not the clause of *non obstante* the statutes of mortmain. For the king's grant ought not to be taken to two intents, viz. to convey the advowson to the corporation, and also to dispense with the statutes of mortmain. And hereupon he cited the case in 9 Ed. 4. in an assize between *Bagot* and *Swirington*, where the king granted an office for life to an alien, and it was there taken that the grant was not good, because no mention was made in the charter that the grantee was an alien, and forasmuch as the grant could not enure to two intents, viz. to make him a denizen, and also to convey to him the office, the charter was held to be void; wherefore the party, in order to enable himself to have the office, shewed the letters of naturalization.

Exceptions taken by Dyer, C. J. to the matter of the bar.

The second exception was, that the charter is not sufficient to make an appropriation.

Exception 2.

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propriation, because it has not made the dean and chapter parsons of the church. And the charter ought to have granted, that after the avoidance of the present incumbent they should be parsons, for the words of uniting and incorporating the parsonage to them and to their successors, and of enabling them to enter into the parsonage, extend only to the rectory in which the king and patron had nothing, and therefore he had no authority over it, and consequently the grant is void for that reason. But the effectual words to make the appropriation in this case are words which constitute them parsons after the avoidance of the present incumbent, which words are omitted. For if a writ of annuity had been brought by the dean and chapter, after the death of the then present incumbent, for an annuity due in respect of the parsonage, or if a writ of annuity had been brought against them for an annuity which was payable for the parsonage, in both these cases they ought to have been named parsons. And this appears in the first case in 21 H. 7. as well as in divers other books which he cited. And he also cited the case in 12 H. 4. in an assize, where the prior of Burton brought an assize for certain wheat taken, &c. and the tenant pleaded out of his fee, &c. and the plaintiff said that he and all his predecessors parsons of the church of Pederton had been seized from time immemorial, &c. and it was the opinion of the justices that the writ should abate, because he was parson, and claimed as parson, and was not named parson. And he cited divers other cases to the same effect. So that, he said, to be parson is the chief point of an appropriation, and therefore the want of words to make them so here renders the appropriation insufficient.

Exception 3.

The third exception was, for that the defendants have not alleged that they entered after the death of Haltman. For the words of the charter are, that after the avoidance "they should and might hold," &c. in which case power and liberty is given them to hold, and they have not shewn that they did enter or hold, for in things of election the party ought to shew that he has done it. And because the defendants have not alleged an entry, the appropriation is not shewn to be executed, and therefore the plea in bar is insufficient.

Exception 4.

The fourth exception was, for that the defendants have pleaded that after the death of Haltman they were parsons, and held and yet do hold the aforesaid rectory and church to their own proper uses, and thereof then and always afterwards have been seized in right of their cathedral church aforesaid, whereas they ought to have said, in right of the church of Dean, for they hold the parsonage in right of the church of Dean, and not in right of the cathedral church of Worcester, as it is shewn before, so that this is not well pleaded, but vitiates the plea.

Answer to the  
first exception  
taken by Dyer  
C. J.

But the Lord DYER was the last who argued, and there was none to reply to him as to these exceptions, and therefore one of the defendant's counsel, who heard the exceptions, put in writing such answer to them as occurred to him, and delivered it to the Lord DYER, which was also seen by the other justices. And the answer was thus, viz. as to the first exception, touching a *non obstante* the statutes of mortmain, the grant is good notwithstanding there is not any license to alien in mortmain, nor any clause of *non obstante* in the patent, and that as well in the case of a grant by the king as by a common person, and it shall vest in the grantees, or else it would not be mortmain. But the penalty is, that the lord immediate may enter within the year, and the other lords within half a year after the time devolves to them, and (if the thing do not lie in tenure) the king shall have it after office found, and until office is found it is in the corporation. And so in this case if the clause of *non obstante* was necessary, the king might have a *scire facias* after office found, and by that means he might reseize the advowson. But the grant was a grant and passed at one time, so that the patent is not void. And if in fact the dean and chapter had a sealed license of the king to purchase this advowson of the king, this license and the grant afterwards by another charter were good, notwithstanding there was no clause of *non obstante* in the charter of the grant of the advowson; and there might be such license in this case, and it is not necessary to plead the license upon the grant, but when the party is impleaded by *scire facias* after office finding the mortmain, then is the time to show it. And in Fitzher-

*bert Tit. Fines* we may frequently see fines levied to corporations without shewing any license; but if after the fine the corporation is impeached for the mortmain, then it is the time to shew the license, and not in pleading or in setting forth the title. And in *rei veritate* there is a clause of *non obstante* in the patent here, although it is not pleaded.

And it seems that though the dean and chapter had not had any license to purchase this in mortmain, nor any clause of *non obstante* in the patent, yet the patent should have been good, for it cannot be presumed that the king is ignorant of his law, because he is the head of it, and therefore when he granted the advowson here, and said, "of his certain knowledge," &c. it is to be supposed that he was desirous that the defendants should have the advowson, notwithstanding his statute of mortmain, whereof it is to be intended that he takes consueance by the words, "of his certain knowledge," &c. so that the grant countervails in itself a grant and a clause of *non obstante*.

And where it is said by the Lord DRYAN, that the king's grant cannot enure to two intents, true it is, where the one intent is to be taken of a foreign matter, as if the king grant land to A. and his heirs, and A. is his villein, this grant shall not enure to give the land to the villein, and also to manumise him, because his being the king's villein was a foreign matter, and in fact not apparent to the king; but yet the patent is good to the villein, and the land is vested in him, though upon an office finding that he is a villein, the king may enter into the land as well as if any other had given it to his villein, and in this case the land passed from the king, although the patent did not manumise the villein. But in the principal case there is no such foreign matter in deed not apparent to the king, which the king might be said not to have consueance of, for the king was well apprised that the dean and chapter were a corporation, and that his statute of mortmain extended to them, which statute he could not be ignorant of, but on the contrary he had knowledge of it, as his words, "of his certain knowledge," testify. So that here there is no ignorance in fact, as in the cases of a villein, and of an alien, but if there is any ignorance at all, it is an ignorance in law, which cannot be allowed in the king in this case.

Yet in some cases it is necessary to have the clause of *non obstante* in the king's grants. As in the case of 2 H. 7. *Fitz. Tit. Grant*, pl. 33. it was ordained by statute that the grant of the king to any one to be sheriff of any county for a greater time than one year should be void, notwithstanding the clause of *non obstante* should be in the patent, and there it was taken that the grant of the king made to the Earl of Northumberland to be sheriff during his life ought to have a clause of *non obstante*, &c. because the statute is strictly penned *ut supra*, and the patent made to the earl in that case was good with the clause of *non obstante*, &c. So if the king will grant to one to be escheator for life, there ought to be the clause of *non obstante*, because the statute has precise words to make void such grants. And in a pardon of murder, if the king expresses that the party shall not find surety for his good behaviour, as the statute of 10 Ed. 3. requires, there ought to be a clause of *non obstante*, &c. in the charter, because the statute expressly makes such pardon void, if such surety is not found afterwards. So that to avoid the precise words of the act, it is necessary to have the clause of *non obstante*, &c. But in the statute of mortmain there are no precise words to make the grant void, but the act gives an entry or seizure, as the case requires, always admitting the grant to be good. And here it appears to be the intent of the king that the dean and chapter should enjoy this without seizure, as it is said before; and the words, "of his certain knowledge," shew that he took upon himself consueance of all things requisite, and consequently of the statute of mortmain.

As to the second exception, viz. that the charter has not expressly made them parsons; to this the said counsel wrote in answer, that the words which enable the dean and chapter to hold to their own proper use, without presentation, admission, or induction, and the words of the grant by which the king appropriates, consolidates, unites, and incorporates the church and the rectory to the dean and chapter and to their successors, import that they shall be perpetual parsons, and in a manner make them parsons, and are equivalent to words

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And note that the dispensing power is now taken away by the statute of 1 W. & M. sess. 2. c. 2. whereby no *non obstante* of any statute shall be allowed, without a dispensation in such statute.

Answer to the 2d exception.

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Answer to the  
3d exception.

words which make them parsons, and are usual in appropriations without other words to make them parsons, as appeared by the precedents shewn to the Lord DYER with that which is here written. And these words, together with the words, "of his special grace, and mere motion," &c. are to be so applied that something shall be made of them rather than they shall be void. And the king's intent ought not to be utterly subverted.

As to the third exception, viz. that the defendants have not shewn that they entered after the death of the incumbent; to this the said counsel wrote in answer, that the patent made the dean and chapter parsons immediately after the death of Haltman, without presentation, admission, and institution, and then if the words shall take such effect, the grant is as fully executed as if all these three things were executed in a common incumbent, and especially as to the admission and institution, by which words they were made fully parsons, and had the spiritual function at the instant of the incumbent's death, and the cure of souls, and as to the induction which gives seisin of the possessions, that was dispensed with by the patent, wherefore the dean and chapter are in the same case as they should be by admission, institution, and induction. And though it should be admitted that the words of dispensing with induction are not equivalent to an induction which gains the seisin, yet the words of the plea in bar are, that after the death of the incumbent the aforesaid dean and chapter were parsons of the same church, and the aforesaid rectory and church to their own proper uses held and yet hold, and thereof then immediately and always afterwards have been and yet are seized in their demesne as of fee; which words (that they were seized) imply an entry, for without entry they could not be seized, and it is not the practice in the Common Bench in like cases of possessions executory to allege an entry. For upon a fine *sur grant et render* the pleading is, "by force whereof he (the party to whom the render was made) was seized," without saying that he entered and was seized. And in an *ejectione firmæ* the plaintiff usually shews the lease made, and says, "by force whereof he was possessed," and does not shew any entry, and it is good, because a man cannot be seized or possessed of land unless he first enters, and therefore when he shews the seisin, it is as much as if he had said, that he entered and was possessed or seized. And so it shall be in the principal case here.

Answer to the  
4th exception.

As to the fourth exception, viz. that the defendants have said that they were seized in right of their cathedral church; to this the said counsel wrote in answer, that the plea is, that after the death of Haltman they were seized of the rectory and church of Dean in their demesne as of fee, "in right of their cathedral church aforesaid," &c. which is true, and well pleaded. For there is a difference when the plea is of the whole, and when of parcel. For if they were disseized of an acre parcel of the parsonage, there if they said that they entered and were thereof seized, they ought to say, "in right of their church of Dean." And so in the Register in a *juris utrum* brought by L. Bishop of Lincoln, parson of the church of E. the words of the writ are, "whether twenty acres of land with the appurtenances in E. are frank-almoign belonging to the church of the said L. or lay-fee," &c. So in 49 H. 6, 16, where the abbot of Colchester, parson of a church, claimed an annuity which was belonging to the said rectory, it was taken that he ought to prescribe in right of the rectory, and not that he and his predecessors abbots have had it from time immemorial, for of parcels and things belonging to the rectory they ought to be claimed in right of the rectory. But here the parsonage and church of Dean is an entire thing, of which entirety the dean and chapter have alleged that they were seized in right of their cathedral church, and so in truth they are, and it would be very absurd for them to say that they were seized of the church of Dean in right of the church of Dean, or of the rectory and church of Dean in right of the church of Dean. Wherefore there is an apparent diversity between the cases.

Besides, if the words "in right of their cathedral church aforesaid," &c. had been totally omitted, the plea would not have been bad, and then the mis-recital of that which might have been wholly omitted cannot vitiate the plea.

(1) And afterwards judgment was given for the defendants, and against the plaintiff; which judgment here follows.

At which day here came as well the aforesaid Roger as the aforesaid dean and chapter, by their attorneys aforesaid. And thereupon, the plea aforesaid, of the aforesaid dean and chapter, above in bar pleaded, being seen, and by the justices here more fully understood, it seems to the same justices here, that the said plea is sufficient to preclude the aforesaid Roger from having his action aforesaid, against the aforesaid dean and chapter. Therefore, it is considered, that the aforesaid Roger take nothing by his writ aforesaid, but be in mercy for his false claim, and that the aforesaid dean and chapter go thereof without day, &c.

(1) N. Bendl. 296. S. C. says that no judgment was here given, but that the parties compromised the matter upon the payment of a sum of money, awarded to the plaintiff.

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The rest of the record.

Judgment.

19 El. A. D. 1577. K. B. Case *de modo decimandi*. [13 Co. 58.]

**N**OTE it was adjudged 19 El. in the K. B., that where one obtained a prohibition upon prescription *de modo decimandi*, by payment of a certain sum of money at a certain day, upon which issue was taken; and the jury found the *modus decimandi* by payment of the said sum, but that it had been paid at another day: and the case was well debated, and at the last it was resolved, that no consultation should be granted; for although that the day of payment be mistaken, yet it appears to the court, that no tithes in kind were due, for which the suit was in the spiritual court; and the trial of the custom *de modo decimandi* belongs to the common law, and a consultation shall not be granted where the spiritual court has not jurisdiction of the cause. TANFIELD, Ch. B. has the report of this case.

Where in prohibition a *modus* was found by the jury, but payable on a different day from that suggested; held that no consultation should be granted, for though the day of payment were mistaken,

yet it appeared to the court, that no tithes in kind were due, for which the suit was in the spiritual court, which therefore had no jurisdiction, for the trial of the custom *de modo decimandi*, belongs to the common law.

M. 21 & 22 El. A. D. 1579. B. R. *Tanner v. Kirkham*.

[Dy. in M. 170. b.] Benl. & Dal. 80. Co. Ent. 463. 1 Gw. 130. n.

**B**ARREN ground is understood, by the opinion and judgment of the common law, to be whereof no profit arises or grows; and that ground which has been stubbed, and after bears either corn or grass, is not barren. Waste ground is understood such ground as no man challenges as his own, or no man can tell to whom it certainly belongs, and lies uninclosed and unbounded with hedge and ditch; but the ground that lies inclosed and hedged and ditched in, and the lord (1) known, is no waste ground. *Quod nota per Curiam*. Heath ground is understood that ground that is dispersed, and lies at common.

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*Barren land* by the common law is that whereof no profit arises; and ground that has been stubbed, and after bears corn or grass, is not barren. *Waste ground* is understood to be that which is dispersed, and lies at common.

*ground* is such as no man can tell to whom it certainly belongs, and lies uninclosed and unbounded with hedge and ditch; but that which is inclosed and hedged and ditched, and the lord known, is not waste ground. *Heath ground* is understood to be that which is dispersed, and lies at common.

(1) I have substituted "lord" for "land," (which is indeed necessary, to render the passage intelligible,) on the authority of a MS. copy of what are generally called "the Marginal Notes of Dyer," interweaved with the edition of his Reports of 1621, now in my possession. The correctness of this MS. has enabled me to detect an infinite number of

mistakes in the printed copies. The author of the notes continually refers to his own Reports, but I have not been able, hitherto, to connect the references with any, either printed or manuscript. Benloe has "land," but his Reports were not printed till 1689, a year after the marginal notes had appeared from the same press.

M. 23 El. A. D. 1581. Exch.

The Case of the Abbot of St. Mary's, in York, [Sav. 4.]

**T**HE abbot of St. Mary's, in York, claimed tithes of lands of the abbey of Torvay, in the vills of Dalston and Burgh, for which a composition was made in ancient time, between the convents of each abbey *mediantibus abbatibus*, that the abbot of Torvay, &c. should pay for the tithes to the abbot of St. Mary's, &c. 26s. 8d. Afterwards, both abbeys came into the hands of king

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An ancient composition was made *mediantibus abbatibus utriusque conventus*, that a certain

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sum should be paid for the tithes of the lands of the one due to the other. After the dissolution, the possessions of each were severally granted by the crown to different patentees; held, that the composition was not extinguished by the unity of possession, as in the case of a rent-charge, common, and such things which issue merely from the land, and that if the money was subtracted, the tithes should revive. The court also ordered, that the payment should be apportioned among the respective grantees of the land charged.

Henry VIII., who, by his letters patent, granted the lands which belonged to the abbey of Torvay . . . after which, process issued out of the Exchequer against the patentees, who appeared by *Walsley*, serjeant, and prayed to be discharged therefrom, for that the lands charged and the abbey of St. Mary's, were both in the hands of the king, and so the unity of possession extinguished them. — *MANWOOD*. By no means, for this payment is granted for the tithes, so that if the money be subtracted, the tithes are payable. — *SHUTE*. Agreed, and said that the grant was executory, and implied a tacit condition, that if the money were unpaid, he might take the tithes: and it is not like a rent-charge, common, or the like, which are merely issuing out of the land. To which *MANWOOD* agreed. — *SHUTE*. What kind of agreement is this, which is made *mediantibus abbatibus* between the convents? — *MANWOOD*. That which is made between the abbots, which was good in those days. *Walsley* prayed, that as his client had land only in Burgh, that it should be apportioned. — *CURIA*. It is reasonable that each should pay according to his proportion, wherefore an auditor was assigned to make an apportionment.

E. 23 El. A. D. 1581.

*Fleming v. The Tenants of Dudley*. [Sav. 13.] 1 Gw. 155.

A custom once settled to pay a certain sum for a tithe lamb is good, and cannot be destroyed by the parson's encroaching for more, or the tenants paying in kind.

IT was held between *Fleming* and the tenants of *Dudley*, that if the tenants, for time whereof, &c. had used to pay a certain sum for a tithe lamb, so that the custom is clearly settled, that although the parson encroach for more, or the tenant pay the lamb in kind, it shall not destroy the custom. But if one had paid a penny for a lamb for fifty years, and afterwards pay tithes in kind, before the custom is settled, although he afterwards pay his penny for twenty years, he cannot prescribe in *modo decimandi*. And M. 25 El. this was held to be law in the Exchequer Chamber, in a case between *Beake* and *Maine*, for tithes claimed by the farmer of the parsonage of *Haddenham*, in *Buckinghamshire*.

1582.

Sequestration to set out tithes, where the dispute is to whom they belong, may be; but where lands are claimed to be discharged, such a thing was never seen, and if the tenant were to agree thereto, he would admit the lands to be titheable.

T. 24 El. A. D. 1582. Exch. *Mayne v. Becke*. [Sav. 30.] 1 Gw. 155.

ONE *Mayne* sued *Becke*, in the spiritual court, for tithes of the manor of B. in the county of Bucks, and *Becke* exhibited an English bill, stating, that he was tenant for years, on the demise of the queen, and that the said manor was discharged of tithes, and prayed a prohibition, which he obtained. Afterwards the said *Mayne* came and prayed a sequestration of the tithes of the said manor. — *MANWOOD*. If the dispute were between the parties, to whom the tithes of the manor severed from the nine parts belonged, your request would be reasonable, but to grant sequestration to set out the tithes, was never yet seen; and if the defendant were to agree to it, he would acknowledge that the lands are titheable. — *SHUTE*, agreed.

H. 24 El. A. D. 1582. B. R.

*Foster & Peacock v. Leonard*. [Cro. El. 1.] Moo. 907.

Birch shall pay tithes, for it is not what is intended by the stat. E. 3. by the name of *Gross Boys*, which is such as serves for building, and other

ATTACHMENT upon prohibition against the defendant, farmer of the parsonage of *Sevennoke*, in Kent, for suing for tithes of great wood, by the name of *Silva cædua*; against the statute of 45 Ed. 3. the defendant pleaded that for 300 loads of the said trees, they were of birch, of which, by the law, he ought to have tithes as *Silva cædua*; and as to the rest, which were of oak and elm, they were under the growth of twenty years; and upon the first it was demurred in law, and upon the second plea they were at issue. And after argument upon the first point by *Clerk* and *Weeks* of the one

side, and by *Fuller* and *Tanfeld* of the other, it was adjudged for the defendant, that he shall have tithes of birch, for birch is not such wood as the statute intends by the name of *gross boys*, for it is intended of such wood as serves for building, and other uses of a high nature, and not only for fuel, as the nature of birch is; and of oak and elm cut down before the age of twenty years, tithes shall be paid; for, until that age, they are not of such value as the law regards for the purposes aforesaid; and therefore, as to the birch, it was awarded he should have a consultation, he having entered a *non vult ulterius prosequi* for the residue, &c.

birch is, though above twenty years old; and of oak and elm cut down before the age of twenty years, tithes shall be paid, for until that age, they are not of such value as the law intends for the purposes aforesaid.

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uses of a higher nature, and not only for fuel, as the nature of

M. 25 & 26 El. C. P. *Sutton v. Dowse*. [1 Leon. 10.]

1583—4.

*Spiritual Court.*  
*Prohibition.*

**S**UTTON, vicar of Longstoke, libelled against Dowse in the spiritual court, and shewed in his libel, that upon the creation and endowment of his vicarage, four quarters of corn were assigned to the vicar out of the granary of the prior of B. of the tithes of the parson of Longstoke, and that the parson or farmer of the said rectory of Longstoke, had always paid the said four quarters of corn to the said vicar and all his predecessors, and alleged further, that the Lord Sands was seised of the said rectory, and leased the barn and tithe-corn, parcel of the said rectory, to the said Dowse, his wife and son, *habendum* to Dowse for term of his life, the remainder to the wife for term of her life, the remainder to the son for life: and shewed further, that the said Dowse had covenanted with the said Lord Sands, to render the said four quarters of wheat to the vicar and his successors, upon which Dowse procured a prohibition, and Sutton prayed a consultation, and it was moved in stay of the consultation that the vicar had libelled upon a covenant wherein Dowse is taxed to pay the said corn, and that is a lay title, and determinable by the law of the land, and not in the ecclesiastical court. But as to that the opinion of the court was, that the libel is not grounded upon the covenant, as the sole title to the said corn against Dowse, but upon the endowment of the vicarage, and the lease by which Dowse is become farmer of the rectory. Another matter was moved, because that upon the libel it appears, that the lease aforesaid, made by the Lord Sands, was made to Dowse, his wife, and his son, jointly, in the premises, *habendum ut supra*, in which case it was objected, that Dowse, his wife, and his son, are all three farmers of the said barn and tithes jointly in possession, against all whom Sutton ought to have libelled, &c. and not against Dowse only, for the *habendum* has not severed their estates which were joint before, *quod tota curia negavit*, for the *habendum* has severed the joint estates limited by the premises, and has distinguished it into remainders, but if the *habendum* hath been *habendum successive*, the estate had remained joint: Another matter was moved, because it appears upon the libel, that the parson or farmer of the said rectory ought to pay to the vicar the said corn, and also it appears upon the matter, that Dowse is not parson, nor farmer of the said rectory, for the Lord Sands had leased to Dowse and his son, only the barn and the tithe-corn, parcel of the said rectory; so as Dowse is farmer but of parcel of the rectory, and the residue of the rectory remains in the Lord Sands, the said Sutton ought to have libelled against the Lord Sands, and Dowse, and not against Dowse only; and for that cause the consultation was denied. And in this case it was further agreed by the court, that if upon a libel in the spiritual court, the defendant make a surmise in *banco* to have a prohibition, if such surmise be insufficient, the other party needs not to demur upon it and have it entered upon record, but as *amicus curie*, he shall shew the same to the court, and the court shall discharge him.

A vicar was endowed with four quarters of wheat out of the tithe corn of the rectory; the tithe corn was leased, and the lessee covenanted to pay the corn to the vicar; it was held, that a prohibition would not lie to the spiritual court, for the libel was not grounded upon the temporal covenant only, but on the endowment of the vicarage and the lease. It appearing from the libel that the parson or farmer of the rectory ought to pay the corn to the vicar; held, that the libel ought to have been against the farmer of the tithe corn and the owner of the rest of the rectory, jointly. If a surmise for a prohibition be insufficient, the other party needs not to demur, but as *amicus curie* shew the same to the court, and they shall discharge him.

1584.

The inhabitants of a hamlet prescribed that time out of mind they had had a chapel of ease within the hamlet, because it was distant from the church of the parish, and with part of their tithes had found a clerk to do divine service in the said chapel, and had also paid a certain sum of money to the parson of the parish for all manner of tithes; held to be a good prescription.

T. 26 El. A.D. 1584. B. R. *Saer v. Bland.* [4 Leon. 24.]

**S**AER, parson of the church of D. libelled in the spiritual court against Bland, for tithes; Bland came to the King's Bench and shewed, that within the said parish of D. there is a hamlet in which the said Bland inhabited, and the said inhabitants within the said hamlet, time out of mind, had had a chapel of ease within the said hamlet, because the said hamlet was distant from the church of the said parish, and with part of their tithes have found a clerk to do divine service within the said chapel, and also had paid a certain sum of money to Saer, and his predecessors, for all manner of tithes; and prayed a prohibition, and had it; and it was holden a good prescription.

T. 26 El. A. D. 1584. Exch. Anon. [Sav. 60.] Gw. 156.

Where it is not known in what parish the lands lie, the tithes of cattle feeding there shall be paid to the parson of that parish to whom they have been paid for time immemorial; but if there be no usage, they shall be paid to the parson where the owner of the cattle lives, according to the provisions of the stat. 2 & 3 E. 6.

**T**HERE is a fen called Wildmore in the county of Lincoln, which is not known to lie in any certain parish. Whereupon it was ordered in this court, that the tithes should be paid to the parson, vicar, pensionary, &c. where the owner of the cattle inhabits. But if the tithes had been paid to the parson of any parish for time whereof, &c. although it be not known in what parish the moor or common is, they shall continue to be paid in the same parish where they had been used to be paid; but where there is no usage for payment as above, nor the parish certainly known, they shall be paid to the parson or vicar, where the owner dwells, by 2 & 3 E. 6. c. 13.

E. 26 El. A. D. 1584. Exch. *Whiskard v. Futter.* [Sav. 62.]

Tithes are not issuing out of the land, as rent is or a thing which charges the land as common, &c. but the tithes are to be taken of the profits of the land, as corn and grain, and when the land lies fresh, no predial tithes shall be paid, but personal tithes for the cattle which feed upon it.

Non-payment of tithes during a unity of possession is but presumption of a discharge, which will be rebutted by payment for twenty or thirty years after severance; but if after such severance, no tithes have been paid, it will

**A**N information was exhibited by the queen's attorney at the suit of Whiskard, one of the clerks of the queen's remembrancer, against W. Futter, upon the stat. 2 & 3 E. 6. for taking certain tithe corn grown upon certain land in the parish of Langdowne in the county of Norfolk, whereof the said Whiskard was farmer. The defendant pleaded that he had not taken and carried it against the form of the statute aforesaid. Upon the evidence it appeared that the rectory of Langdowne and the land were both in the possession of the abbot of Blickling, as appropriated to the said abbey, during which time, the tithes were not set out, by reason of unity of possession. And so it was said by the defendant's counsel, that although the rectory and the land were now severed, yet as by the unity of possession they were once extinguished, they shall not be revived, and then the defendant is not bound to set out his tithes; and though he had carried them it is not contrary to the form of the statute. — **MANWOOD.** The unity of possession is no cause for discharge of tithes, but they are suspended during the time of unity; but if after the unity tithes have been paid for twenty or thirty years, they shall be charged with the payment for ever, for the payment proves that the unity was the sole cause of the stay of payment; but if after the severance no tithes have been paid, it is a vehement presumption, that they were discharged by some composition, or that the abbey was of the Cistercian or some other order discharged by the general council. And tithes are not issuing out of land, as common, &c. but tithes are to be taken of the profits of the land, as corn and grain, for when the land lies fresh no predial tithes shall be paid, but personal tithes for the cattle which feed upon it. And a deed was shewn for the plaintiff, by which one Nicholas Myns, who had purchased the said parsonage of the queen, had granted the said rectory, with all lands, &c. tithes, oblations, &c. to the said rectory belonging, to the plaintiff in the twentieth year of the queen, and the deed was acknowledged before a master in chancery, but not inrolled, nor any livery made, nor estate executed; wherefore the defendant said that nothing passed by the deed, and that no tithes passed, but those which were appendant to the parsonage, and if they passed by



this deed, they were in gross and not appendant. And so if one be seised of a manor to which an advowson is appendant, and there were such a deed of feoffment, and the estate not executed, the advowson shall not pass. So it was said if one be seised of a manor to which divers woods are belonging, and by such a deed the manor and the wood thereto belonging be granted, that in such case the wood shall not pass; and the wood, when it is felled, is but a chattel, which was not belonging to the manor.

And it was moved, to whom the treble value should go, inasmuch as it is not limited to any certain person.—*SHUTE*. It seems to me, that he who had the loss and injury shall have the forfeiture.—*CLINCHE* agreed.—*MANWOOD*. When it is not limited who shall have it, the queen shall have it. *Quære*.

or others which were discharged by the general council: *Note*. This was in the case of the Abbey of *Blickling*, a smaller abbey.

The court doubted whether the treble value in an information on 2 E. 6. should go to the party injured, or to the crown.

1584.  
WHISKARD  
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afford strong presumption, that the discharge was by reason of some composition, or that the abbey was of the order of Cistercians,

### M. 26 El. A. D. 1584. Scac. Anon. [Sav. 68.]

**BOYS** moved this case; the Queen by letters patent leased to I. S. the parsonage of D. for twenty-one years; one of the parishioners detained his tithes, whereupon an information of intrusion was exhibited by the queen's attorney. His question was whether the information laid in this case.—*MANWOOD* asked if the tithes were severed from the nine parts.—*Boys*, No.—*MANWOOD*. Then the information for intrusion does not lie.—*SHUTE*. The reason is, that the queen has no interest to sue for the tithes during the lease for years, but the lessee may sue in the spiritual court or in the court of pleas by *quo minus*, or, as he said, by English bill. But if the tithes were severed from the nine parts, and a stranger took them, the queen may have an information, for she cannot have an assise, for she is not out of possession of her freehold; wherefore she has intrusion, and the party, trespass. And as the lessor of a common person after such lease made, may have an assise upon an ouster made on the tenant for years, so may the queen have intrusion. With which the court agreed.

An information for an intrusion will not lie where the tithes (leased by the Queen) have not been severed from the nine parts; but if after such severance a stranger take them, the Queen may have intrusion, and the party trespass.

### T. 26 El. A. D. 1584. B. R. *Withy v. Saunders*. [1 Leon. 23.]

**WITHY** libelled against Saunders in the spiritual court, and now came Saunders and surmised, that Withy had libelled against him for tithes-grass, and shewed, that all the claim that Withy had to the said tithes was by a grant without deed, and by the law such things would not pass without deed; and also that the spiritual court would not allow of this plea, and therefore prayed a prohibition: and the court upon the first motion conceived a prohibition should pass, for if the grant be without deed, nothing passed, and then hath not Withy cause to claim these tithes against the said Saunders. And notwithstanding that tithes are *quodam modo* spiritual things, and so demandable in a court of that nature, yet now in divers respects they are become a lay-fee, and lay things, for a writ of assise of *Mortdauncester*, and an assise of *novel disseisin* lies of them, and a fine may be levied of them. But it hath been doubted, whether tithes be deviseable by will: but at another day the matter was moved, and the court was clearly of opinion, that a consultation should be awarded, for, whether Withy hath right or not right to these tithes, Saunders of common right ought to pay his tithes, and he ought to sever them from the nine parts, and whosoever takes them, whether he has right to them or no right, Saunders is discharged: but Saunders may prescribe *in modo decimandi*, without making mention of any severance, and may surmise, that the tithes do belong to I. S. with whom he has compounded to pay such a sum for all tithes, and afterwards a consultation was awarded.

A. libelled for tithes; B. for a prohibition shewed, that all the claim A. had to the tithes, was by grant without deed; and at first the court were inclined to grant it, for without deed nothing passed, and A. had no right to claim the tithes of B.; but afterwards they held that whether A. had right or had not, B. of common right ought to pay his tithes and to sever them from the

nine parts, and whosoever takes them, rightfully or not, B. is discharged; but they held that B. might prescribe *in modo decimandi* without making mention of any severance, or might surmise that the tithes belonged to I. S. with whom he had compounded to pay such a sum for all tithes. A consultation was awarded.

1584

E. 26 El. A. D. 1584. B. R. *Daws v. Mollins.* [2 Leon. 79.]

In a suit for tithes of faggots, it was held, that none should be paid for those which were made of loppings from stocks of oak, ash and beech, before cut, which stocks were not shewn to have been cut within twenty years before the last fall; and that where fallows, hornbeam, &c. grew promiscuously among the oaks, and the owner cut the whole and made them together into faggots, where the most part of every faggot was oak, so as the severance of the fallows, &c. from the oak, was not worth the charge, no tithes should be paid; but if the greater part were fallows, &c. tithes should be paid.

IN an attachment upon a prohibition by Daws against Mollins, for that the defendant drew the complainant into the spiritual court for tithes of great trees, by the name of *silva cedua*: the defendant pleaded, that the loppings for the tithes of which he sued, were the loppings of trees, called ash, beech and oak, *de stipitibus prius succisis crescentes*: and also for hornbeams, maples, hazels, &c. The plaintiff, as to the ash, oak, and beech, did demur in law; and as to the residue, he pleaded, that with part he mended the hedges, and the rest being *de minimo valore*, were bound up with the boughs of oaks, &c. into faggots; upon which the defendant did demur in law. It was argued by Egerton, solicitor, on the part of the plaintiff; and he held, that a wood of common right ought not to pay tithes, not because the soil in which it grows yields other tithes of the herbage, but because *non renovantur in annum*; and therefore at this day no consultation shall be granted for quarry, stone, and coals: but after came the statute of Sarum, (*vide F. N. B. 51 h.*) by which it was agreed *coram concilio regis in parlamento apud Sarum, quod consultationes fieri debeant de silva cedua, eo non obstante quod non renovantur per annum*: and see to that purpose the register 49. *Et ulterius, super hoc facta fuit quedam consultatio pro abbate de Notley de silva cedua*: which statute was afterwards expounded by the statute of 45 E. 3. cap. 3. not to extend to great wood of the growth of twenty years or more, but only to such wood which is called *silva cedua*. And at last, after many motions, it was ruled, that because the defendant had not shewed that the trees, (*scil.*) oak, ash, and beech, were before cut within twenty years before the last succision, of which the tithes are now demanded, tithes shall not thereof now be paid. And as to the other point, that the hornbeams, fallows, &c. did grow *sparsim* amongst the oaks, and the owner felled the whole wood, and caused them to be promiscuously cut into faggots, and bound up in faggots together, and the most part of every faggot was oak, and the residue was of little value, so as the severance of the fallows, &c. from the oak, &c. would not quit the charge; in such case tithe shall not be paid: but of the other part, if the most part of the wood be fallows, &c. and here and there *sparsim* groweth an oak, &c. and the owner cuts down all the wood, and makes faggots as before, tithes in such case shall be paid of them.

H. 26 El. A. D. 1584. B. R. *Gerrard's Case.* [4 Leon. 7.]

The owner of the land set out his tithes, and a stranger carried them away; it was held that no prohibition would lie to the

THE owner of the lands severed his tithes, and a stranger took them and carried them away. The parson libelled in the spiritual court against the owner of the land for the tithes; who thereupon prayed a prohibition. It was adjudged no prohibition should issue in this case; for that he might plead the same matter in bar in the spiritual court.

spiritual court to stay a suit for them, for that the same matter might be pleaded in bar there.

M. 27 El. A. D. 1585. B. R.

1585.

*Futter v. Borome.* [Godb. 35.] 4 Co. 34.

A portion is a thing in gross by itself, and cannot pass by that which is intended *nomen collectivum*, as a rectory is.

THE case was, that the queen by her letters patent anno 12, of her reign, *ex certa scientia et mero motu*, &c. did grant to B. *totam illam portionem decimarum et garbarum in L. in com. Norf. und cum omnibus aliis decimis suis cujuscunque generis et speciei fuerint in L. nuper in possessione Johannis Corbet*, or his assignes, *nuper Abath. de Wenly, pertinent.* &c. And in fact the parsonage of L. was parcel of the abbey of Wenly, and out thereof was a portion appertaining to another church; and this rectory came to the queen by the statute of dissolution of abbies: the question was, whether the rectory do pass by the grant, *totam illam portionem*: there being also words in the patent, *viz. Non obstante any misnomer, misrecital, or other such things which are recited in the*

statute for confirmation of patents. *Hamon*: the grant is good; for this word (portion) shall not be said a thing severed from the church and rectory; and all the tithes are parcel of the rectory: for as 44 E. 3. 5. is, before the council of Lateran, a man might give his tithes to what church he pleased; and when any thing is given to the church, it is a portion belonging to the church; as the glebe is, which is but a clod of earth, which is parcel of the rectory and a portion of it. And a case in this court in the time of this queen, was argued, and there in a rectory there were many priests, and each of them knew his portion, so as they were called portionary priests, which was in respect they had each of them interest in the church, and not because their portions were severed each from the other. And 22 E. 4. 24. by Pigot it is said, if a parson have any tithes in another parish, as appertaining to his church, it is called a portion; so as portion is not meant that which is severed by itself as in gross; but by portion is meant all the tithes appertaining to the rectory, or the rectory itself. For as 22 Ass. 9. is, if the king have tithes of those lands which lie out of any parish, if he grant *totam portionem decimarum*, &c. I conceive, that the tithes shall pass thereby: and yet it is a thing severed from other tithes; but it contains all the quality of tithes in that place. And also if the king grant his rectory of D. to J. S. saving to him the tithes, and afterwards grants *totam portionem decimarum*, &c. I conceive clearly (under correction) that the tithes shall pass. And in the principal case, if the tithes shall not pass by this word (portion;) yet the *non obstante* in the letters patent *de male nominando*, &c. shall make it to be a good grant, and that so the tithes shall pass thereby. We are also to consider, if by any words subsequent in the patent, the grant be not good, viz. by these words, *cum omnibus aliis decimis*, &c. *in tenura et occupatione* Johannis Corbet, &c. whereas in truth John Corbet was never occupier of them: and as to that, I conceive, that the words *cum omnibus*, &c. pass the tithes; and that the words after, shall not abridge or control the largeness of the precedent words; and to that purpose is the case 39 E. 3. 9. of the grant of the king to the earl of Salisbury, &c. In the end of which grant were these words, *quas nuper concessimus patri*, &c. although that the thing granted, was never granted to the father; yet the grant was good, and not restrained by those words coming after. 2 E. 4. A release was pleaded of a right which the party had in lands of the part of his father, &c. there, although he had the land from the part of his mother, yet the release was good. In the case of the bishop of Bath and Wells, which was lately argued in the exchequer chamber; there it was agreed, that if the king grant a fair in such a place, or elsewhere in the county of Somerset; if he mistake the county, in putting one county for another, yet the grant is good, and all that coming after the *alibi* shall be void. He further argued, that all the matter appearing by special verdict, is not well found; for the jury find, that no tithes were in the occupation of John Corbet at the time of the grant; and no mention is in it, that they were not in his occupation nor in the occupation of his assignees; for they might be in the occupation of his assigns, although that they were not in his own occupation: for in a verdict, if it strongly imply any thing not expressed (as in the case of *Trivilian*: where the jury found a devise of land, without saying that the land was held in socage) it is a good finding of the jury; for no devise could be, if it were not of land holden in socage, and therefore that tenure is implied. Contrary, when a man is to plead a devise; but where the verdict doth not strongly imply a thing, it shall not be good; as in Plo. Com. 411. exception was taken that the jury did not find, that the devisor had not any heir male alive *præter* the said John and Francis; for if he had, the wife of the plaintiff had no cause of action. And it was there holden by *Harpur*, that it was not a good verdict for the uncertainty; so in our case.—*Coke* contrary: 1. The grant is not good, and the rectory is no part of it; nor can they pass by the word (portion.) 1. By the etymology of the word; for portion is a thing in gross by itself, and cannot pass by that thing which is intended *nomen collectivum*, as a rectory is. So of a manor; if a man grant *totam illam portionem manerii*, he being seised of a manor, nothing passes; for *portio* is no more than *partio*, as the Latinists say; and then if a man grant all that part of his manor,

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manor, or part of his tithes in D. and he be seised of the whole manor of D. or of the rectory of D. nothing passes. Also the words after expound the queen's mind, for the words precedent are coupled with a (*cum*) after, *scil. cum omnibus aliis, &c.* So as the first part shews the grant of tithes, and the latter part shews what tithes; viz. those which were in the occupation of John Corbet, so as but part is granted: and in the king's grant, a part shall not be taken for the whole; and so in no case, if not by the figure synecdoche, which cannot be in cases of grants at the common law. Also the words are, *totam illam portionem, &c.* and not *totam meam portionem, &c.* and the word [*illa*] or [*that*,] ought to have a word [*what*;] which is a word shewing in whose possession the portion was. Also the king's letters patent ought for the most part to be taken according to the meaning of the King; for the case was in the exchequer: that where the King granted all his tenements in D. that nothing passed by that grant, but the houses. Otherwise it is in the case of a common person. So 22 Ass. where the King grants goods of felons *quorumcunque damnatorum*, it shall not extend to treason, nor to murder of the King's messenger. So 8 H. 4. 2. If the grant be of all the goods of those who *pro aliqua transgressionem sive delicto, &c. forisfacere deberent*; it shall not extend to those who are *felo de se*. Also the *non obstante* does not help the matter; for I take this difference, when nothing passes by the words precedent, *ex vi termini*, there nothing is helped by the *non obstante*; but if any thing pass by the precedent words, *ex vi termini*, there a *non obstante* may make the thing good, which otherwise should be void: as if the King grant to J. S. the manor of D. *non obstante* that he is seised for the term of life thereof, it is a void grant; but if the grant were of the manor of D. notwithstanding that I. S. has it for life, here the *non obstante* makes the grant good; which otherwise should be the ignorance of the King to make a grant of that of which he is excluded by the *non obstante*, because thereby he takes knowledge of the particular estate, and so he is not deceived. As to the matter moved against the verdict, I conceive, that it makes against the other side; for it was on his part to prove the occupation; and if there be no occupation at the time of the lease, the grant is void: and he was to prove it, being in the affirmative. And then, *in re dubia majus inficiatio quam affirmatio intelligenda*: and [a may be] may be intended in every case. And if such construction should be in special verdicts, I dare affirm, that by such [may bees] all special verdicts shall be quashed. But the law is, to give a favourable construction of them, according to the meaning of the jurors. — Snagg contrary: and by him these words, [*cum omnibus aliis, &c.*] are void in the King's case; and vouched the case of 29 E. 3. 9. before vouched, where the King had granted to the Earl of Salisbury the custody of the lands of the prior of Mountague, being seised into the King's hands as a prior alien; and afterwards the earl died, his heir within age, whereby the said lands, and others, and advowsons, came to the King's hand by reason of minority; and afterwards the King granted to the son all the lands and advowsons which were *patris sui, ac omnes terras, ac omnes advocaciones* of the said prior, which the King had before given to the father of the said son. And it was there holden, that although that the advowsons passed not to the father, yet by that grant they did pass; and that these words [which he granted to his father] were merely void. — CLENCH, J. Nothing passes by this word [portion], for it is a thing in gross, and a thing in gross cannot contain another thing, and a word which signifies a thing in gross, cannot pass another thing: as if a man grant all his services in D. it is to be intended services in gross; and if he have not any services, but those which are parcel of a manor, nothing shall pass by those words. But I conceive, that those tithes which are parcel of the rectory shall pass by these words, *cum aliis, &c.* For although that the words are, in the tenure of John Corbet, yet if they were not in his tenure, the *non obstante* will help it; for it is, *non obstante* any misnaming of the tenants, or of the quantity or quality of the tithes; so as these words imply as much as if the grant had been in the tenure of John Corbet, or of any other in L. or elsewhere. — GAUDY, J. If the words *totam illam portionem* were left out of the book, the other words, *cum omnibus aliis*, shall pass nothing; and those words

*totam illam portionem*, are as nothing to pass a thing not in gross; and by consequence nothing shall pass by the other words. And afterwards judgment was given, that nothing passed by the letters patent.

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M. 27 & 28 El. A. D. 1585. C. B.  
*Branche's case.* [Moo. 219.] 1 Gw. 156.

**A** PROHIBITION was granted out of the Common Pleas against the ordinary of Gloucester and one *Branche*; and the surmise was, that the lands out of which tithes were demanded, was copyhold, parcel of a manor of which the prior was seised in fee, and was also parson imparsonnee, by which union the tithes were extinguished. *Snag*, serjeant, moved, that the surmise was not good, for the unity was no discharge of the tithes of the copyholders, and for this he prayed a consultation, and had it; for the court said, that there was no prescription to be discharged of tithes alleged in the surmise; and in truth, if an abbot or prior were seised of land discharged of tithes, he who is now farmer of such land shall be allowed to prescribe in *non decimando* by the stat. 2 E. 6. which wills that no one shall pay tithes otherwise than they were paid forty years before; but in no other case shall a man prescribe in *non decimando*, but only in *modo decimandi*.

Unity of possession by a religious person of a manor and parsonage, is no discharge for the copyholders without a prescription; and a prohibition shall not be granted in such case where no prescription is alleged in the surmise to be

discharged of tithes. If an abbot or prior were seised of land discharged of tithes, the new farmer of that land shall be admitted to prescribe in a *non decimando* by the stat. 2 E. 6. which wills that no one shall pay tithes, otherwise than they were paid forty years before; but in no other case shall a man prescribe in *non decimando*, but only in *modo decimandi*.

E. 28 El. A. D. 1586. Scac. *Cary's Case.* [1 Leon. 281.] Moo. 222.

1586.

**I**N an information in the Exchequer, by the Queen against *Cary*, the case was this. A man grants *situm rectorie cum decimis eidem pertinent. Habendum situm predict. cum suis pertinentiis*, for twenty years, the first grantee dies within the term. If now, because the tithes are not expressly named in the *Habendum*, the grantee shall have them for life only, was the question. It was moved by *Popham*, Attorney General, that the grantee had the tithes but for life, and to that purpose he cited a case adjudged 6 Eliz. in the Common Pleas: a man grants black acre and white acre, *Habendum* black acre for life, nothing of white acre shall pass but at will; and in the argument of that case, *Anthony Browne* put this case: Queen Mary granted to Rochester such several offices, and shewed them specially, *Habendum* two of them, and shewed which in certain, for forty years. It was adjudged that the two offices which were not mentioned in the *Habendum*, were to Rochester but for life, and determined by his death: and so he said in this case, the tithes not mentioned in the *Habendum* shall be to the grantee for life, and then he dying, his executors taking the tithes are intruders. But as to that, it was said by *MANWOOD*, Chief Baron, that the cases are not alike, for the grants in the cases cited are several, entire, and distinct things, which do not depend the one upon the other, but are in gross by themselves. But in our cases, the tithes are parcel of the rectory, and therefore for the nearness betwixt them, i. the rectory and the tithes, the tithes upon the matter pass together with the *site* of the rectory for the term of twenty years, and judgment was afterwards given accordingly.

One grants *situm rectorie cum decimis eidem pertinentibus, habendum situm predictum cum suis pertinentiis*; held that tithes are parcel of the rectory, and therefore for the nearness betwixt them, viz. the tithes and the rectory, the tithes pass together with the *site* of the rectory.

T. 28 El. A. D. 1586. B. R. *Wellock's Case.* [2 Leon. 73.]

**A** PARSON, in consideration of twelve-pence, granted to one of his parishioners, that he should hold his lands discharged of tithes: it was holden by the whole court, that the same was no good discharge, being without deed, as a lease of his tithes. But it was holden, if the parson afterwards sue the parishioner for tithes against the same grant and promise, the parishioner may have an action upon the case against the parson upon his promise, although he cannot plead the grant as a lease.

A grant by a parson to one to hold his lands discharged of tithes without deed, is not good as a lease of his tithes; but if the parson

sue against such grant, an action on the case lies.

1586.

M. 28 &amp; 29 El. A.D. 1586. B. R.

*Bush v. Hunt.* The Vicar of *Pancras's* Case. [2 Brod. & Golds. 36.]  
Godb. 50. 63.

THE vicar of *Pancras* sued one in the spiritual court for tithes; and he pleaded, that some of them, for which the vicar did sue, did belong to the parson; and that he had paid them to the parson, and prayed a prohibition. — *Cook*. He shall not have a prohibition, for by this plea he hath put in debate the controversy of the tithes, betwixt the parson and vicar; and then when both are spiritual persons, the common law shall not hold plea of them, as is 35 H. 6. 39. and 31 H. 6. Also by this plea a *modus decimandi* is not in question, but the right of the tithes, and that doth appertain to the common law. And there *Cook* said, that it is holden in 11 H. 7. that unions and endowments of vicarages do appertain to the spiritual law. Also the prescription of the defendant was, that he had used, time out of mind, &c. to have for horses agistment, herbage, three-pence *ob. q.* and after that they had used to pay for every cow to the vicar, four-pence, and for the calf and milk of every cow, six-pence. And *Cook* took exception that such prescription was double, and repugnant in itself, for he prescribes that he pays for herbage; and then he prescribes, that he pays for every cow, four-pence, which cannot be meant but for herbage of the cow, for it is not for milk or calf of the cow, for he prescribes to pay for them six-pence. He took another exception, that he prescribes that he hath used to pay, but doth not shew that he hath paid; for so he ought to do, for otherwise he shall out the spiritual court of jurisdiction, and yet not give any remedy in this court. Also, he saith, that he hath paid, but doth not shew where; and the other may say, *non solvit*, and so an issue shall be, and no place from whence the *vine* shall come. — *Godfrey* contrary. If one be a layman, and the other a spiritual man, then the trial shall be at the common law, as it is holden, 31 H. 6. and 2 E. 4. And the defendant here is a layman, who makes prescription of a *modus decimandi*, for the discharge of tithes in kind. As to that which *Cook* said, that he prescribes that he hath used to pay to the parson, and doth not say, that it was due to the parson; and if he pay the vicar's tithes to the parson, he doth wrong to the vicar; he saith, that he hath paid, and used to pay four-pence to the parson in full satisfaction, &c. and *reddendo singula singulis*, it is good enough. As to the doubleness or repugnancy of the prescription, he said, that the prescription is set forth according to the truth of the matter. As to the place, for that, no issue can be taken upon it; he answered, that he conceived the issue will be upon the custom or *modus decimandi*. — And *Gawdy*, J. agreed to that. — *Surr*, J. there is no *modus decimandi* alleged; for when he saith, that he hath paid to the parson that which the vicar demands, that is no answer. *Gaudy*, J. the prescription is repugnant, as *Cook* said; and he said, that the herbage is for all kine, as well for those which have calves as those which have not. No prohibition granted.

Where the *modus* does not come in question in the spiritual court, but to whom to be paid, no prohibition lies.

*De mero jure* the parson is to have all tithes, if there be not any endowment of the vicarage.

Note that it was agreed in this case, that if a parsonage be inappropriate, and the vicarage be endowed, and difference be between the parson and the vicar concerning the endowment, that shall be tried by the ordinary, for the persons and the cause also are spiritual: and there the vicar sues the parson for tithes, and he suggests the manner of tithing, and prays a prohibition, and it was granted, and after, upon solemn argument, consultation was granted, inasmuch, that the manner of tithing did not come in question; but the endowment of the vicarage only; for that is the elder brother, as the Lord *Coke* said; this was cited to be adjudged by *Coke*.

M. 28 & 29 El. A.D. 1586. B. R. *Anon.* [Godb. 44.]

It was said that no tithes should be paid of heath, turf, and broom,

A QUESTION was moved to the court, whether tithe should be paid of heath, turf, and broom? And the opinion of *Surr*, J. was, that if they have paid tithe wool, milk, calves, &c. for their cattle which have gone upon

upon the land, that they should not pay tithe of them. But some doubted of it, and conceived, that they ought to say, that they have used to pay those tithes for all other tithes; otherwise they should pay tithe for heath, turf, broom, &c.

had gone upon the land; some thought that it should be alleged that those tithes had used to be paid for all other tithes.

1586.

if tithes had been paid for the cattle which

M. 28 & 29 El. A. D. 1586. B. R. *Anon.* [Godb. 60.]

**I**N a case for tithes, the defendant did prescribe to pay but three-farthings for the tithes of all willows cut down by him in such a parish. COOKS, it is no good prescription; for thereby, if he cut down all the willows of other men also, but three farthings should be paid for them all. But he ought to have prescribed for all willows cut down upon his own land, and then it had been good. But as the prescription is, it is unreasonable; and of that opinion was the whole court.

other men also, but the same sum would be paid for them all. But if he had prescribed for all willows cut down upon his own land, then it had been good.

One prescribed to pay three-farthings for all willows cut down by him in such a parish; it was held bad, for if he cut down those of

M. 28 & 29 El. A. D. 1586. B. R. *Anon.* [Godb. 45.]

**T**WO parsons were of two several parishes, and the one claimed certain tithes within the parish of the other, and said, that he and all his predecessors, parsons of such a church, *scil.* of D. had used to have the tithes of such lands within the parish of S. and that was pleaded in the spiritual court: and the court was moved to grant a prohibition: and SURR and CLENCH, Justices, he shall have a prohibition, for he claims only a portion of tithes, and that by prescription, and not merely as parson, or by reason of the parsonage, but by a collateral cause, *viz.* by prescription, which is a temporal cause and thing. And it is not material whether it be betwixt two parsons. *Vide* 20 H. 6. 17. Br. Jurisdiction, 80. and 11 H. 4. and 35 H. 6. 39. Br. Jurisdiction, 3. Where in trespass for taking tithes, the defendant claimed them as parson, and within his parish; and the plaintiff prescribed, that he and his predecessors, vicars there, had had the tithes of that place time out of mind, &c. And the opinion of the court was, that the right of tithes came in debate betwixt the vicar and the parson, who were spiritual persons, who might try the right of tithes: and therefore there the temporal court should not have the jurisdiction.

Where a parson claims tithes in the parish of another by prescription as a portion, prohibition lies.

E. 29 El. A. D. 1587. B. R.

*Wray v. Clench.* (1) [Cro. El. 55.] *Anon.* Moo. 908.

1587.

**N**OTA, it was held by WRAY and CLENCH, if one cut trees which are or may be timber trees, as oaks, elms, &c. although they may be under the age of twenty years no tithes are due; and so if trees of that age are cut, and new germins grow, no tithe due, though they be cut under that age.

If timber trees are cut and new germins grow, no tithe is due, although they be cut under the age of twenty years.

(1) It is doubtful if the names of these parties be correct, but rather a mistake arising from the names of the judges.

E. 29 El. A. D. 1587. B. R.

*Lane v. Pigot.* Moo. 915. [Cro. El. 55.]

**I**T was said there are divers precedents, that if a lessee for years be sued in court christian for tithes, he in the reversion may have a prohibition.

Prohibition.  
Reversion.

H. 29 El. A. D. 1587. C. B. *Anon.* [2 Leon. 70.]

**T**HE case was this, (*viz.*) by the civil law the parson ought to have his tithe by the tenth ridge; and in a great field there was corn upon the arable land, and grass upon the head lands; and in a suit for tithe hay, and raking

By the canon law the tithe of corn is to be paid by the

1587.

tenth ridge, therefore a custom to pay the tenth shock in lieu of rakings and tithe of headlands is good.

rakings of the corn, the defendant did prescribe, to pay the tenth shock of corn for all the corn, hay, and rakings of the corn; and the prescription was challenged not to be good, for it is upon the matter a prescription of *non decimando*, for the tenth shock is due of common right, and so nothing is for the hay and rakings. It was holden by all the justices, that for tying of horses upon the head lands, and eating of the grass and corn together, that the prescription was good: but the doubt was, when the grass is made into hay, which is upon the head lands, if it be a good prescription then, and discharge for the hay, because it is another thing than what is growing upon the land? But in the end all the justices agreed, that by the civil law (*ut supra*) the tenth ridge is due for tithe corn: therefore for the reaping, binding, and shocking, it is a reasonable prescription, that the party shall have the hay upon the head lands in recompence of the said other things, and the hay upon the head lands is but of little value.

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H. 29 El. A. D. 1587. B. R. *Roote's Case*. [Godb. 120.]

One prescribed to pay in one part of his land the third of the tenth, and in another half the tenth for all manner of tithes.

THE case was in a prohibition touching tithes; and the libel in the spiritual court was for corn and hay, and other things; and the tenant of the land did prescribe to pay in one part of the land, the third part of the tenth; and in another part, the moiety of the tenth of corn, for all manner of tithes. And the court did incline that the same was a good prescription. And a prohibition was granted to the ecclesiastical court.

The court inclined to think the prescription good. (1)

(1) This must have been a prescription under a monastery.

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E. 29 El. A. D. 1587. C. B.

*Anon.* cited in *Liford's Case*. [11 Co. 48.]

No tithes shall be paid for the germins which grow from the roots or stems of timber trees felled.

IF a man fell his timber trees, tithes shall not be paid for the germins which are growing *ex radicibus seu stipitibus*, in respect that the root is parcel of the inheritance.

1588.

Vicar. Endowment. Woad. Where the vicar was endowed generally, (*decimis garbarum et feni ac mortuariis vivis duntaxit exceptis*) and he had taken tithe for twenty years from the land where woad had been sown; held that the tithe of woad should be paid to him.

M. 29 & 30 El. Cam. Scacc. *Baskerville v. Clarke*. 4 Gw. 1567.

UPON hearing the matter in controversy between *William Baskerville* and *Jenebor*, his wife, the queen's farmers of the parsonage of *Colshill*, in the county of Berks, plaintiff, and *John Clarke*, defendant, being for withholding and subtracting tithes of woad sown by the said *John Clarke* after the plough, in certain grounds lying and being within the tithable places of the parish of *Colshill* aforesaid, parcel of a farm there called *Flint Farm*; forasmuch as it appears by composition shewn in this court, under the seal of the Chancellor of Sarum, that all manner of tithes, oblations, and obventions whatsoever, belonging to the church of *Colshill* aforesaid, (*decimis garbarum et feni ac mortuariis vivis duntaxit exceptis*,) have belonged to the vicar of the said church for the time being; and for that also it is proved in this cause by depositions, that the vicar of the said church for the time being has had the tithes of the grounds where the said woad was sown for the most part by the space of twenty years last past; it is therefore ordered by the court, that the said plaintiffs, and all other farmers of the said parsonage, be from henceforth barred to demand or have any tithes of woad, growing, renewing, or coming in and upon the said grounds, and that the tithes of the said woad, sued for by the said plaintiffs, and of all other woad which at any time or times hereafter shall grow, renew, or come in and upon the same grounds, shall be and remain to the vicar of the said church and his successors, as in the right of the vicarage there.



E. 30 El. A. D. 1588. B. R.

*Stebbs v. Goodlock.* [Moo. 913.] 1 Gw. 158.

1588.

**I**N B. R. between *Stebbs* and *Goodlock*, parson of Litcombe, in the county of Berks, the custom alleged was, that the parson ought to have every tenth land for tithe of corn, beginning from the land nearest to the church; by which means, the occupiers, knowing before hand which land would be the parson's, by covin and to defraud him, did not till, nor sow, nor manure it, as they did their own. Upon which covin the parson sued in the spiritual court to have tithes in kind, viz. the tenth cock of all grain. And a prohibition was granted notwithstanding, for the fraud is to be remedied by action on the case at common law.

did not cultivate it properly, held that as the fraud was remediable by an action on the case at common law, prohibition should go to a suit for tithes in kind of the corn.

Where a custom was alleged that the parson was to have every tenth land for the tithe of corn, and the parishioners knowing before-hand which would be the parson's, at common law,

H. 30 El. A. D. 1588. B. R.

*Savel v. Wood.* [1 Leon. 94.] Cro. El. 71. Moo. 908. 1 Gw. 157.

**T**HE case was, that a parson libelled in the spiritual court against a parishioner for tithes of such lands within his parish, the defendant came into the king's bench, and surmised, that he and all those whose estate he has in the lands out of which the tithes are demanded, have used to pay every year five shillings to the parish clerk of the same parish, for all the tithes out of the same place. And it was argued by *Coke*, that that could not be, for a parish clerk is not a person corporate, nor has succession. But if he had prescribed that they had used to pay it to the parish clerk to the use of the parson, it had been good. Also he ought to shew that the parson ought of right to find the parish clerk, &c. [And if it be a good surmise, yet there is no cause, but a consultation shall be awarded, for it is to come in question in the spiritual court, whether the parson or the clerk has right to the tithe. *Cro. El.*] And he cited the case of *Bush and Hunt*, parson of Pancras, who libelled in the spiritual court for tithes. The defendant to have a prohibition did prescribe that he and all those, &c. had, time out of mind, &c. used to pay to the vicar, &c. and at last a consultation was awarded, because it was triable in the ecclesiastical court; for both parties, as well vicar as parson, are spiritual persons, and the *modus decimandi* is not in question, but *cui solvendi*. And at another day, it was agreed by the justices, that of common right the parson is not tied to find the parish clerk, for then he should be said the parson's clerk and not the parish clerk; but if the parson be tied to find such a clerk, and such a sum have been used to be paid to the parish clerk in discharge of the parson, the same had been a good prescription, and so by way of composition; and by *CLENCH, J.* tithes are to be paid to spiritual persons, but a parish clerk is a lay person, and afterwards the court granted a consultation.

A suggestion of an immemorial payment of money to a parish clerk, in discharge of tithes, is not good. But the court thought that if it had been specially surmised that the parson was bound to find such a clerk, and such sum had been used to be paid to him in discharge of the parson, it might have been good by way of composition.

T. 30 El. A. D. 1588. B. R.

*Gatefould v. Penn* [1 Leon. 128.] Cro. El. 136. *Coteford v. Pease.*

**G**ATEFOULD, parson of North-Linne, libelled against *Penn*, in the spiritual court, for tithes in kind of certain pastures. The defendant to have prohibition surmises, that he is an inhabitant of South-Linne, and that time out of mind, &c. every inhabitant of South-Linne, having pastures in North-Linne, has paid tithes in kind for them to the vicar of South-Linne, where he is not resident, and the vicar has also, time out of mind, paid to the parson of North-Linne for the time being, two-pence for every acre. — *Lewis.* This surmise is not sufficient to have a prohibition, for upon that matter, *Modus Decimandi* shall never come in question, but only the right of tithes, if they belong to the parson of North-Linne, or to the vicar of South-Linne, and he might have pleaded this matter in the spiritual court, because it touches the right of tithes, as it was certified in the case of *Bashly*, by the doctors of the

Where to have a prohibition it was suggested that every inhabitant in S. that had pastures in N. had paid tithes for them to the vicar of S. who had paid to the parson of N. 2d. for every acre; it was held insufficient, for

1588.  
GATEFOLD  
v.  
FENN.

no modus would  
come in ques-  
tion, but who

civil law. — GAWDY. This prescription stands with reason, for such benefit has the parson of North-Linne, if any inhabitant there has any pastures in South-Linne. And afterwards (1) the whole court was against the prohibition, for *Modus Decimandi* shall never come in debate upon this matter, but who shall have the tithes, the vicar of South-Linne or the parson of North-Linne?

And also the prescription is not reasonable.

The court also held the prescription not reasonable.

(1) *Croke*, in his report of *Cotford v. Peme*, which I conceive to be the same case, omits this latter opinion of the court.

E. 30 El. A. D. 1588.—C. B.

*Botham and Cooper v. Lady Gresham.* [3 Leon. 202.] Cro. El. 136.

Where to have a prohibition to a libel it was suggested that 4d. an acre had always been paid to the vicar in lieu of tithe-hay, it was held ill, for the modus would not come in question, and it ought to have been pleaded in the spiritual court, that the tithe belonged to the vicar and not to the parson, and if the vicar afterwards sued for tithe of the hay, then the modus would come in question.

IN a prohibition by Botham and Cooper against the lady Gresham, who had impleaded them in the spiritual court for tithe-hay, and made their suggestion, that time out of mind, &c. they had paid to the vicar of the said parish four-pence for the tithe of hay of every acre. It was moved, that upon that surmise a prohibition ought not to be granted, for that a *Modus Decimandi* shall never come in question. But the party ought not to have pleaded the same matter in the spiritual court, *scil.* that the same doth appertain to the vicar and not to the parson: and then if the vicar sue for the tithe of the hay, the *Modus Decimandi* will come in question; and although he has averred in his surmise, that the tithe-hay belongs to the vicar, yet that is not material: and afterwards a consultation was awarded.

that the tithe belonged to the vicar and not to the parson, and if the vicar afterwards sued for tithe of the hay, then the modus would come in question.

T. 30 El. 1588.—B. R.

*Bennet v. Shortwright.* [2 Leon. 101. Cro. El. 206.]

Modus, how  
pleaded.

If the parishioner set out his tithes, and the parson will not take them, or they be destroyed by cattle by his laches, he shall not have tithes again, and if the spiritual court will not allow the plea, the party shall have a prohibition. But if the parishioner set forth his tithes, and take them again, he may be sued for tithes in the spiritual court, and such setting forth shall not excuse him.

THE case was, the defendant sued the plaintiff in the spiritual court for tithes in kind, and now the plaintiff prayed a prohibition, and suggested, that they had used in the said parish, time out of mind, &c. to take the tenth sheaf in satisfaction of tithe of corn, &c. in those years in which the plaintiff had supposed the subtraction of his tithes, he had severed the tenth sheaf from the nine parts, and the parson would not take them away: and that he had offered that matter by way of plea in the spiritual court, but they there would not allow of it. And the court was clear of opinion, that the suggestion was good; for if the parishioner set out his tithes, and the parson will not take them, or if they be destroyed by cattle by his laches, he shall not have tithes again: and therefore if the ecclesiastical court will not allow that plea, it is reason that the party have a prohibition, for after severance *transit decima in catalla*. But it was said by the court, that if the parishioner set forth his tithes, and take them again, he may be sued for tithes in the spiritual court, and the setting forth shall not excuse him.—LEON. [For the wool he made another suggestion; for the calves, he said they used to pay within the said parish, &c. two-pence for the milk of every cow in satisfaction of calves: and the proofs were, that there was such a usage for all the land, except five farms; and for this cause it was held he had failed in his prescription, for it may be these lands were parcel of the five farms; but if it had been proved, that the lands were not parcel, it had been otherwise. And for this cause a consultation was granted. Cro. El.]

Two pence for the milk of every cow in satisfaction of calves. Where a custom was suggested, "for all the parish," and the proof was "except for five farms," it was held that it failed, for it might be that the lands in question were parcel of the five farms, but if it had been proved that they were not parcel, it had been otherwise.

M. 30 El. A. D. 1588. Scac. *Prowse's Case*. [4 Leon. 47.]

1588:

IT was holden in the case of one Prowse, by *Egerton*, solicitor, upon the statute of 31 Hen. 8. where an abbot had a rectory impropriate, and also land within the same parish, &c. and so paid no tithes, because he could not pay them to himself, and for no other cause was discharged; and after the dissolution, the rectory is granted to one, and the land to another, that in such case, the king nor his patentees should not be discharged of tithes, for the lands were not discharged in right; but if the lands in the hands of the abbot were discharged in right, as by composition or lawful means, there the king and his patentee should be discharged from payment of tithes. And it was said by *BURLEIGH*, lord treasurer, that if the composition or custom was that the abbot and his successors should be discharged without extending to farmers or lessees, if the abbot made a lease, and the lessee paid tithes as he ought; and after the reversion cometh to the king, the lessee should pay tithes during his lease, but after the lease determined, the king and his patentee should not pay, but should be discharged by the said statute; and said the like matter was in the chancery, Trin. 30 Eliz. The abbot of Tewkesbury having the rectory impropriate of Tewkesbury, (11 Hen. 7.) purchased lands within the said parish to him and his successors; after the dissolution the king granted to G. the rectory, and to W. the lands; and if W. should pay tithes was re-ferred to *Manwood* and *Periam*, who gave their resolution that tithes were payable.

Where an abbot had a rectory, and lands within it, and paid no tithes because he could not pay to himself, and for no other reason, the land, after severance from the rectory, is not discharged by 31 H. 8. for it was not discharged of right: so if the composition or custom were that the abbot should be discharged without extending to his farmers or lessees, if during a lease tithes were paid, as

they ought, yet after the lease determined, the patentee under 31 Hen. 8. shall be discharged. The abbot of Tewkesbury was seised of a rectory impropriate, 11 Hen. 7. he purchased lands within it, it was held that tithes should be paid for them after severance.

T. 30 El. A. D. 1588. Cam. Scac.

*Grymes v. Smith*. [12 Co. 4.] 1 Gw. 158.

THE case was as follows. The abbot of Sulby held the parsonage of Lubbenham, in the county of Leicester, appropriate, which, as a parsonage impropriate, came to king Henry VIII. by the dissolution of monasteries, anno 31 Hen. 8. who, in the 37th year of his reign, granted it in fee farm, under which grant the plaintiff claims. The defendant had obtained a presentation of the queen, and, to destroy the said impropriation, shewed the original instrument of it, anno 22 Edw. 4. with condition that a vicarage should be competently endowed, and alleged that such vicarage was never endowed, and that for that very cause, the impropriation was void. In truth, there was no instrument, nor direct proof of any endowment of the vicarage. But as the said rectory was, during all the time of the impropriation, supposed, reputed, and taken to be appropriate; and by all that time a vicar had been presented, admitted, instituted, and inducted, as a vicar rightfully endowed, and had paid his first-fruits and tenths: it was resolved, that it shall be presumed in respect of continuance, that the vicarage was lawfully endowed, for that *omnia presumuntur sollemniter esse acta*. And it would be a dangerous precedent to examine the originals of impropriations of any parsonages, and the endowments of vicarages, for that the originals of them in time will perish. And so it was decreed for the plaintiff.

Endowment is to be presumed where a vicarage has long continued, for *omnia presumuntur sollemniter esse acta*, and in time originals of endowments will perish.

E. 30 El. A. D. 1588. C. B. *Stafford's case*. [1 Leon. 111.]

THE case was, that the parson of the church of B. did libel in the ecclesiastical court for tithe-milk of eight kine depasturing within such a field within his parish. The defendant said, that he and all those, &c. had used time out of mind, &c. to pay every year a certain sum of money to the parson, &c. for the tithes of the same field; which plea the judges of the ecclesiastical court would not allow, and therefore the party had now a prohibition and an injunction against the judges, doctors, proctors, &c. And afterwards the same parson libelled again, for the same tithes against the same parishioners, and in

Where a parson libels again upon a claim with respect to which a prohibition has been granted, an attachment shall issue.

1588.

STAFFORD'S  
CASE.

both libels there was no difference, but that in the latter libel it was for a less number of kine, and now the parishioner upon this matter prayed an attachment upon the prohibition, which was granted unto him by the court, for otherwise a prohibition should be granted to no purpose.

M. 30. El. A. D. 1588. B. R.

*Perry v. Soam.* [2 Leon. 27. Cro. El. 139.]

For a prohibition to a libel for tithes of green tares, it was suggested that there was not in the parish sufficient meadow or pasture for the draught cattle and milch kine; and that they had used to pay the tenth shock of their ripe tares; but in consideration that they gave their green tares to their cattle, they were discharged of tithes for the same. And it was held good; for the matter was the want of meadow and pasture; and if it had been said, that for want of meadow and pasture they had been used to eat their meadows with their cattle, and pay no tithes, therefore it had been good; and for such tithes the parson has the tithes of the land cultivated with the cattle.

A custom to pay for the tithes of sheep bought or sold, for the lamb,  $\frac{1}{4}d.$ , and for the wool and fleece of the sheep,  $1d.$  and for all sheep bought or sold between Lady-day and Lammas,  $\frac{1}{4}d.$ ; and as to the residue of the year, nothing said, is bad. Where a modus covers only part of the year, and nothing is said as to the residue, it is bad. A modus for calves under seven, for every calf reared,  $\frac{1}{4}d.$ ; for every one killed,  $1d.$ ; for every one sold, the tenth penny; and if seven or above, to give one in satisfaction of tithes of them, and of all dry cattle, was held bad; for if no calves, but dry cattle, nothing is paid; and it is uncertain whether there will be calves or not; so it is an uncertain thing for a certain duty. A modus is bad where an uncertain thing is to supply the place of a certain duty,—as where one prescribed to pay yearly by the hands of two persons inhabiting such houses,  $\frac{1}{4}d.$  to the vicar in satisfaction of all tithes; for the houses may decay, or none may live in them, and so nothing shall be paid. Where a custom was alleged, that the inhabitants had used to till and sow their lands, and had used to be discharged of their tithes of rakings after the shocks were carried away; *Coke*, for the parson, dared not demur, but traversed the prescription.

**S**OAM, parson of the church of Sherring, in Essex, libelled in the spiritual court against Perry, for the tithes of green tares, eaten before they were ripe, and for the tithes of the herbage of dry cattle, and for tithes of sheep bought and sold, and for churchings and burials. Perry prayed a prohibition, and in his surmise, as to the green tares, he said, that they had used, time out of mind, &c. in the same parish, in consideration that they had not sufficient meadow and pasture for their milch kine and draught cattle, to pay for the tithes of the ripe tares, the tenth shock; but for their green tares, which are eaten up before they are ripe, in consideration that they gave them to their cattle, they had used to be discharged of any tithes thereof; and the truth was, that 400 acres of lands within the said town, had used to be ploughed and sowed every year by the labour of draught cattle, and industry of the inhabitants; in consideration of which, and that in the said parish there was not sufficient meadow nor pasture for their draught cattle, they had used to be discharged of the tithes of green tares eaten before they were ripe. It was holden by the court that the same was a good custom and consideration, for the parson hath benefit thereby, for otherwise the said 400 acres could not be ploughed; for without such shift to eat with their draught cattle the green tares, they could not maintain their plough cattle; and so the parson should lose his tithes thereof; and for the tithes of the green tares he has the tithes of 400 acres. There was a case lately betwixt the *Lord Howard and Nichols*, where the suit in the spiritual court was for the tithes of rakings; and a surmise to have a prohibition was made, that the inhabitants had used to till and sow their lands, &c. and they had used to be discharged of their tithes of rakings after that the shocks were carried away. And *Coke*, who was of counsel with the parson, durst not demur upon it, but traversed the prescription. — *Wray*, Ch. J. The want of meadow and pasture in the parish is the great matter here; and there is not any mischief here, as if they had surmised that, for want of meadow and pasture, they had eaten their meadows with their cattle. And it was held by the whole court that it was a good prescription. And as to the herbage for dry cattle, he surmised, that every parishioner there which had milch kine and calves under the number of seven, shall pay for every calf he rears, one half-penny; for every one he kills, one penny; for every one he sells, the tenth penny; and if he have seven or above, to give one in satisfaction of tithes of them and all dry cattle. And as to the tithes of sheep bought or sold, he surmised, that they paid for the lamb one half-penny, and for the wool and fleece of the sheep, one penny; and for all sheep bought or sold between the Lady-day and Lammas, to pay fourpence; and to the residue of the year says nothing, nor to the churchings and burials; and for that it was clearly held ill. *Coke* said, the second surmise is not good, for he alleges not that he had calves; for if he have no calves, but dry cattle, he pays nothing; and it is uncertain whether he shall have calves, or not; so it is an uncertain thing for a certain duty. And last term it was ruled

ruled in the lady *Gresham's* case, where one prescribed to pay yearly by the hands of two persons inhabiting in such houses, four-pence to the vicar in satisfaction of all tithes, it was adjudged ill; for the houses may decay, or none live in them; so nothing shall be paid. As to the second, the court said, for the not averring he had calves, it cannot be good; and the other are not to be defended. And therefore, for all, except the first, consultation was granted, and for that they would advise. (1) *Croke*.]

(1) *Croke* says, the court "would advise" above report of *Leonard*, they entertained no as to the 1st point; but according to the doubt upon the subject.

1588.  
HENRY S. SOAM.

T. 31 El. A. D. 1589. C. B.

*Bird v. Adams*. [Anders. 199.] Sav. 100. Moo. 278.

**WILLIAM ADAMS** was attached to answer for suing in the spiritual court after prohibition, &c. which was granted upon suggestion that [Bird] was seized of sixty acres of land in, &c. and that he, &c. for time whereof, &c. had used to pay the tenth sheaf of corn grown there, after it was reaped, in full satisfaction of all grain being upon the said sixty acres, which had been accepted, &c. and that notwithstanding, the defendant had sued the plaintiff in court christian for twenty loads of tithe rakings, although he had received the tenth sheaf of all the corn in the said close made into sheaves, &c.; and the court held that this was not good by prescription, for it is no other than to pay as much as the owner pleases, for he is not bound, but may put as much into sheaves as he pleases, and no more; and then it may follow that for his tenth part he shall have but the third [of his tenth], which is not reasonable. And some of the judges held, that one cannot prescribe to pay part of the tithes in kind, for all the tithes of the same nature, as to pay an apple for the tithes of all his apples, and such like. (1)

(1) *Saville* reports that *Periam* said he had known a bushel of eggs paid in satisfaction of the tithes of all the eggs in a town.

1589.  
The tenth sheaf is no satisfaction for more than the corn of which it is the tithe, and therefore not for the rakings. *Periam* said he had known a bushel of eggs paid in satisfaction of all the eggs of a town. Qu.

H. 31 El. A. D. 1589. B. R.

*Mott v. Hales*. [Cro. El. 123.] Moo. 270.

**DEBT** upon lease for years. The case was—a parson makes a lease to the plaintiff for twenty-one years, after the statute of 13 Eliz. of lands usually let, rendering the ancient rent; the patron and ordinary confirm the lease; the lessee lets part of the term to the defendant; the parson dies—the successor enters and lets it to the defendant, against whom the first lessee brought debt upon the former lease, who pleads the statute of 13 Eliz. that makes all leases void where the parson is non-resident or absent for eighty days, &c. and that the successor has entered, &c.: upon this plea the plaintiff demurred. And it was argued by *Coke* and *Godfrey* that the statute extends not but to the parsons that make the leases, and are non-resident or absent, &c. and extends not to leases of parsons which afterwards die; for such persons cannot be said to be absent which are not *in esse*, especially the statute giving liberty to let land usually let, which shall be vain, being confirmed by the patron and ordinary, if they continue no longer than the parson's life. But it was adjudged that this lease is void by the death of the incumbent, for the justices said that the statute does provide against dilapidations, and for maintenance of hospitality; and therefore provides not only that leases shall be void for non-residency, &c. but by death or resignation; for otherwise dilapidations shall be in the time of the successor, and he cannot maintain hospitality, and so it was adjudged.

Leases of benefices for twenty-one years, shall be void, not only by non-residence for eighty days, under 13 El. c. 10. but by death or resignation of the incumbent.

T. 31 El. A. D. 1589. B. R.

*Gomersal v. Bishop*. [1 Leon. 128.] Cro. El. 136.

**BISHOP** libelled in the spiritual court for the hay; the plaintiff, *Gomersal*, made a surmise that there was an agreement betwixt the said parties, and

An agreement between the ...

1589.

GOMERSALL  
v.  
BISHOP.

parson and any of his parishioners, is good cause for prohibition, for the spiritual court will not allow the plea.

In prohibition a variance between the surmise (which is a writ) and the declaration, is fatal.

and for the yearly sum of seven shillings to be paid by Gomersall unto Bishop; Bishop faithfully promised to Gomersall, that Gomersall should have the tithes of the said land during his life. And upon an attachment upon a prohibition, Gomersall declared, that for the said annual sum Bishop leased to the plaintiff the said tithes for his life: and upon the declaration Bishop did demur in law for the variance between the surmise and the declaration; for in the surmise a promise is supposed, for which Gomersall might have an action upon the case, and in the declaration a lease. But note, that the surmise was not entered in the roll, but was recorded by itself, and the declaration only enrolled. — *Godfrey*. It was resolved in the case betwixt *Pendleton* and *Hunt*, that an agreement betwixt the parson and any of his parishioners, is a good cause to grant a prohibition, if he libel in the spiritual court against such agreement, because the spiritual court cannot try it, and they will not allow such plea. *Curia*, the surmise is as a writ, for which, if variance be betwixt the same and the declaration, all is naught.

Tr. 31 El. A. D. 1589. B. R. *Chapman v. Hurst*. [1 Leon. 151.]

Where the lessee of a rectory agreed with a farmer that for ten pounds per annum during the term for his tithes, the farmer should hold his land without tithes, and without any suit for the same, *Gawdy* held that it was a good discharge of the tithes for the time, and a good composition to have a prohibition upon, and not like a covenant.

**B**ETWIXT *Chapman* and *Hurst*, the defendant libelled in the spiritual court for tithes against the plaintiff, who came and surmised, that whereas he held certain lands, by the lease of Sir Ralph Sadler, for term of years, within such a parish, that the now defendant being farmer of the rectory there, in consideration that the plaintiff promised and agreed to pay to him ten pounds per annum, during the term, for his tithes, he promised that the plaintiff should hold his said land without tithes, and without any suit for the same, and thereupon prayed a prohibition. And by *GAWDY*. The same is a good discharge of the tithes for the time, and a good composition to have a prohibition upon; and it is not like a covenant. See 8 E. 4. 14. by *Danby*. (1)

(1) Ante, 55.

M. 31 El. A. D. 1589. B. R. *Parkins v. Hinde*. [Cro. E. 161.]  
Dy. in M. 43. Noy, 35. *Stile v. Miller*. 1 Leon. 300. Owen, 39. S. C.

A parson leased his glebe for 99 years, with the profits and commodities thereto belonging, rendering a certain rent for all exactions and demands whatsoever, to the rectory therefore belonging: and the question being, whether the lessee should have the close discharged of tithes, it was resolved by the court, that the tithes should not pass by such general words, especially as the rent was but 13s. 4d. for 24 acres of land, it could not be intended that it was reserved for the tithes.

**P**ROHIBITION for suing for tithes of land in Babington, the case was—  
The parson of Babington, 29 H. 8. leased all his glebe land to *Mills* for ninety-nine years, rendering thirteen shillings and four-pence rent, for all exactions and demands. And now his successor sued for tithes of the land, being the glebe land, and upon it the plaintiff sued a prohibition. *Godfrey* moved that the prohibition lies, because the land was let rendering rent, and it is for all exactions and demands; and by that he bars himself and successors of all tithes. But all the Justices *contra*; for *WRAY* said (1), the parson shall have tithes against his lessee, and the words here shall be no discharge; for these tithes arise, and accrue after, and are not things issuing out of the land, but collateral and due *jure divino*; and therefore cannot be discharged but by special words. But if the words had been—as well for tithes growing and arising upon the land, as for other demands—then peradventure it had been a good discharge; but as the case is, it cannot be intended by any words that he reserved the rent for tithes. And so *GAWDY*, J. did conceive, especially as the case here is, the lease being of twenty-four acres of land, and only 13s. 4d. reserved: and afterwards, the same day, they granted a consultation, but they said that the words shall discharge the lessee of all rents and services, but not of suit at court, or such things as are not then in demand.

(1) *Owen*, in his report of this case by the name of *Stile v. Miles*, gives *Wray's* judgment as follows: "That although the land was parcel of the glebe, yet when it was leased out, tithes ought to be paid; and if no rent be reserved, tithes ought to be paid without question; but these may be a doubt where

"the rent is reserved to the true value of the land; but here the rent is of small value, wherefore tithes shall be paid also." *Noy*, who reports the case by the name of *Perkins v. Wilde*, adds, as to the last point, "Sed quære of that diversity."

T. 31 El. A. D. 1589. C. B. Lord *Rich's* case. [Owen, 34.]

**T**HE lord *Rich* was seised of *Hadley park*, and of all the tithes thereof, and paid for the tithes but one buck in the summer, and a doe in the winter, for thirty years past. The park was disparked and turned into arable land, and the parson would not receive this fee buck and doe, but would have tithe corn, and thereupon brought him into the spiritual court, and he brought a prohibition. And *Carus* and *Cattin* said, that he need not pay other tithes but buck and doe; for although they be not titheable, yet may they be paid by composition, and he may not take them, but they are to be delivered to him. And in like manner partridges and pheasants in a garden are not titheable, yet may they be paid in lieu of tithes, and shall be brought dead to the parson; and although there be no park, yet may he give a buck out of another park, and perhaps it may be made a park again.

1589.  
A modus of a buck in summer and a doe in winter, in lieu of the tithes of a park, when disparked, held good; for although there be no park, yet a buck may be given out of another park.

M. 31 & 32 El. A. D. 1589. Scac.

Countess of *Lennox's* case. [2 Leon. 71.] Owen 46.

**I**N this case it was said by *MANWOOD*, Ch. B. that whereas the Cisterians, &c. had a privilege, that they should not pay tithes for their lands, *quas propriis manibus excolunt*, but their farmers should pay tithes: and now by the statute of 31 H. 8. they are dissolved, that the queen and her farmers should be discharged of such tithes as the spiritual persons were: for the queen cannot *excolere*; ergo, her farmers shall be discharged: and so long as the queen has the freehold, her farmers shall have such privilege, although she leases for years, or at will: but if the queen grants over the reversion, then the farmers shall pay tithes.

The Cisterians were privileged to pay no tithes for lands *quas propriis manibus, &c.* by the 31 H. 8. the queen and her farmers should be discharged, as the spiritual

persons were; but as the queen cannot *excolere*, ergo her farmers shall be discharged; and so long as the queen has the freehold, her farmers for years, or at will, shall be discharged. But if the queen sell the land or the reversion to another, then the farmers shall pay tithes.

E. 32 El. A. D. 1590. B. R.

*Bagg and Nelson v. Woodward.* [3 Leon. 257.] 2 Leon. 29.

Cro. El. 188. 249. Owen, 103.

**W**OODWARD libelled in the spiritual court against *Bagg and Nelson*, for tithes of certain lands called *Christian Hill*. The defendant sued a prohibition, and surmised, that one *Pretiman* was seised of the said land; and in consideration of £5 by him paid to the said parson, it was agreed betwixt them, that the said *Pretiman* and his assigns should be discharged of tithes of the land, during his life, and afterwards the said *Pretiman* leased the same to the defendants: upon which, a prohibition was granted.

And it was holden, that the party need not to make proof thereof within six months, for it is not within the statute, because a composition with the same parson: but now a consultation was granted, because the agreement is shown, but no deed of it, which cannot be any discharge: but if it had been for a time, *scil. usque vice*, it had been good; but for life, not. Also, it is not an express grant of the tithes, but only a covenant and agreement, that he shall be discharged; upon which he may have an action of covenant, but not a prohibition.

It was said on the other side, that although without deed, tithes cannot pass in point of interest: yet, by way of discharge, they might.

**Coke.** It was holden betwixt *Pendleton* and *Green*, that upon such words of covenant and agreement, the party should hold the land discharged of tithes; which was denied. For if the grantee of a rent-charge will grant it to the tenant of the land, the same without deed is not good. And there was very lately a case between *Weitbed* and *Pepper*, where it was agreed betwixt the parson and one of his parish, that for twenty shillings rent by the year, the parishioner should be discharged of tithes for twenty years, if he so long lived.

1590.  
A parson agreed by parol with one P. that he and his assigns, in consideration of a sum, should hold his land discharged during the life of the parson. It was held, that the agreement being by parol only without writing it only amounted to a cause of action for F., not for his lessees, and that it did not amount to a release of tithes, for as they cannot be leased without deed, so they cannot be released or discharged without deed. But a sale for that

1590.

BAGG  
and  
NELSON  
v.  
WOODWARD.

year in which the discharge is made, is good without deed, because the parson has for that year, as it were, an interest; and if for years it had been good;

And it was holden, that no prohibition should lie upon it; *a fortiori*, where the estate is for life.

**GAWDY.** In the case of grant of tithes for life, a deed is requisite, but here it is but a covenant for money, &c. See 21 H. 6. 43.

**WRAY.** If it had been for years, it had been good enough; but here is not any contract, but only a discharge for life; which cannot be during his life, without deed. And afterwards, the record was read; which was, that *concordatum et aggregatum fuit* between the parties *pro omnibus decimis* during the time, that the one should be parson, and the other occupier of the said land, that in consideration of £5, the said Pretiman and his assigns should hold the said land discharged of tithes.

**WRAY.** The same is no contract, but a promise, for he does not grant any tithes. Afterwards a consultation was awarded.

and it was said to be, in this case, no contract, but a promise, for no tithes were granted.

T. 32 El. A. D. 1590. B. R.

Wickham, Bishop of Lincoln v. Couper. [1 Leon. 248.]

Cro. El. 216. 1 Gw. 163.

Lands held by a bishop and his predecessors, by prescription, discharged of tithes, though severed from the bishopric for a time, shall, upon a regrant to the bishop and his successors, be again discharged.

**T**HE Bishop of Lincoln sued a prohibition against Cowper, who had libelled against him in the spiritual court for tithes out of the manor of D. And the bishop suggested, that he and all his predecessors had been seised of the said manor, and that as long as it was in their possession, it had been discharged of tithes, and showed, that in the time of E. 6. the said manor was conveyed to the Duke of Somerset in fee, and afterwards was regranted to the bishop and his successors; it was moved, that the prescription was not good, because *de non decimando*: and admit that the prescription be good, the same is interrupted by the seisin of the Duke of Somerset; and although the manor be reassured to the bishop of Lincoln, yet the prescription is not revived; as homage ancestrel if it be once in a foreign seisin, although it be reassured, yet it is not revived. But by **WRAY**, **GAWDY**, and **FENNER**, the prescription is good in the case of a spiritual person, but not in the case of a common person. And they all were clear of opinion, that the prescription is not gone by this interruption, for tithes are not issuing out of the lands, neither can unity of possession extinguish them, neither are they extinguished by a release of all right of land, &c. See for this case, Co. 11. part of his Reports in the case of *Pridle and Napper*.

M. 32 &amp; 33 El. A. D. 1590. B. R.

Nash v. Mollins. [1 Leon. 240.] Cro. El. 206. 1 Gw. 162.

Issue was joined to try whether certain lands had been held by a prior and his predecessors time out of mind, before and at the dissolution discharged of tithes; it appeared by the evidence of old persons who were produced, and remembered the time of the monasteries, that no tithes were paid for the lands there or from thence; but no cause of discharge was shewn, whether by unity, real composition, or any other way which was excepted to; it was held, that a spiritual man might prescribe in *non decimando*, and that it was well enough, although the special matter of discharge did not appear, for the court ought to take it that it was by lawful means, for the stat. 31 H. 8. is, that the King shall hold discharged as the abbot, &c. and if he held it discharged, *non refert* by what means, for it shall be intended a lawful discharge of tithes *tempore dissolutionis*.

**N**ASH and Usher sued a prohibition against Mollins, for that the defendant had libelled against them in the spiritual court, for tithes of wood, growing in Barking Park in Essex; the other surmised, that the lands were parcel of the possessions of the prior and convent of Christ Church, and that the said prior, and his predecessors, time out of mind, &c. had held the said lands discharged of tithes, and held them so at the time of the dissolution, &c. and the other part traversed it, whereupon they were at issue, if the prior, &c. held the land discharged, *tempore dissolutionis*, &c. And now on the part of the plaintiff in the prohibition, certain old persons were produced, who remembered the time of the monasteries, and that they did not pay any tithes then, or from thence: exception was taken to the suggestion by *Coke*, that here is nothing else than a prescription, *de non decimando*, for here is not set forth any discharge, as composition, unity of possession, privilege of order, as *templarii*, *hospitarii*, &c.



&c. — FENNER, J. Spiritual persons may prescribe in *non decimando*, for it is not any prejudice to the church. — WRAY. Although it is not set down the special manner of discharge, yet it is well enough, for we ought to take it that it was by a lawful means, as composition, &c. or otherwise: for the statute is, that the King shall hold discharged as the abbot, &c. and we ought to take it, that it was a lawful discharge of tithes *tempore dissolutionis*: and afterwards the jury found for the plaintiffs in the prohibition: but no evidence was given to prove, that the defendant did prosecute in the spiritual court, contrary to the prohibition.

1590.

NASH

v.

MOLLINS.

E. 33 El. A. D. 1591. B. R.

*Green v. Penilden.* [Cro. El. 228.] 3 Leon. 265. 4 Gw. 1568.

1591.

**P**ROHIBITION for suing for tithes, was prayed; for that he had pleaded in the spiritual court, that the said P. was not lawful incumbent, but one Taylor. Which plea they would not allow the parishioner to plead to the right of the incumbency; and it was granted *per curiam*; for he being the tenant of the land, may plead it, or else he shall be twice charged for his tithes.

If the spiritual court refuse a plea to the right of incumbency, the tenant of the land may have prohibition, else he would be twice charged for his tithes.

E. 33 El. A. D. 1591. B. R.

*Stransham v. Cullington.* [Cro. El. 228.] 3 Leon. 129.

**P**ROHIBITION for suing for tithes, as proprietor of the rectory of Cednam, and shewed, that the tithes did grow *inter loca decimabilia* of that parish, as he ought to do, and that must be first proved: the defendant there pleaded, that the land was in the parish of Ashpole, and that he had paid the tithes there; and upon this they are at trial, and upon this he had a prohibition: (1) for the bounds of the parish are triable by the common law. And upon another prohibition for tithes, unity of possession in the time of the abbot, at the time of the dissolution was surmised, and proved by the testimony of Mr. Hynde and another, who said, they had seen a deed of appropriation of the parsonage to the abbot; for which they verily thought, that there was an unity of possession at the time of the dissolution. And this was ruled no proof, for it may be intended not to continue, and a consultation was granted: but they said, that hearsay shall be allowed for a proof.

Boundaries of parishes are triable by the common law, not by the spiritual, for the Pope has ordained, that tithes shall be paid within the parish, but has not distinguished parishes. Hearsay is allowed for proof of a suggestion.

(1) FENNER. The pope has not distinguished parishes, but has ordained, that tithes shall be paid within the parish.

T. 33 El. A. D. 1591. B. R.

*Knightley v. Spencer.* [1 Leon. 331.] The case *de ratione*.

**I**N a prohibition betwixt Knightley and Spencer, the case was, that Ph. abbot of Evesham, and all his predecessors time out of mind, &c. were seised as well of the rectory impropriate of B. in the county of N. and also of the manor of B. in the same parish, &c. until the dissolution of his house; and that *by reason thereof* the said abbot and all his predecessors had holden the said manor discharged of payment of tithes until the dissolution, &c. and shewed the branch of the statute of 31 H. 8. And that the said abbot did surrender the possessions of the said house to the King, and that the King held the same discharged of the payment of tithes; and that afterwards the King granted unto the ancestor of Knightley the said manor, and to the ancestor of Spencer the said rectory, and although the plaintiff ought *de jure* to hold the said manor discharged of tithes, yet the defendant sued him in the spiritual court, &c. To which the defendant, confessing the impropriation, pleaded, that the said abbot was seised, *ut supra*; but that before the making of the said statute of 31 H. 8. the said abbot demised *decimas rectorie predict.* to one Spencer for 70 years, who made the defendant his executor, and died, and that at the time of the said demise, and dissolution of the said abbey, one Goodman and others were possessed of the said manor until the year 1585, which was

For a prohibition it was alleged, that an abbot and his predecessors had been seised, time out of mind, as well of a manor as a rectory impropriate in the same parish, until the dissolution, and that *by reason thereof*, the said abbot, &c. had held the said manor discharged of tithes until the dissolution, and then shewed the

1591.

KNIGHTLEY  
v.  
SPENCER.

branch of 31 H.

8. The defendant confessing the impropriation, pleaded, that before the 31 H. 8. the abbot demised the tithes of the rectory, and that at the time of the dissolution, tithes of the manor were paid to such lessee *absque hoc* that the abbot and his predecessors held the said manor quit of the payment of tithes time out of mind, &c. Upon demurrer to this, *Coke* argued, that the traverse was bad, for it traversed their conclusion; for the plea was an argument, where-soever is unity time out of mind, &c. there is a discharge of tithes; but in the abbot was such a unity, *ergo*, he held discharged of tithes: on the other side it was argued, that the traverse was good, and that unity was no discharge within the statute: but the case was adjudged.

the year before the suit began in the spiritual court, and that at the time of the dissolution he paid tithes for it, and now the plaintiff refuses to pay, &c. *absque hoc*, that the abbot and his predecessors held the said manor quit of the payment of tithes time out of mind, &c. upon which the plaintiff did demur in law. *Coke*, for the plaintiff, that this unity of possession is a discharge within the statute of 31 H. 8. the words of which are, that the King and his assigns shall have and enjoy the lands discharged and acquitted of tithes, as freely as the said abbot held the same at the day of the dissolution: and see before, whereas divers abbots were acquitted and discharged of, and for the payment of tithes; for the statute doth not intend a real discharge, as by composition or such manner, which is not here, but only a suspension, which is not any discharge in law; and yet in speaking of discharge ordinarily, an actual discharge is understood, as if I be bound by obligation to discharge one of such a bond, it is not enough to pay the money, but I ought to procure an actual discharge where it is put generally, but where it is put *secundum quid*, as it is here referred to the dissolution, a suspension is a discharge intended in the said statute; but where the statute is indefinite, there an actual discharge is understood, but restrained to a time a suspension suffices, and truly it is a discharge within the intent of the statute; for if the statute shall be intended of an absolute discharge, and a discharge in law only, the statute had been superfluous, for the law said so much before; for without such provision, the King and his assigns held discharged from payment of tithes. But the makers of the statute knew well enough, that the abbot might have such discharge by divers means, and it should be infinite for the party interested to inquire of them all; and therefore they did enact briefly, that if at the time of the dissolution they were in any manner freed of payment of tithes, the same should be sufficient, and so here is not any wrong unto any, for the parson had all as he had before, and the same is like to the case betwixt *Wharton* and *Morley*, 7 Eliz. in the Exchequer, the report of which Mr. Plowden communicated unto me, and it was upon the statute of 1 E. 6. cap. 14. of Monasteries, that all grants made to the King by any provost, governor, &c. of any manor, &c. shall be good, &c. and the case was, that a prebend of the church of York surrendered to the King, but the surrender was never enrolled, and yet adjudged good upon the statute; for if it was a lawful surrender, the same had been good of itself, without any aid of the statute, which was made to supply insufficient assurances, and so in our case for the cause aforesaid, and it should be injurious to drive the jury to inquire of the manner of the discharge, if it were by composition upon the foundation, or by dispensation of the pope, as *cisterc. templari*: and here the plaintiff has declared of an impropriation before time of memory; and so before the council of *Lateran*, which was within these 400 years; and 25 Eliz. there was a *Sussex* case, where the plaintiff declared as here, but they would not proceed; and see *Dyer*, 10 Eliz. 277, 278. (1) The prior of St. John has privilege from Rome, that he shall not pay tithes for any lands *quas propriis manibus aut sumptibus excolant*, but their farmers have paid tithes; and it was holden, that in the hands of the farmers tithes should be paid, but after the term ended the patentee should hold discharged, so as the statute hath a favourable construction upon this point. Now it is to see, if the lease of the rectory by which the defendants claim be good or not, and then admitting that tithes are due in this case, yet if his lease be void, he shall not have a consultation, especially if it appear upon his own shewing, as it was holden in a Hampshire case betwixt *Sutton* and *Dowze*, which see Mich. 25 & 26 Eliz. and in that case the lease is void, for it was made within a year after the statute of 31 H. 8. the January before, and the statute in April after, for he has not averred, that the usual rent is reserved, nor that the land was usually let to farm, for which leases otherwise made within the year are absolutely void by the said statute: but it will be objected, that this matter shall come in of our part, and it is sufficient for them to plead the case; but it is not so, as it was lately agreed in *Heydon's* case in the Exchequer, where the case was, that the warden and canons of the college of Otery, leased certain lands to Heydon for years, and he in pleading of his lease did not show that

that the ancient rent was reserved, and therefore naught; and so was the opinion of the justices of the Common Pleas, in the case betwixt the Lord Cromwell and All-Souls College, upon the statute of 18 Eliz. cap. 6. upon a branch of it, by which it was provided, that the third part of the rent reserved upon any lease should be paid in corn, &c. and the leases made to the contrary should be void; and in an *ejectione firmæ* brought upon such lease, because it was not shewed in the declaration, that the corn was reserved according to the statute, judgment was arrested, and we need not to plead the statute; for although the statute be particular, yet because the King has interest in it, it shall be holden in law a general act, and the judges shall take notice of it, although it be not alleged by the party, as it was ruled in the Lord Barclay's case, 4 Eliz. Plow. 231. but if such rent was reserved, yet the lease cannot be good, for the king cannot have his rent, because it is not incident to the reversion, nor passes by the grant of the reversion; for it is not a rent, but rather a sum due by reason of contract, which see 30 Ass. 6. A man leases a hundred, rendering rent, or grants a rent out of a hundred, the same is not a good rent, but merely void; for a hundred is not manurable, nor can be put in view, nor does any assize lie of such rent. See 9 Ass. 24. and in 20 Eliz. in the case betwixt Corbet and Cleer, the dean and chapter of Norwich leased a parsonage and common of pasture, rendering rent, 1 E. 6. they surrendered their possessions to the king, and afterwards the king granted the parsonage without speaking of the common of pasture. It was holden, that the patentee of the parsonage should have all the rent, and no apportionment should be in respect of the common; for all the rent issues out of the parsonage, and nothing out of the common: so here, for tithes are not an hereditament, which can support a rent within this statute, for which cause the lease is void: Also he said, that the traverse of the defendant was not well taken, for the plaintiff has said, That time out of mind, &c. the Abbot and his predecessors were seised of the rectory and manor aforesaid, *simul et semel*, and *ratione inde*, was discharged, &c. at the time of the dissolution; the defendant traverses *absque hoc*, that the Abbot and his predecessors held discharged of tithes time out of mind, &c. which is not good, for he has traversed our conclusion; for our plea is an argument, wheresoever is unity time out of mind, &c. there is a discharge of tithes, but in the Abbot was such an unity, *ergo* he held discharged of tithes, as 21 E. 3. 22. In a *præcipe quod reddat*, the tenant says, that the land in demand is parcel of the manor of D. which is ancient demesne, and, &c. to which the plaintiff says, That it is frank-fee, and the same was not good, for he denies the conclusion; but he ought to plead to the nature of the manor, that it is not ancient demesne, or that the land in demand is not parcel of it. Another matter was, because it is pleaded *fuit in tenura et occupatione* of Goodman and others; but he did not shew by what title, disseisin or lease, or other title, &c. Buckley contrary. And he said, This unity of possession is not any discharge of tithes by the said statute; and as to the case cited before, of 3 Hen. 7. 12. where tenant in tail of a rent enters upon the tenant of the land, now is the rent suspended, and then after when he makes a feoffment in fee, by that feoffment the rent is extinguished, which was but suspended at the time of the feoffment; and therefore some have holden, that if after such entry he make a lease for life of the land, that his rent or seignory is utterly gone *in perpetuum*, for by the livery all passes out of him, which he said cannot be law; and so it seemed to GAWDY, Justice, Then upon such feoffment with warranty he could not vouch as of land discharged of the rent generally, but as of land discharged at the time of the feoffment, which proves that the suspension is not a discharge, for it was suspended before the feoffment, and discharged by the feoffment, and so suspension is not a discharge, *à fortiori* in the case of tithes, for in the case of common, and rent, although they are suspended so as they cannot be actually taken, yet they are to some intent *in esse*: as where lands holden of other lords are in the hands of the King for *primer seisin*, by reason of prerogative, and during such seisin of the King the lord gets seisin, the same is a good seisin, notwithstanding that it was suspended so as he could not distrain. And also in assize of rent, damages as to the rent out of the land shall be recouped, therefore the rent in

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some sort is *in esse*, and *a multo fortiori*, this tithe (which is a thing of common right) shall be *in esse*, but goes with the land, and therefore, by unity of possession, shall not be suspended, 35 Hen. 6. He who has liberty of warren in the lands of another enters into the land, the warren is not suspended, nor by feoffment of the land extinct; and in this case upon the matter, during the unity of possession the tithes were paid, although not in specie. Also the abbot had the tithes as parson of B. and the land as abbot, and therefore no suspension, for the tithes were always *in esse*, although not taken in the manner as tithes commonly are, but by way of retainer, 22 Edw. 4. 44. A writ of annuity is brought against a prior, and it appeared, that the prior and his predecessors had used to pay the annuity as parson of D. and not as priors, which parsonage was appointed to the said priory time out of mind; and in the writ the defendant was named prior only, and not parson, and therefore the writ was abated. See 14 Edw. 4. 4. 10 Hen. 7. 5. In an action of waste. So *Bracebridge's case*, 14 Eliz. Plowd. 420. The case put by *Catline*, If the parson, patron and ordinary make a lease for years, and afterward the lessee become their incumbent, the term is not extinct, for he has the term in his own right, and the inheritance in the right of his church, which see 30 Hen. 8. Dyer 43. (1) A parson purchases, and after leases his parsonage, he himself shall pay tithes, notwithstanding this unity; and as to the reason of the other side, that if such discharge of tithes be not intended by the statute, but only a discharge in law, the statute should be in vain, the same is not so; for if the abbot had been discharged by way of release or composition, the monastery being dissolved, the appropriation had not been good, if it had not been supported by the statute, and then the release and composition of no force, and the King should not take advantage of it, but by this statute; and as to *Wharton's case* before cited, the same cannot be law, for it has been held upon the statute of 18 Eliz. of Confirmations, That if an infant make a lease to the King, the same is not made good by the statute, for the said statute extends to imperfections in circumstances, and not in substance. And although the lease be not good, yet because the matter of the surmise is naught, although our bar be naught, a consultation ought to be granted, also our lease is well pleaded, and if such defect be in it, as has been objected, the same ought to come in by plea on the other side; and it is not like *Heydon's case*, for there it was found by special verdict; nor to *Cromwell's case*, where such defect was in the declaration, and so no ground of action. As to the traverse it is good enough, as if special bastardy be pleaded against one born before the marriage, and so bastard, the other party shall traverse generally the bastardy, and not the special matter; but for the principal matter, in this unity of possession, divers rules have been. 5 Eliz. in the common pleas, (2) the case was, An abbot had a manor within the parish of D. and a composition was made between the parson of D. and the said abbot, that the parson should have yearly certain loads of wood, out of thirty acres of the said manor, for, and in recompence of all the tithes of wood there, afterwards the parsonage was appropriated to the said abbot; and afterwards the house was dissolved, and the manor granted to one, and the rectory to another; and it was held, that the portion of the tithes was removed, for he had them, *scil.* the manor and the tithes, in several rights. And MANWOOD, Ch. B., and PERIAM, J., to whom a case depending in the chancery was referred, concerning the discharge of tithes by unity of possession, delivered their opinions: That *such an unity* is not any discharge within the said statute. It was adjourned.

(1) Ante, 50.

(2) Moo. 50. ante, 58.

M. 33 & 34 El. A. D. 1591. Scacc. *Langley v. Haynes*. [Moo. 302.]

In an action of debt on 2 E. 6. the declaration stated, the statute made 2d Nov. 2 & 3 E. 6. and judgment was arrested after verdict, for a day cannot be in two years of a King's reign.

IN the plea side of the exchequer, debt was brought, upon the 2 Edw. 6. for treble damages, for not setting out tithes; the declaration recited the statute made 2d Nov. Anno 2 & 3 Edw. 6. whereas, in truth, this day could not

not be in two years of the said King, and for this reason, upon my motion, the judgment was arrested after verdict. Also, it was an action of debt upon the statute, and the defendant pleaded *not guilty*, and not *nil debet*, and yet adjudged good.

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M. 33 &amp; 34 El. A. D. 1591. C. B.

*Dullingham v. Kyfeley*. [Cro. El. 251.] 1 Leon. 58.Parson of *Facknam's* case.

**PROHIBITION.** And surmised that K. the defendant being proprietor of the parsonage of Sapston, in Suffolk, had sued *Curtis* in the court christian, for tithes of certain land in the parish of Sapston, the plaintiff being parson of Honington, in the same county, came in *pro interesse suo*, and alleged there is a custom within the parish of Sapston, that the parson of Honington shall have thirteen cheeses for the tithes of these lands in Sapston, and that in recompence thereof, the parson of Sapston had thirteen cheeses for the tithes of such lands in Honington, and upon this matter he grounded his prohibition, alleging that he had pleaded this in the spiritual court, and it would not be received. *Tanfeld* moved, that the prohibition lies not, for it is for one that is not sued, and it is not reasonable that he should stay the suit of a stranger. Also here the very right of tithes is to come in question, and not the bounds of the parish, and so is not triable here, as 35 H. 6. 39 & 47. (1) and 14 H. 4. 17. are. (2) *Coke* contra, for the right of tithes is not here in question, but a *modus decimandi*, and so is triable here; and this was a good matter for the parishioner to plead, and that which the parishioner may plead; he that comes in *pro interesse* may plead. *GAWDY*, the parishioner might well plead it; but when the parson of another parish will plead it, by this the right of tithes will come in question between the two parsons; 20 Hen. 6. 18. the case is, that when the right of tithes is in question between two parsons, this court has no jurisdiction, for the trial of the right, &c. belongs to the civil law, 31 Hen. 6.; and afterwards the court was of opinion to grant a consultation. *Sed adjournatur*.

*Prohibition.*  
*Tithes Portionist.*  
The parson of S. sued a parishioner for tithes of certain land in the spiritual court; the parson of H. came in *pro interesse suo*, and for a prohibition surmised that there was a custom in the parish of S. that the parson of H. should have thirteen cheeses for the tithes of the land in S. and in recompence thereof the parson of S. had thirteen cheeses for the tithes of certain lands in H. The court

thought a consultation should be granted, for though the parishioner might well plead the *modus*, yet between the parsons, the very right to tithes was in question, and not the bounds of the parish, and so triable in the spiritual court.

Where the right to a portion of tithes is in dispute between two parsons, and not the boundaries of a parish, prohibition does not lie.

(1) Ante, 38.

(2) Ante, 29.

H. 34 El. A. D. 1592. B. R. *Wentworth v. Crispe*. [Moo. 912.]

1592.

**IT** was adjudged that debt lies in the temporal courts for not setting out tithes. And husband and wife may join, if the husband be seised or possessed of the rectory in the right of his wife, or in jointure with her. And upon a writ of error the judgment was affirmed.

*Baron and feme*  
may join in an action on 2 E. 6. if the husband be seised of the

rectory in right of his wife, or in jointure with her.

E. 34 El. A. D. 1592.—B. R.

*Green v. Piper*. [Cro. El. 276.] Moo. 912. 1 Gw. 164.

**IT** was held by the justices, that a house in London, which was part of the possessions of a priory that was discharged of paying tithes of their possessions, yet by the statute of 37 Hen. 8. 2. shall be charged for tithes, according to the ordinance there; for before that statute no dwelling-house was chargeable for tithes, because no profit ariseth of it; and only noblemen's houses are excepted; and P. 35. it was adjudged accordingly, and a consultation was granted.

By the common law no tithes are payable for houses. Houses in London, though part of the possessions of one of the greater abbays, shall

34 El.

pay tithes by 37 H. 8. 2. for no houses are excepted in that stat. but those of noblemen.

1592.

Tithes are determinable in Chancery.

84 El. A. D. 1592. Canc. *Moone v. Bond.* [Toth. 124.]

**M**Y Lord declares, that matters for tithes are determinable in this court.

E. 34 El. A. D. 1592. B. R.

*Scory v. Baber.* [Cro. El. 276.] 1 Gw. 163.

*Custom.*

Finding straw for the body of the church is no good modus in discharge of tithes of hay, unless it be shewn that the parson had a benefit from it; but if the straw had been given to the parson, and he bestowed it on the body of the church, or he had a seat in the body of the church, it had been otherwise.

**P**ROHIBITION against the proprietor of the church of South Kirby, in the county of York, who sued for tithes of hay; and surmised, that time out of mind, the owner of these lands had found straw for the body of the church, in discharge of all tithes of hay. *Coke* moved, that this is no cause of discharge, for the parson was not chargeable with it, nor had any benefit by it; and in *Hill*. 30 El. (1) it was ruled, that where one prescribed that he had used to pay the parish clerk his wages, in satisfaction of tithe hay, this was no discharge, and of that opinion was the whole court; but if he had alleged, that he gave the straw to the parson, and he bestowed it in the body of the church, or that the parson had a seat in the body of the church, it had been otherwise; and thereupon consultation was granted.

it on the body of the church, or he had a seat in the body of the church, it had been otherwise.

(1) Ante, 93.

E. 34 El. A. D. 1592. B. R.

*Lyss v. Watts.* [Cro. El. 277.] Moo. 908.

If a consultation has been granted by one court of competent jurisdiction, another court will not grant a second prohibition, for the same cause. Tithes are not due for quarries of slate or stone.

**P**ROHIBITION upon a libel for tithes of slate-stones. The defendant prayed a consultation, for that heretofore the plaintiff sued a prohibition for the same cause in chancery, and upon the same libel, and thereupon a consultation was granted; for otherwise he shall be infinitely vexed, that when one court grants a consultation, he shall sue a prohibition in another court. And of this opinion was all the court, that he shall have a consultation, if before a consultation was granted in another court upon the same cause. And it was here held by the Justices, that no tithes are due of a quarry of slate or stone, for the parson may have tithes of the grass or corn which groweth upon the surface of the land in which the quarry is.

E. 35 El. A. D. 1593. B. R.

*Sherwood v. Winchcombe.* [Cro. El. 293.] 1 Gw. 164.

1593.

Tithes cannot be prescribed for as parcel of a manor; therefore though one may prescribe to have *decimam partem granorum* as parcel of a manor, yet such a prescription for *portionem decimarum* is bad.

**P**ROHIBITION. The plaintiff declared that whereas King Henry VIII. was seized of the manor of D. of which a portion of tithes of such a place was parcel time out of mind, &c. conveyed it to him, and he was impleaded in the court christian for these tithes, &c. and upon this declaration it was demurred; for tithes cannot be parcel of a manor, for they are things spiritual, for which at common law a common person cannot sue, and being of a distinct nature, cannot belong to a manor, 10 Ed. 3. 5. 9 Hen. 7. 46 Ed. 3. *catalla felonum* cannot be parcel of a manor, and although the King may have tithes, yet he hath them not as a lay tee. And of that opinion were all the Judges, that he cannot prescribe for tithes as parcel of a manor; but if he had prescribed to have *decimam partem granorum*, this had been good, but not *portionem decimarum*, and a consultation was granted. V. 2 Co. 45. b.

M. 35 & 36 El. A. D. 1593. B. R.

*Sherburne v. Clarke.* [Cro. El. 306.] Moo. 907.

Where the right to tithes is in question between parson and vicar, the common law courts will not

**P**ROHIBITION against the parson of T. for suing for tithes of wood of the park of Thachsty, and surmised, that he and all those, &c. time out of mind, &c. had used to pay to the vicar of T. ten shillings yearly, for all tithes of wood growing in the said place; and the proofs were, That he paid ten shillings for discharge of tithe-wood in the park, and two other places. And *Coke*, Solicitor, moved for a consultation; first, because he surmised he

paid

paid so much to the vicar in discharge of tithes; and by this the right of tithes, between the parson and vicar, is to come in question, which is merely triable in the court christian, as it hath been twice adjudged in this court, Mich. 28 & 29 Eliz. inter *Hunt and Bush*, (1) and E. 30 & 31 Eliz. the lady *Gresham's* case. (2) Second cause, the proofs do not prove the prescription; for the prescription is to pay ten shillings for the tithes of the wood, &c. and the proofs are of that park and two other places. And of that opinion was the court, for both points, but it was adjourned, and no consultation awarded.

(1) Ante, 90.

(2) Ante, 94.

H. 36 El. A. D. 1594. B. R.

*Woodroffe and Cooke v. Bartue* [Owen, 13.]

**W**OODROFFE and Cooke brought a prohibition against Bartue; the case was thus.

The abbot of Langley let land to one *Raston*, for ninety-nine years, who let the same to Woodroffe for sixty years, who granted parcel of the said land to Cooke during the whole term. And Bartue libelled against them both in the spiritual court for tithes, and they joined in a prohibition.

*Godfrey*, They may not join in a prohibition, for by the statute of 34 H. 6. 13. if two men are sued in the court christian for slander, battery, &c. which are several in themselves, there they cannot join in a prohibition; but where they are sued for the finding of a lamp, &c. by reason of their land, there they shall join; but in this case the tithes are several. But it was resolved,

1. That their joining in the prohibition was good enough.
2. That the death of one of them shall not abate the writ of prohibition, because nothing is by them to be recovered, but they are only to be discharged of tithes.

E. 36 El. A. D. 1594. B. R.

*Tryor v. Betts*. [Cro. El. 317.] Moo. 907. *Fryer v. Bestney*.

**P**ROHIBITION for suing for tithe-hay in Chartres, and surmised that the defendant is parson imparsonce of the parsonage of Chartres, and that there was a vicar of Chartres, of which the defendant was patron, &c. and that time out of mind, &c. he had used to pay to the said vicar in full satisfaction of the tithes of hay of the place, where, &c. six shillings and eightpence per annum, and the pasturing of a horse in the same place. And *Godfrey* moved, that it was no good surmise, for by it the right of tithes came in question, to whom they were to be paid, to the parson or vicar, as 31 Hen. 6. and 6 Ed. 4. are, and *Bush's* case in this court. (3) *GAWDY* and *POPHAM*, where the right of tithes is to come in question, this shall be tried in the court christian, and it is no plea, he has used to pay the tithes to the vicar, for then he confesses he ought to pay tithes; but the question was who should have them; and this shall be tried in the court christian; and that was the reason in *Bush's* case, for there he pretended he was to pay tithes in specie: but here is only a *modus decimandi*, which though he pleads it to be to the vicar, in discharge of tithes, yet it is good, for otherwise there will be a great mischief, for the spiritual court will not allow a plea of *modus decimandi*, but only of payment of tithes in kind; and they will not allow him to plead the interest of the vicar, nor payment to him for discharge, but he ought to come in *pro interesse*; and if he will not come, but collude with the parson, to charge the parishioner to pay tithes in specie, he shall be charged to pay other tithes than he has used, and therefore the common law shall aid him, and especially as this case is, as it was moved by *Tanfield*, that the defendant is patron of the vicarage, and the vicar, in consideration of these tithes, discharges him of all spiritual care and charge. *FENNER* and *CLENCH* inclined to this opinion, *Et adjournatur*.

(3) Ante, 90.

1593.

*SHEEDBURN*  
v.  
*CLARKE*.

interfere, it being properly triable in the spiritual court.

1594.

Where a libel is against two they may join in a prohibition, and the death of one shall not abate the writ.

Though the right to tithes between parson and vicar shall be tried in the spiritual court; yet where a *modus* was the subject of dispute it was doubted whether a prohibition should go, as that court will not allow a *modus*. Besides, the spiritual court will not allow one to plead the interest of the vicar, nor payment to him in discharge of tithes claimed there by a rector, but the vicar ought to come in *pro interesse suo*; therefore the common law shall aid, if he collude and refuse to come.

E. 36 El. A. D. 1594. B. R.

1594.

*Rame's case*, Mus. Brit. MS. Hargr. No. 50. 46, b. (1) 1 Gw. 165.

Trees once privileged as timber, shall not render tithes for the loppings, though cut every fourteen or fifteen years. *Popham* said that tithes might be paid for the loppings and yet the tree be privileged, but that must be by reason of usage: as if a man lop a tree which is under the age of twenty years and not timber at the time of the lopping, if it become timber and above twenty years of age, and it had used to be lopped every twelve or fourteen years, it shall pay tithes, but only by reason of the usage.

ONE *Rame*, parson of a church in Essex, libelled in the spiritual court for tithe wood, viz. the branches of pollards, and alleged that they had used to be lopped every fourteen or fifteen years. And the defendants, in the spiritual court, brought a prohibition, and alleged, that the body of the trees, for which he libelled for the tithes, was timber, and therefore they ought not to pay tithes for the loppings. And so was the opinion of the court; for the body being privileged, that which comes from the body shall be privileged also, unless there be a usage to the contrary. For by *POPHAM*, C. J. tithes may be paid for the loppings, and yet the bodies be privileged, but this must be by reason of usage; as, if a man lop a tree which is under the age of twenty years, and not timber at the time of the lopping; if, afterwards, the tree become timber, and above twenty years of age, and it had used to be lopped every twelve or fourteen years, it shall pay tithes; but this shall be by the usage. And he said, there were but few trees in England of this nature.

(1) "Reports of cases in B. R. and Ex-Elizabeth." See Catalogue of Hargr. MSS. chequer from the 34th to the 39th of Queen London. 1818.

T. 36 El. A. D. 1594. B. R.

*Hungerford v. Howland*. [Dy. in M. 43.] 1 Gw. 118. n. a.

A portion of tithes will pass by the word hereditaments.

IN an action of debt the condition was, that the defendant should suffer the plaintiff, &c. quietly to enjoy his manor of D. in the parish of S. (where the defendant was parson) and all his other lands, tenements, and hereditaments there in such and the like sort as the father of the plaintiff, &c. enjoyed, &c. without interruption, suit, or denial, &c. The defendant pleaded condition performed; the plaintiff replied, that his father, for the space of, &c. before, was seized of the said manor of D. and of a portion of tithes, by reason whereof he held the land discharged, and now the defendant has libelled against him in the spiritual court, &c. Resolved, that the condition was broken; for, notwithstanding the unity of possession, the manor and the portion of tithes of the manor continue several, and both descend to the plaintiff, so that at the time of making the obligation, and afterwards, the manor is discharged of tithes; wherefore judgment was entered for the plaintiff, especially because of the word hereditament in the condition.

T. 36 El. A. D. 1594. B. R. *Folcot v. Ridge*. [Cro. El. 333.]

Issue upon a modus of four-pence in lieu of tithe-hay on fifteen acres of land. The jury found the modus, but that part of the land was never mown; held that this verdict was for the plaintiff, for both parties were agreed that all the land had been mown; and the finding contrary to it is void.

PROHIBITION for suing for tithe-hay upon fifteen acres of land, ten acres of meadow, and seven acres of pasture, and surmises, that he and all those, &c. time out of mind, &c. had used to pay four-pence yearly in satisfaction of all tithes of hay cut there, &c. and issue upon it; the jury find the prescription, but that part of the land was never mowed, but shew not what part is *certo*. The question was, if this verdict be certain enough, and for whom it was found, and it was adjudged for the plaintiff; for both parties are agreed, that all the land had been mowed, and the finding contrary to it is void; and the verdict is certain enough.

That this verdict was for the plaintiff, for both parties were agreed that all the land had been mown; and the finding contrary to it is void.



T. 36 El. A. D. 1594. B. R.

*Higham v. Best.* [Owen. 58.] & 74. [Cro. El. 462.(1)] 4 Gw. 1568.

1594.

**I**N an action of trespass by the parson of Wickhambrooke in the county of Suffolk, against the vicar of the same place, for taking of tithes, on the general issue the jury gave this special verdict:

That the place where, &c. was a place called B. the freehold of I. S. and parcel of the manor of Badmanshall, and found that the pope as supreme ordinary, heretofore made such an endowment to the vicarage in these words; *volamus quod vicarius, &c. habeat tertiam partem decimarum Bladorum & Feni quomodocunque pervenientem de manerijs de Badmanshall.*—Owen.

And whether the vicar thereby should have the tithes of the third part of the demesnes, and of the freeholders also, was the question. And, after argument at the bar, it was resolved by POPHAM and FENNER (for the other justices were not in court) that the vicar should have tithes as well of the freeholders, as of the demesnes. For FENNER said, that an endowment is to be construed according to the intent of the parties, which (without doubt) was, that the vicar should have tithes throughout the manor. And, therefore, if the Queen grant unto me consueance of all pleas within the manor of D. I shall have consueance of pleas between the freeholders of the manor. — POPHAM. If the Queen grant me free-warren within my manor of D. I shall have it within my own demesnes only, for if otherwise, the Queen should impose a charge upon another person, which the law will not suffer: so it is, if the lord grant a rent-charge out of his manor. But if the Queen grant unto me felons' goods, or waifs and strays, within my manor, I shall have it in the lands of the freeholders. For it is a liberty due to the Queen, which she may grant, and is not any charge to the subject: for she has it in every man's land, and therefore may grant it to any other. So this composition does not create a new charge, but is a disposing of the ancient, which was due by the tenants; for it runs through all the limits of the manor, as well to the freeholders, as to the demesnes. But if the lord had made such a grant before the council of Lateran, it would not have charged his freeholders, but his own demesnes only. And it was adjudged accordingly for the vicar.—(Croke.)

A vicar was endowed by the pope as supreme ordinary, with a part of the tithes of a manor, and it was held to extend to the freeholders as well as to the demesnes, viz. through all the limits of the manor. But if the lord had made such a grant before the council of Lateran, it would have extended to his own demesnes only. Grants ought not to be restrained to their strict words, but are to be construed according to the intent of the parties.

(1) In some editions of Croke, the numbers of the pages from 457 to 470 inclusive are repeated.

M. 36 &amp; 37 El. A. D. 1594. B. R.

*Mantell's Case.* [1 We. Rep. 19.] M.S. Hargr.

**M**ANTELL brought an action of trespass against a vicar for the tortious taking of certain logs of wood; the defendant says, that he is vicar of the said parish where, &c. and that the plaintiff set out the wood for which the action is brought as the tenth part for the tithes, and that the plaintiff commanded the defendant to take them; it was now moved at the bar, that the plea is double, one that he took them as tithes, the other that he took them by command of the plaintiff; *sed non allocatur*, for the command is unnecessary and but surplusage, and the substance of the plea is, that this wood belonged to him as tithes; another exception was taken, for that the defendant does not shew that the tithe of wood belongs to him, for of common right, tithes of wood, &c. belong to the parson and not to the vicar; to which the court agreed, wherefore a day preceptory was given to him to amend his plea.

Where in an action of trespass, the vicar pleaded, that he took certain wood as tithes, he must shew that the tithe of wood belongs to him, as of common right it belongs to the parson, and he was compelled to amend his plea.

M. 36 &amp; 37 El. A. D. 1594. B. R.

*Buckhurst v. Newton.* 1 We. Rep. 29. b. (1) Cro. El. 347.

Goldsb. 127. S. C.

**O**NE libels in the spiritual court for tithe of billet, faggot, and talwood, and avers that this comes from birch, maple, hazel, and thorn; upon this, prohibition

Prohibition for suing for tithe of faggots of oak and elm, *cautelid* making his libel for faggots,

(1) This report of the case very nearly corresponds with that of Gouldsbrough. Were calls the defendant *Newmen*, but as it

has been generally known as *Newton*, I have continued it so.

1594.

BUCKHURST  
ON  
NEWTON.

which were of beech and thorn; defendant prayed a consultation *ita quod* he should not meddle with faggots of oak and elm, for otherwise a stick of great wood might be put into the faggots, and so the parson be deprived of the tithes of the residue. The court held that the special matter must be shewn that the oak and elm were so intermixed that the parson could not do otherwise, but that no consultation should be granted as it then stood. It was said that in the spiritual court, though the libel be for wood of one kind, and it is found of another kind, yet sentence will be for the plaintiff.

hibition is sued upon the suggestion that it comes from oak, ash, elm, and beech; and in the spiritual court, although one libel for wood of one nature and this is found of another, yet sentence will be given for the plaintiff. — CURIA. It is not reasonable, for it is absurd, and therefore we will hear a civilian on this point. — COKE. If a consultation be not granted, adieu to tithes of all wood; and here, in truth, in each faggot of birch, they put a great piece of oak or ash, thinking by this to privilege the whole faggot from tithe, *nam crescit in orbe dolus*. — WEBB, Clerk, the cunning is on your part to libel for faggot, for if you had libelled for maple, birch, or hazel, no prohibition would have been sued. And it was adjudged in this court in *Mollin's case*, (1) one libelled for billet of faggot generally, without shewing of what wood it was made, and from the pleadings, upon the prohibition, it appeared to the court that part was titheable and part not, and upon this they never got a consultation. — COKE. It does not appear here that there was any mixture, so the case is not like. — WEBB. You have no right to have tithe of faggot, because part of it is not titheable, being oak, so for your covetousness to have more than your right, you have lost that which is your right. *Adjournatur*. Afterwards in the same term, it was moved again by *Carvill*, who said, that it was adjudged in *Lane's case*, that tithes should not be paid for hazel which is mixed with oak in faggots, which GAWDY denied. — FENNER. He ought to have pleaded the special matter *pro consultatione habenda*, as to that which is hazel, &c. for so it was done between *Molyns* and *Dawes* in this court, for I have seen the record of it, for it was intermixed in such way that it could not be otherwise done; wherefore as it is not so done here, no consultation shall be granted for any part of it, because he has not pleaded specially *pro consultatione habenda*, according to the common form, and of this opinion were all the justices. *Quod nota*.

(1) Ant. 86.

M. 36 & 37 El. A. D. 1594. B. R. *Jesop v. Payne*. [Cr. El. 363.]

A custom to pay the tenth fleece of wool in satisfaction for all locks and tithes due for wool held good.

It was said that it was not a good custom to pay cocks of hay for all tithe hay.

A suggestion of a *modus emittit* to state "that they usually paid, &c." which is issuable, is not good in prohibition, and a consultation shall be awarded for the defect.

PROHIBITION prayed for suing for tithes of locks of wool, suggesting, that he paid the tenth fleece of wool in satisfaction for all locks, and tithes due for wool. *Drew* moved, that the prescription was not good, because it is but to have the same thing, and of the same nature in recompence, and it hath been ruled in the Queen's Bench, to give the tenth sheaf in satisfaction of the tithe of corn and rakings, is not sufficient to maintain a prohibition. And there, in 33 Eliz. in the case of *Shakerley* against Sir *James Marcin*, it was held, that it was not any prescription to have cocks of hay for all tithe-hay; but the court held, that in this case the substance of the prescription was good enough, and agreed to the case of the rakings; for that is as good corn as any other, but locks be not of the same value with the fleece; but in regard of a fault in the suggestion that it was not, (that they usually had paid,) &c. which is issuable, it was not good: and therefore they held, that consultation should be awarded.

1595.

Qu. Whether a prohibition will lie in the spiritual court for suing for tithes of lands holden of the crown in *capite*?

E. 37 El. A. D. 1595. B. R. *Vaughan v. Beal*. [Cro. El. 393.]

PROHIBITION being prayed for suing in the spiritual court, for the tithes of lands holden of the Queen in *capite*. It was now moved, that consultation should be awarded; for that there is not any cause to grant a prohibition: for then he never should have any remedy for them: for if he may not sue for them in the spiritual court, he cannot sue for them here. And all the court held, that a prohibition lay not: for although N. B. R. 401. (1) is, that a prohibition

(1) "In some cases a man shall have a prohibition when he is sued in the spiritual court for the tithes of his lands. As if a

man be the King's tenant, and holds of him in chief by knight's service, and is sued in the spiritual court for the tithes of the de-

prohibition lies in this case, yet that is to be intended where it is sued in chancery, where peradventure they may give remedy for the tithes. But because they were informed, that there be the like precedents in the Queen's Bench, they said, they would further advise.

"mesne lands, he shall have a prohibition because these lands may come into the King's hands by reason of wardship or by escheat; and then, perhaps, the King shall

"be otherwise charged than he ought to be charged, and therefore the same ought to be tried before the King in his chancery."—  
F. N. B. 96. b.

1595.  
VAUGHAN  
v.  
BEAL.

M. 37 & 38 El. A. D. 1595. B. R. *Green v. Bosekin*. [Moo. 420.]

THE case was argued concerning the lands of the college of Maidstone, in Kent. The stat. 31 H. 8. gave all colleges, &c. dissolved to the crown, in which stat. there is a clause that the King and his patentees shall hold discharged of tithes, as the abbots held at the time of the dissolution; afterwards the stat. 1 E. 6. gave to the crown all colleges, but no clause of exoneration from tithes, for which the parson libelled in the spiritual court, and the farmer of the land brought prohibition upon the stat. 31 H. 8. And three points were considered by the judges. 1. Whether the colleges shall be now said to be given to the crown by 31 H. 8. or 1 E. 6. and all the judges were clearly of opinion, that the King had them by 1 E. 6. for it is the latter stat. although it contain no negative words, viz. that he had them by this stat. and no other. 2. Whether the King should have the land by 1 E. 6. and be discharged of tithes by 31 H. 8. so that he should take the tithes by the latter, and the land by the former, for the former does not give the tithes, (1) although it says that the King should have the lands, in as ample manner and form as the colleges, which does not extend to tithes, but the estate in the land. And of this the judges doubted. And POPHAM and FENNER thought that he should not hold the land discharged by 31 H. 8. which he had by 1 E. 6. — GAWDY. *E contra, ideo quere.* 3. If unity without composition or prescription was a sufficient discharge of tithes by 31 H. 8. and they all agreed that it was; but GAWDY said, that there ought to be unity of the parsonage and the land in the religious persons for time whereof, &c. before the dissolution. POPHAM and FENNER *e contra*, for if there be perpetual unity in fee of the rectory and in fee of the land, at the time of the dissolution, this is sufficient by 31 H. 8. and no consultation was ever granted out of the King's Bench upon perpetual unity.

Two judges against one held, that if there were a perpetual unity in fee of the rectory and in fee of the land at the time of the dissolution, it was a sufficient discharge of tithes by 31 H. 8. without a perpetual unity of the parsonage and land.

(1) Moore literally should be translated, "so that he should take the tithes by the first statute, and the land by the latter, for the latter does not give the tithes," meaning

by the first, the first in point of time, viz. 31 H. 8. and by the latter the 1 E. 6. and not considering the construction of his preceding sentence.

M. 37 & 38 El. A. D. 1595.  
*Sharlington v. Fleethood*. [Moo. 599.]

BY all the Justices; if a parson libel for tithes, and a prohibition issue, and be libel for the tithes of another year, before the first libel be determined upon, an attachment shall be granted: so, where a custom is general for all the inhabitants, and a prohibition is granted for one who is sued, if the parson sue another upon the same ground for tithes before the first is determined, attachment lies.

prohibition granted, and before it be decided upon, a libel for tithes of another year, or another parishioner be sued within the same custom, attachment shall be granted.

If there be a libel for tithes of one year, or if one be sued for tithes where a general custom is alleged in a parish, and prohibition granted, and before it be decided upon, a libel for tithes of another year, or another parishioner be sued within the same custom, attachment shall be granted.

M. 37 & 38 El. A. D. 1595. *Hugton v. Prince*. [Moo. 599.]

IT was held that tithes were not payable for turkies, or their eggs; nor for tame partridges or pheasants, because *fera natura*.

Tithes are not due of turkies or their eggs, or of tame partridges or pheasants.

1595.

M. 37 &amp; 38 El. A. D. 1595. C. P.

*Grysmen v. Lewes.* [1 We. Rep. 83, 141.] No. 14. pp. 44. 49.  
Cro. El. 446. Moo. 911. 1 Gw. 165.

A prescription to pay the tenth sheaf for tithes of all the corn in the sheaf, and of all which is raked, is void, for tithes is to be paid of both of them. It is also unreasonable, for then the less part may be put into sheaves and the greater part left to be raked.

Payment of tithes of one thing cannot be a satisfaction for the tithe in kind of another, but *Walmesley* said that money might be a satisfaction for many or all tithes.

*Walmesley* held that no tithes were properly due for agistment, for the grass is part of the freehold, but if a parishioner would convert tillage into pasture to agist it, then the parson might suggest covin to defraud him of his tithes; but all the other judges held that the opinion in *F. N. B.* was not law, and that tithes should be paid for agistment *dummodo non agatur* for agistment of milch kine, draught oxen, or other beasts for provision of the house.

**D**OCTOR *Lewes*, parson of Kingland, in the county of Hereford, sued in the spiritual court for tithes of cows, oxen, steers, horses, &c. *Grisman* the defendant, there (surmising that he used, &c. to pay for every milch cow one penny yearly, and for every other cow, one half-penny yearly, in recompence of all tithes) obtained a prohibition. *Warberton* moved that there was no cause for a prohibition, for this conclusion goes in discharge of the tithes for kine only, and not of other tithes; and the court were of this opinion. But as *Williams* (who was counsel on the other side) was absent, they gave time till the next Monday, otherwise consultation to be granted. At which day, *Williams* contended that the prescription was good, for he prescribes to pay for every milch cow one penny, and one half-penny for every barren cow, in discharge of all tithes of cows, oxen, steers, and calves; also, one penny for every mare in discharge of all tithes of mares, horses, and colts; and it seemed to him that it was good, for he does not prescribe here in *non decimando* (as has been said) but in *modo decimandi*. A man is to pay one penny for each cow, &c. and of these cows for which he pays, all the other things for which the tithes are demanded, are but the increase, and then for one thing one tithe is sufficient; and *F. N. B.* 53. 2. for agistment tithes shall not be paid, for that the parson had tithes of the beasts which feed there, so here. *Warberton*, e contra, to prescribe in *non decimando* is directly contrary to the law of God, for tithes are commanded to be paid by God, but the manner of the payment is by the constitution of the church, and this is the reason why one may prescribe in *modo decimandi*; the opinion of *Fitzherbert*, that tithes shall not be paid for coal, nor for agistment, cannot be law; the reasons as to the coals are two; 1st. they do not renew annually, but that is no reason, for wood, saffron, and liquorice, and many other things, are titheable, although they do not annually renew; the other reason is, that tithes are paid for the vesture of the land, and then two tithes shall not be paid for the same land; but this is not so, for of every several commodity, tithes shall be paid; and for herbage, in one case it shall be paid, and in another not, for no tithes shall be paid for the agistment of kine, sheep, oxen for the plough, for these beasts which depasture there pay tithes of themselves; but for the agistment of barren cattle, steers, colts, or horses, which are not employed in tillage, tithes shall be paid, for no other profit is derived from these beasts: then here he prescribes to pay so much for kine and so much for mares, which cannot be a recompence for the other beasts, for they ought to pay tithes of themselves, no more than one can prescribe to pay hay tithe for grain, and all other tithes. And he cited the case of *Sir Charles Morrison* here, who prescribed to pay the tenth part of his corn in the sheaf, in discharge of all other corn raked and not in sheaf, which was held a void prescription, which is to be discharged of one tithe by the payment of another; so here, he prescribes for part, viz. for mares and kine in *modo decimandi*, and this is good; but for the other part, viz. for the steers, &c. he prescribes in *non decimando*, which cannot be good, wherefore we pray a consultation. — *WALMSLEY.* *Fitzherbert* says, with good reason, that no tithes are due for herbage, for it is not a chattel severed, but is part of the freehold, and annexed to it, and no tithes shall be paid for any thing, unless it be a chattel severed, and *Fitzherbert* and the *Register* say, that prohibition shall be granted to a suit for tithe of agistment: but it seems that upon special matter shewn (as where one employs land, which had usually been tilled or fed with kine, for the depasturing barren cattle, from which no tithe arises) consultation shall be granted; but *primò facie* no tithe shall be paid for agistment, according to *Fitzherbert*. And I conceive that this usage to pay tithe for herbage, arose from the Constitutions of the bishops, which were made from time to time, to prevent the fraud of the parishioners by taking the tithe from their parsons; and then no tithe being originally due for colts, calves, &c. it seems to me that this prescription to pay

a certain sum in recompence for the tithes of them, and of kine for which tithes are due, is reasonable and good.—ANDERSON. Tithes without doubt are due by the law of God, and consequently by the law of the land. The prescription is not good, unless he pay some consideration for every thing for which tithe is due, and therefore one cannot prescribe to pay the milk of a cow, in recompence of the calf, for tithes shall be paid for both; and tithes are due for agistment, for otherwise every one would employ all his land in feeding barren cattle, and so no tithe would be paid, and the prescription in the case of *Morrison* cannot be good, for then he could make ten sheaves of corn, and pay tithes of them, and leave all the rest scattered, therefore it is unreasonable.—BEAUMOND. This prescription cannot be supported by the reasons before given, and the stat. 2 Edw. 6. for the payment of tithes is in the affirmative, and does not make any bad custom, which was before used, good, but only provides that tithes shall be paid in the same manner as of right they used to be paid forty years before the making of the statute, and therefore will not aid this custom.—WALMESLEY. I do not contend that tithe of one thing can be a satisfaction for the tithe in kind of another thing, but money may be a satisfaction for many or all other tithes *Et adjournatur*. And afterwards, M. 37 & 38 Eliz. *Webster* moved for a consultation. *Williams*, the Register has a writ of prohibition against a parson who demands tithe of agistment; and we have prescribed to pay for every milch cow one penny, and for each barren one a half-penny, in discharge of all tithe of kine, oxen, steers, calves, &c. and this is good, for, for barren cattle no tithe shall be paid.—OWEN. So the parishioner might keep one cow for which he will pay one penny, and have one hundred oxen for which he would pay no tithe at all, which is unreasonable, whereupon the whole court agreed a consultation should be granted unless cause were shewn to the contrary on the ensuing Monday; at which time *Williams* moved that the consultation might be staid, and *WALMESLEY* continued of his former opinion, that properly no tithe is due for agistment, for the grass is part of the freehold; but if a parishioner would convert tillage into pasture, to agist it, then the parson may suggest covin to defraud him of his tithes, and upon such matter have tithes from him, and if such a case do not appear to us, I see no reason against our awarding a prohibition; but as to the other tithes, I agree that a consultation should be awarded. But all the other justices held that tithes should be paid for agistment, and afterwards, upon the prayer of *Williams*, the justices ordered the consultation to be special *dummodo non agatur* of tithes for agistment of pasture for milch kine, draught oxen, or oxen or other beasts for provision of the house.

1595.  
CRYSMAN  
v.  
LEWES.

M. 37 & 38 El. A. D. 1595. B. R. *Antn.* [Moo. 911.]

**P**ROHIBITION was sued upon a custom that they had paid three half-pence for the wool of sheep sold after shearing and before Michaelmas, and adjudged a good custom. And the word *ovis* is equivocal, and extends to wethers as well as ewes.

*Nota.* A prescription to be discharged of locks of wool, ought to be shewn to be of locks casually lost.

(*ovis*) is a doubtful word, and extends to wethers as well as ewes. A prescription to be discharged of locks of wool ought to be shewn of locks casually lost.

Wool.

A modus of three half-pence for the wool of all sheep sold after shearing and before Michaelmas held good. Sheep

T. 38 El. A. D. 1596. B. R.

*Green v. Balser*, or the Archbishop of Canterbury's Case. [2 Co. 46.]  
1 Gw. 189.

**I**N a prohibition in the King's Bench, between *Green* and *Balser*; the case was, there was a religious college in Maidstone, to which the rectory of Maidstone was impropriate. And the said college had divers lands and tenements within the said parish of Maidstone, and all was given to the King by the statute of 1 E. 6. And afterwards the rectory was conveyed to the bishop of Canterbury, and the lands, parcel of the possession of the said college, were

1596.

1. Colleges, chantries, free chapels, &c. did not come to the crown by 31 Hen. 8. but by 1 E. 6. c. 14. only; and are

1596.

GREEN

v.

BALSER.

therefore not entitled to a discharge of tithes under the former statute.

2. The stat.

31 H. 8. says "as freely as the abbot retained the same," and it was said that it was the intent of the King and the makers of the act, to discharge the land of payment of tithes in the case of unity of possession, being a general case, to induce purchasers the rather to purchase the land for greater prices, for by the infinite impossibility, and impossible infiniteness, all the discharges which religious houses had could not be known.

3. If land had come to the King by the stat. 31 H. 8. then by force of the branch of discharge of the payment of tithes, a general allegation that the prior, &c. held the land at the time of the dissolution of the said priory discharged of the payment of tithes, without shewing how, had been sufficient, and so is the common use.

4. But although lands of a religious person that came to the crown by 1 E. 6. may be discharged of tithes by prescription, composition, &c. yet such general allegation is not sufficient without shewing how he was discharged, either by prescription, composition, or other lawful means.

5. A general allegation of unity of possession of the rectory and the land is not sufficient under 31 H. 8. it must be a lawful and perpetual unity.

6. If before the dissolution the farmers of the demesnes of a greater monastery had paid tithes, &c. to the abbot, &c. then the intendment of law by reason of unity of possession (which ought to be time out of mind) that the land was discharged of the payment of tithes will not hold; for *statitur presumptioni donec probetur in contrarium*. But if the land had been always occupied by the abbots or demised over and no tithes at any time paid for the same before the act, although the land be conveyed to one and the rectory to another, yet the land is discharged of the payment of tithes: and if the farmers of the demesnes had paid tithes before the act, the same should be pleaded by a defendant in prohibition, and issue thereupon might be taken.

7. General words shall not discharge lands of tithes, for they are not issuing out of land, but are things distinct from the land.

1. Whether the said college came to the King as well by the statute of 31 H. 8. as by the statute of 1 E. 6. for if this college came to the King by the statute of 31 H. 8. then without question the said branch of the said act concerning the discharge of tithes, extends to it: and it was objected by the plaintiff's counsel, that the words of the said act are general, *sc.* "that all monasteries, &c. colleges, &c. which hereafter shall happen to be dissolved, &c. or by any other means come to the King's Highness, shall be vested, deemed, and judged by authority of this parliament in the very actual and real possession of the King, &c." And when this college came to the King by the stat. 1 E. 6. it came to the King within these words of the act "by any means." But it was answered by the defendant's counsel, and resolved by the court, that that could not be for several reasons.

1. When the statute speaks of dissolution, renouncing, relinquishing, forfeiture, giving up, &c. which are inferior means, by which such religious houses came to the King, then the said latter words "or by any other means" cannot be intended of an act of parliament: which is the highest manner of conveyance that can be; and therefore the makers of the act would have put that in the beginning and not in the end, after other inferior conveyances, if they had intended to extend the act thereunto. But these words "by any other means" are to be so expounded, *scil.* by any other such inferior means. As it has been adjudged, that bishops are not included within the statute of 13 Eliz. cap. 10. for the statute begins with colleges, deans and chapters, parsons, vicars, and concludes with these words, *and others having spiritual promotions*; these latter words do not include bishops, *causa qua supra*. So the statute of West. 2. cap. 41. the words of which are, *statuit Rex, quod si abbates, priores, custodes hospital' et aliarum domorum religiosarum, &c.* These latter words do not include bishops, as it is holden 1 & 2 Phil. and Mary, Dyer, 100. 109. for the cause aforesaid.

2. The said clause of 31 H. 8. that the said religious houses shall be in the King by authority of the same act: and the statute of 1 E. 6. enacts, that all colleges, &c. shall be, by authority of this parliament, adjudged and deemed in the actual and real possession of the King, so that the latter parliament being of as high a nature as the first was, and providing by express words, that the colleges

1596.

GREEN

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colleges shall be, by authority of the said act, in the actual possession of the King, the said college cannot come to the King by the act of 31 H. 8. It is said in 29 H. 8. *parliament. et stat. br.* if lands be given to tenant in tail in fee, his issue cannot be remitted, for the latter act doth take away the stat. *de donis*, &c. 3. The usual form of pleading of them, which came to the King by the statute of 1 E. 6. and by the act of 31 H. 8. doth manifest the law clearly, *scil.* to plead surrender or relinquishment, &c. *virtute cuius ac vigore* of the statute of 31 H. 8. the King was seised, but to plead the act of 1 E. 6. of chantries, *virtute cuius ac vigore* of the statute of 31 H. 8. was never heard or seen, and for all these causes it was resolved, that this college came to the King by the act of 1 E. 6. and not by the act of 31 H. 8.

The 2d question was, forasmuch as the said college came to the King by the act of 1 E. 6. and not by the act of 31 H. 8. whether the said branch of discharge of tithes, extends to such colleges which after came to the King by any other act, and not by the act of 31 H. 8. and it was objected, that the said branch should extend to colleges which came to the King by any other act, for it was said, that although the preamble of the said branch says, "the late monasteries, &c." yet this is not literally to be understood of monasteries only which were dissolved before the act, for (late) is to be construed according to the body of the act, *sc.* of those which were dissolved before, or which should come to the King afterwards by the said act, so that when they are dissolved, and in the King by force of this act, this act may call them (late), *quod fuit concessum per curiam*. Also they said, that the words of the branch itself are general, *scil.* any monasteries, &c. colleges, &c. without any limitation, so that they conceived, that the words of the said branch made for them, and that this clause of discharge should extend to all monasteries; &c. colleges, &c. *quacunque*, by what means soever they came to the King; and they said, that the intent of the act was so, for the intent of the act was to benefit the King, and to make the subject more desirous of purchasing them, &c. Against which it was said by the defendant's counsel, and resolved by the court, that neither the words nor the meaning of the said branch, did extend to any monasteries, &c. but to those only, which came to the King by the act of 31 H. 8. for it would be absurd, that the branch of the act of 31 H. 8. should extend to a future act of parliament, which the makers of the act of 31 H. 8. without the spirit of prophecy, could have no foreknowledge of; but this clause of discharge of tithes, shall extend only to those possessions which came to the King by the same act. And where it was said, that the first words of the branch were general, the same is true, but the conclusion of that branch is, in as large and ample manner as the late abbots, &c. So that (late) being so intended, as it has been agreed on the other side, *scil.* only of religious houses which came to the King by 31 H. 8. it is clear, that that branch cannot extend to this college which came to the King by the act of 1 E. 6.

The 3d question was, admitting that the said college had come to the King by the stat. of 31 H. 8. whether such general allegation of unity of possession of the rectory and of the lands in it, was sufficient; and it was resolved by the court, that it was not sufficient; for no unity of possession shall be sufficient within the same act, but a lawful and perpetual unity of possession time out of mind, (1) as it was adjudged M. 34 & 35 Eliz. in a prohibition between *Valentine Knightly*, esq. plaintiff, and *William Spencer*, esq. defendant, (2) where the case was such, the plaintiff in the prohibition shewed, that *Philip*, abbot of Evesham, and all his predecessors, time out of mind were seised as well of the rectory impropriate of Badby cum Newman in the county of Northampton, as of the manor of Badby cum Newman, in Badby aforesaid, in his demesne, as of fee, in the right of his monastery, *simul et semel*, until the suppression of the same monastery, *quodque ratione inde*, the said abbot, and all his predecessors, until the dissolution of the same monastery, had held the said manor discharged from the payment of tithes, until the dissolution of the same house,

(1) Vide contra, *Green v. Bosekin*, ante 111.

(2) See the report of the case, ante 101, from which it appears that this point was not determined.

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and shewed the branch of the statute of 31 H. 8. concerning discharge from the payment of tithes, and conveyed the said manor to *Knightly*, and the said rectory to *Spencer*, who libelled in the spiritual court for tithes of the demesnes of the said manor, against *Knightly*, who upon the matter aforesaid brought the prohibition, and it was adjudged, that the prohibition was maintainable : for the said branch of the act of 31 H. 8. was made to prevent two mischiefs, one, that otherwise all the impropriations of rectories to houses of religion, had been disappropriate ; for if the body to which the rectory is appropriated, had been dissolved, the impropriation to such body had been dissolved also, as appears by 3 E. 3. 21 E. 4. 1. a. 21 H. 7. 4. b. F. N. B. 33. k. l. Another mischief was, that whereas many religious persons were discharged from the payment of tithes, some by their order, as the Cisterians, Templars, Hospitallers of St. John of Jerusalem, as appears by 10 El. Dy. 277. (*ante*, 59) some by prescription, some by composition, some by the Pope's bulls, &c. and the greater part of religious houses, as the said abbey of Evesham was, were founded before the council of Lateran : and before time of memory, it would be infinite, and in a manner impossible by any search, to find all the discharges and immunities which such religious houses had, and for this reason also the said branch was made. And the great doubt in the said case, was conceived upon this word (discharge), for it was said, that unity of possession was not any discharge of tithes, and by consequence was not such discharge as was within the intent of the said act. And for the force of this word (discharge) 18 E. 3. Bar. 247. 35 H. 6. 10. b. 22 E. 4. 40. B. & 6 H. 7. 10. b. were cited. But as to that, it was resolved by the court :

1. That the statute does not say discharge of tithes, but discharge of payment of tithes.

2. The statute does not say, discharge of payment of tithes, absolutely, but as freely as the abbot, &c. held it at the day of dissolution, and then this word (discharge) being referred to a certain time, may be intended of a suspension by unity. As if a man seised of a rent disseise the tenant of the land, and make a feoffment with warranty, the feoffee shall vouch as of land discharged of the rent, and yet the rent was but suspended, but every suspension is a discharge for a time, and the discharge being referred to the time of the warranty, extends to the suspension. *Quod vide* 30 E. 3. 30. 3 H. 7. 4. 41. a. 21 H. 7. 9. a. b. F. N. B. 135. e.

3. The statute says, "as freely as the abbot, &c. retained the same." And it was said, that it was the intent of the King, and of the makers of the act, to discharge the land of payment of tithes in such case of unity of possession, being a general case to induce purchasers the rather to purchase the land for greater prices.

4. For the infinite impossibility, and the impossible infiniteness as has been said, all the discharges which such religious houses had, could not be known ; and the same construction was made in this court, Hil. 24 Eliz. in a prohibition between *John Rose* and *William Gurling*, for tithes in Flixton in the county of Suffolk. See 18 El. Dy. 349. the parson of *Peykirk's* case (*ante*, 66). And it was likewise resolved in the said case of *Knightly*, that nothing could be traversed but the unity, for *ratione inde*, &c. is but the conclusion and the judgment of the law upon the precedent matter ; but it was also resolved, that if before the dissolution the farmers of the demesnes had paid tithes, &c. to the abbot, &c. then the intendment of the law by the reason of the said unity of possession (which ought to be time out of mind) that the land was discharged of the payment of tithes, will not hold place. For as Bracton says, *stabitur presumptioni donec probetur in contrarium*. But if the lands were always occupied by the abbots, or demised over, and no tithes at any time paid for the same before the act, although the land be conveyed to one, and the rectory to another, yet the land is discharged of the payment of tithes : and if the farmers of the demesnes had paid tithes before the act, the same should be pleaded by the defendants in the prohibition, and issue thereupon might be taken, as it was in the like case, Trin. 38 Eliz. in this court between *Edward Grevil*, esq. possessor of the demesnes of the manor of Nasing in the county



of Essex, plaintiff, and *Martin Trot*, proprietor of the rectory of Nasing, defendant, where against such unity of possession in manner and form aforesaid alleged by the plaintiff in the abbot of Waltham and his predecessors, &c. in the rectory and demesnes, and with like conclusion as aforesaid: the defendant alleged payment of tithes by the farmers of the said demesnes (without any traverse by the rule of the court), and issue was joined thereupon, and it was tried against Trot, and therefore the prohibition stood. And it was likewise resolved, that although the plaintiff in the case at bar alleged, that the master of the said college, at the time of making of the said act of 1 E. 6. held them discharged of tithes; and although the lands of such religious persons may be discharged of tithes by prescription, as it has been lately adjudged in the case of one *Wright* in this court, (*post*, 119) or by composition, &c. yet such general allegation that he was discharged of tithes, was not sufficient, without shewing how he was discharged, either by prescription, composition, or other lawful means. But if the land had come to the King by the statute of 31 H. 8. then by force of the said branch of discharge of the payment of tithes, such general allegation, that such prior, &c. held the land at the time of the dissolution of the said priory discharged of the payment of tithes, without shewing how, had been sufficient, and so is the common use in prohibitions.

The fourth question in the case at bar was, whether any house which was ecclesiastical, and not religious, as bishops, deans and chapters, archdeacons and the like, shall be within the act of 31 H. 8. for no house within the act of 31 H. 8. is said religious, but such which was regular, and which consisted of such persons as had professed themselves, and vowed three things, that is to say, obedience, voluntary poverty, and perpetual chastity; and those are called in our law, dead persons in law. For after such profession their heirs shall have their lands, and their executors or administrators their goods, and that was called *mors civilis*, which was the reason that when a lease for life was made, always the *habendum* was, to have and to hold to him *durante vita sua naturali*, for it was then taken, that if the *habendum* had been *durante vita sua* (without saying *naturali*) the civil death, that is to say, the entry into religion had determined it. But it was resolved by the court, that no ecclesiastical house, if it be not religious, is within the act of 31 H. 8. for divers reasons.

1. The words of the act are always through the whole act in the copulative, "religious and ecclesiastical," so that if it be ecclesiastical only, it is out of the act.

2. The makers of the act gave the King as well those religious and ecclesiastical houses which were dissolved, &c. as those which should be afterwards dissolved, but none were dissolved before the act, but only religious houses, and no house ecclesiastical only; for no bishopric, deanery, archdeaconry, &c. or such like ecclesiastical and secular corporation was dissolved before; therefore no ecclesiastical house which was not religious, (which after the act shall be dissolved) was within the intent and meaning of the said act.

Thirdly, it is enacted by the statute of 31 H. 8. that all religious and ecclesiastical houses, which after shall be dissolved, &c. shall be in the actual possession of the King, in the same state and condition as they were at the time of the making of the said act, upon which clause of the statute it was adjudged, Pasch. 5. Eliz. Rot. 129. reported by Serjeant *Bendloes* (*ante*, 58). And M. 6 & 7 El. Dy. 231. and Plow. Com. 207. That if an abbot after the said act grant the next avoidance of an advowson, or make a lease for years, and afterwards surrender, so that by the act, the possessions of the abbey ought to be in the King, in the same state and condition as they were at the time of the making the act; and at the time of making the act, the land and the advowson were discharged of all interests, for this reason it was adjudged in both cases, that the lease and the grant were void by the said act. But if a dean and chapter, and other such ecclesiastical and secular corporations should be within the said act, then if they should surrender their possessions, they would avoid all their own grants and leases, which would be dangerous. And that was one principal reason that the colleges, chantries, &c. which came to the King by the acts of 37 H. 8. or 1 E. 6. should not vest in the King by the act of 31 H. 8. for the mischief before, for avoiding of their leases, grants,

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&c. And to conclude this point, it was held in the Common Pleas in *Parret's* case, concerning the priory of Frideswide, that if the house be not religious and regular, it is not within the act of 31 H. 8.

And as to the opinion of 10 Eliz. Dyer, 280. *Corbet's* case, concerning the priory of Norwich, it seems that that differs much from other deans and chapters, for the dean and chapter of Norwich was once religious, for they were prior and convent before; and yet that case was denied by POPEHAM, C. J. and some other of the judges, for the reasons and causes aforesaid.

Fifthly, it was held by the court, that although it be provided by the statute of 1 E. 6. that the King shall have the lands of the colleges, &c. "in as ample and large manner as the said priests, wardens, &c. had or enjoyed the same," that these general words should not discharge the land of any tithes, for they are not issuing out of land, but are things distinct from the land. For as the book as in 42 Edw. 3. 13. a. the prior shall have tithes of land against his own feoffment of the same land; and it is no good cause of prohibition to allege unity of possession in a college which came to the King by the statute of 1 E. 6. as a man may by the statute of 31 H. 8. in an abbot, prior, &c. as aforesaid; for the statute of 1 E. 6. hath no such clause of discharge of payment of tithes, as the statute of 31 H. 8. hath. And therefore such perpetual unity, as hath been said before, will not serve upon this act of 1 E. 6. And afterwards a consultation was granted: and another consultation was granted the same term in another prohibition sued upon the same matter between *Green and Buffken*. (1) And *Laurence Tanfield* and others, were of counsel with the plaintiff, and the *Attorney-General* and others with the defendant.

(1) Vide ante, 111, the report of this case by *Moore*, which is contrary to what is here stated by *Coke*.

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*Anon.* [Dy. in M. 170. b. (1)] Moo. 430. 1 Gw. 166.

For grounds drained are not barren land within the 2 E. 6.

**F**ENNISH or moorish grounds which are drained, shall pay tithes within the seven years, and are not within the statute of 2 E. 6. c. 13.

(1) I again rely upon the accuracy of the MS. alluded to ante, 81.

T. 38 El. A. D. 1596. Scac. *Monday v. Lovice*, Moo. 454.

A prescription to pay calves and lambs, and 1d. for each milch cow, in satisfaction of all tithes of lambs, calves, milch kine, and all barren and other beasts and agistment, held bad.

**P**ROHIBITION for tithes, and the plaintiff prescribed that the inhabitants had used to pay calves and lambs, and one penny for every milch cow, in satisfaction of all tithes of lambs, calves, milch kine, and all barren and other beasts, and agistment. And it was found by verdict according to the prescription, but in arrest of judgment it was alleged by Serjeant *Savile*, that the prescription was not good, to pay calves and lambs, and one penny for milch cows, in satisfaction of the tithes of other cattle. And the court also was of the same opinion, that these things were in satisfaction of the tithes of themselves, but not of other kinds. Note, also in C. B. M. 36 & 37 El. Prohib. *Collyer v. Norrington*, and *Gryman v. Lewes*, ante, 112. So *Richard's* case in C. B. it was adjudged that it is not a good prescription to pay tithe corn in satisfaction of all tithes of the land. So *Bird v. Adams* (ante, 97), no good prescription to pay tithe corn in satisfaction of tithes of rakings.

E. 38 El. A. D. 1596. B. R. *Bedingsfield v. Feak*. [Owen. 74.]

Cro. El. 467. Moo. 909. Gouldsb. 149. 1 Gw. 166.

A parson had the great tithes of a parish, and the vicar the small tithes; held that saffron being a small tithe, the vicar should have it, although the

**T**HE case was, a church in which there had been a parson and a vicar time out of mind, and the parson used to have the great tithes, and the vicar the small; and for the space of forty years last past it was proved that the parson had tithes paid him out of a field of twenty acres of corn, and now the field is sown with saffron,—and the vicar sued for the tithes of saffron in the court christian, and the parson had a prohibition. — *Coke*. I conceive the parson shall have the tithes, for by the statute of 2 E. 6. it is enacted that tithes shall be paid as has been used the last forty years, and this has been always titheable

tithable to the parson; and although the ground be otherwise employed, yet the parson shall have the tithes. And so was it in Norfolk, in the case of a park, where the parson prescribed *pro modo decimandi*, to be paid three shillings and four pence for all tithes arising out of the said park; and although the park was after converted to arable, yet no other tithes shall be paid.

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land on which it

was grown, had produced corn for 40 years before, of which tithes had been paid to the parson. So if the vicar is to have all the hay, if the meadow be converted into arable, the parson shall have it. If a park had paid 10s. for all tithes renovant within the park, and be disparked and sown with corn, the 10s. only shall be paid: but if the prescription be for the deer and herbage of the park, not for the whole park, and corn be sown, tithes in kind shall be paid. So if the shoulder of every deer be to be paid for all tithes, when disparked, tithes in kind shall be paid; or if to pay 10s. and a shoulder of every deer, if disparked, tithes shall be paid in kind, and not the ten shillings only. Where the suit is between parson and vicar concerning the right of tithes, no prohibition shall go, *contra* where a farmer who is a temporal man, is a party.

POPHAM. It has been adjudged otherwise in *Wrot's* case of the *Inner Temple*, in the Exchequer. But the law is clearly as has been said; and the difference is, when the prescription is to pay so much money for all tithes; or when the prescription is to pay a shoulder of every buck, or a doe at Christmas; for there if the park be disparked, tithes shall be paid, for tithes are not due for venison, and therefore they are not tithes in *specie*. And I conceive that tithes of saffron-heads shall be comprehended under small tithes; and although the tithes of this field have been paid to the parson, yet it being converted to another use, whereof no gross tithes do come, the vicar shall have the tithes: and so if arable land be converted into an orchard, the vicar shall have tithe of the apples; and so if the orchard be changed to arable, the parson shall have tithes. *Quod Fenner concessit*. [So if the vicar is to have all the hay, if the meadow be converted into arable, the parson shall have it, so *e converso*. Cro.]

[TANFIELD. The right of the tithe comes in question between the parson and the vicar, howbeit the farmer be made a party to the suit; and as the right of tithes is in question between two spiritual men, this court has no jurisdiction. And this very point was adjudged *Bush v. Hunt* (ante, 90), that in such case the parson shall have a consultation. — POPHAM. One of the parties is a man temporal, and it was not so in your case. *Gouldsb.*]

[But if a park had paid ten shillings for all tithes, and it be disparked, and sown with corn, the ten shillings only shall be paid. But if the prescription be for the deer and herbage of the park, and not for the whole park, and the park be disparked and sown with corn, tithes in kind shall be paid. If the prescription be to pay ten shillings and a shoulder of every deer, and the park be disparked, tithes shall be paid in kind, not the ten shillings only. See *Cowpe v. Andrews*.

E. 38 El. B. R. *Wright v. Wright*, or the Bishop of *Winchester's* Case. [1 We. Rep. 187. 2 We. Rep. 24. l. MS. Harg. No. 50. 210. b. 2 Co. 43.] Cro. El. 475. 511. Moo. 425. 1 Gw. 167.

IN prohibition, the case was, The bishop of *Winchester* had land in a parish, and he prescribed in *non decimando* (as he might, being a spiritual person), and made a lease for years of this land; the question was, whether the lessee should pay tithes to the parson of the parish, or not; TANFIELD held that he should, for the land is discharged of tithes by reason of being in the hands of a spiritual person; then it is otherwise when it is come into the hands of a temporal person. And it was lately held in the court of wards in *Moone's* case, by the two Ch. Justices, that if an abbey were discharged of tithes, by reason of being of the Cistercian order, if the abbot make a lease for years, &c. the farmer shall pay tithes, as it was held 10 El.; and for the same reason it was held in the exchequer in the time of MANWOOD, Ch. B. (as my Lord Ch. J. well knows), that the lessee for years, or the farmer of the queen, shall pay tithes, though the queen herself shall not pay tithes; but it is otherwise of the tenant at will of the queen. — *Popham*. The reason that a spiritual person may

Spiritual persons might and may prescribe to hold their lands for themselves, their tenants and farmers, for years or at will, discharged of tithes.

The allegation of a refusal of a plea by the spiritual court, is not traversable, and is of course, rather

than of effect and substance; for our judges well know, that in case of discharge of tithes, or *modus decimandi*, the ecclesiastical judges will not allow such allegation.

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prescribe in *non decimando* is, for that he was capable of tithes by reason of his order at common law; and at common law before the council of Lateran, every man was at liberty to pay his tithes to what spiritual person he would; so the bishop of Winchester and his predecessors have retained the tithes for these lands to themselves; but no temporal person could prescribe in *non decimando*, for that (by the common law) he was by no means capable of tithes, and he could not retain tithes as a spiritual person to himself; and tithes *ex mero jure*, are due from every layman; and therefore I think that although the bishop were discharged of tithes, yet the farmer shall pay tithes; as a parson cannot pay tithes to himself of his glebe, yet if he make a lease for years of it, the lessee shall pay tithes, for the land is discharged in respect of the person who had the possession; and as the privilege is personal when it is transferred to strange hands, the law and the reason for it are changed: FENNER seemed to be of a contrary opinion, wherefore they advised the counsel for the queen to demur, &c. which they accordingly did. And the plaintiff declares (1), for that whereas Steven, late bishop of Winchester, was seised in fee in right of his bishopric of the manor of East Meane, in the county of Southampton, whereof a capital mansion, 800 acres of land, 50 acres of meadow, 1000 acres of pasture, 400 acres of wood, being demesne lands of the said manor, were parcel for time whereof, &c. And whereas the said Steven and all his predecessors, bishops of Winchester for the time being, seised of the said manor and site, and demesne lands, time beyond memory, by themselves, their farmers and tenants thereof, and every part thereof, for years or at will, held and enjoyed, were free and discharged of payment of all tithes growing or any way rising off, in, or upon the said house and demesne lands. The said Steven, bishop, so being seised of the said lands discharged as above, on 4th July, 38 H. 8. by indenture demised a moiety of the said lands, with a stock of 400 sheep and 400 ewes, to one Robert Wright, ancestor of the plaintiff, for forty years, to commence at Michaelmas, 1575, rendering for the land 10l. 10s. and for the stock 11l. 13s. 4d. yearly; which lease on the 20th July, 38 H. 8. was confirmed by the dean and chapter, and further shews that Robert Wright the ancestor being possessed, &c. (the plaintiff conveys an interest for years to himself), and at Michaelmas, 1575, entered and was possessed of the said term, and held it discharged of tithes; and then shews a branch of 2 E. 6. that no one shall be sued or compelled to pay any tithes for any lands which by the laws and statutes of this realm, or by any privilege or prescription, were not chargeable with the payment of tithes, or which were discharged by composition real: then he shews that Nicholas Wright, as farmer of the rectory of East Meane, by virtue of a lease to him made by Thomas, bishop of Winchester, 10th May, 32 El. supposing the tithes of the said demesne lands to belong to him, by reason of the said lease (whereas in truth they were discharged); and supposing the said lease and confirmation to the ancestor of the plaintiff to be void, sued him in the Court of Audience for tithes of wheat, barley, pease, and oats, growing upon the said lands, in the year 1596, and for tithe wool and lamb of his sheep kept upon the said land, in the same year, and also for tithe apples: and that afterwards the said plea was brought before the judges delegates, when he pleaded his lease and all the aforesaid matter, and offered to prove it; and the judges refused to admit his plea. And afterwards, pending the said plea, Nicholas Wright died, and made the defendant his executor, who afterwards prosecuted the said appeal, and tried to condemn him, notwithstanding a prohibition to him delivered. The defendant, by protestation that his allegations are not true, for plea says, that good and true it is, that the plea pleaded in the spiritual court that Steven, bishop of Winchester, was seised, &c. (*following the declaration*) and that he ought to hold it discharged of tithes, by reason of the privilege and statute aforesaid, in such manner as the plaintiff has alleged: but he further says that the said judges in the said court allowed his plea, and admitted his proofs, *without this*, that the said judges delegates refused to allow and admit the pleas and allegations of

(1) The pleadings may be seen at length, 2 Co. 38.

the plaintiff before them in manner and form, as he has alleged,—upon which the plaintiff demurred.

*Walter*, of the Inner Temple, argued for the defendant, and said, the first point is, if this plea in bar be good, and therein the matter is, if this traverse be well taken of refusal of the plea in the spiritual court, or not; and it seemed to him that this is well traversed. A man ought always to traverse that which is material, and the substance of the action of the other party. Then the substance, ground, and cause of this prohibition is, the refusal of the plaintiff's plea in the spiritual court. For prohibitions are granted to the spiritual court in two cases only: the one, when the spiritual court holds plea of that which appertains to the common law: for the common law has this prerogative, that where the common law may interfere with the cause, the spiritual court shall not: and in such cases as 8 R. 2. *attachment sur prohibition*, 15. a man shall have an attachment without a prohibition, for the law is a prohibition in itself. The other is, where they do not right to the parties; and in other cases they ought not to be granted. In 44 E. 3. 32. if a man sue another in the spiritual court for rent reserved on a lease of tithes, a prohibition lies; for action of debt lies for this at common law. 22 E. 4. 20. if I owe one ten pounds, and swear to pay him it by a certain day, and thereupon he sue me in the spiritual court *pro lesione fidei*, prohibition lies; for he shall have debt for this at common law. So on the other hand, 4 E. 4. 37. 47. & 4 H. 7. *Pearce Peckham's case*. If a man sue one in the spiritual court for matter spiritual, and they will not deliver the libel to the party, according to the statute of 2 H. 5. c. 3. by all the judges, a prohibition lies thereupon; for non-delivery of the libel is a tort, which tort is matter temporal, and punishable by temporal law; so that in these two cases prohibition lies. Then here the matter of the suit in the spiritual court is for tithes, which is a spiritual thing; then the cause of the prohibition is the tort done to the plaintiff in not allowing his plea and proofs; then this is the substance of his suit, and then it is traversable more properly than any other thing: for whether there be such prescription or such lease made to R. W. the ancestor, by Steven, the bishop, is not the cause of the prohibition; for if this be true, and the spiritual judge admit his plea, he cannot have prohibition; therefore the refusal is the sole ground and cause of this suit, wherefore it is traversable; so we are within the general rule of traverse.

But it may be objected, and so it has been in such cases, that the allegation of this refusal is but matter of form, and not material, therefore not traversable. But this we deny. For if a man be sued in the spiritual court, and it be admitted, that the common law would bar the libellant, but that such matter is not any bar by the spiritual law; yet, he shall not have a prohibition before he has pleaded this matter in bar in the spiritual court; or if, after the rejection of his plea, he sue prohibition, and do not allege that he offered such plea, and that it was refused,—upon that surmise he cannot maintain the prohibition. This appears by 7 E. 6. 79. where the case is put, that a man had used to pay for the tithes of a close for the space of six years and more, but twelve pence per annum, to the parson or vicar for the time being; and now the parson had a farmer who sued in the spiritual court for tithes in kind, he pleaded this payment of twelve pence for the tithes, which was not allowed by the ecclesiastical judge, but sentence was given for the farmer. A prohibition was granted in this case in the king's bench by good advice, upon the said averment in the suggestion that the spiritual court would not admit his plea there; which shews that without that averment the suggestion would not have been good: so this is material, and not a thing of form. Accordingly it was adjudged here, H. 30 El. in a case between *Bagnall-v. Stokes*. [Cro. El. 88.]

"Prohibition, and surmised that the defendant sued him, being an executor in the spiritual court, for a legacy; whereas the plaintiff had a release, but had only one witness to prove it; but a consultation was granted. But if he had surmised that he had pleaded this release in that court, and produced his witness, and that they would not allow it, because it had not two witnesses—this had been a good surmise. And it was said the plaintiff is at

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"no mischief; for he may have a prohibition after sentence given in that court." Which proves that this allegation is material, else the omission could not have been material, and then every thing is material. If this be not allowed, it will alter the whole course of the law; for it is a rule, that a man shall never have a prohibition upon that which he may plead in the spiritual court. So is the 8 E. 4. 14. a. by *Choke*. If a parson lease to me by deed the tithes of his benefice, and afterwards sue me for the tithes of my own lands, upon this I shall not have prohibition; for I may plead this in bar in the spiritual court. So it was in this court, 31 El. between *Cowper* and lady *Gresham*, (ante, 94) who libelled as impropiator of a parsonage against him in the spiritual court for tithe hay, he suggested that he and those whose estate, &c. have paid for time, &c. to the vicar of that church, four pence for tithe hay of each acre; and it was adjudged that a prohibition did not lie upon this, for the *modus decimandi* did not come in question; but the matter was, whether it belonged to the parson or the vicar; and it is a good plea in the spiritual court to say, that the tithe belongs to the vicar; whereupon a consultation was awarded. So wherever the matter may be pleaded in the spiritual court, a prohibition shall not be had upon it. And in this case it appears that it is a good plea; for we by way of bar allege, that he pleaded this matter, and the court allowed it, and received his proof, whereupon he demurs, which is a confession of all matters of fact duly and well pleaded: so that it appears to the court by the confession of both parties, that he might, and had pleaded this in the spiritual court, and had it allowed.

But it may be objected, that though the parties have agreed upon this by conclusion between themselves, yet that this does not bind the court from judging upon what they know from their own judicial knowledge. But, I say, that upon this point of spiritual law, the court have no judicial knowledge. This appears in 34 E. 3. Dett. 164. If I am bound to enfeoff I. S. of the manor of Dale, such a day, and on that day he enters into religion, or dies; in debt upon this obligation I may say, that "on the day he entered into religion, or died;" and I need not plead that I tendered the deed on the day; for it is apparent to the court that I could not perform it, for that I shall not be bound to tender a thing impossible. But in the above book it is, that if I am bound to present I. S. to a benefice, when it becomes vacant, and at the time he has married, which at that time by the common law, incapacitated him from taking it, yet there in debt, it is not sufficient to say, that he had married at the time; but I ought to say, that I presented him to the ordinary, who refused him, inasmuch as he was incapable; for this is a spiritual matter, of which this court cannot judge. And that this court cannot take notice of spiritual matters, appears by the general learning of the books, where it is taken for a rule, that if the act be alleged to be done in the spiritual court, it shall be intended to be duly done, and shall never be examined here; for this court cannot judge of their law. In 4 H. 7. 14. if two be candidates for the place of abbot, and one be elected by two, and the other by twenty; and they interplead in the spiritual court, and there it be awarded, that he who was elected by the smaller number shall be the abbot, he shall be allowed to be the abbot, and shall sue and be sued here. In 20 E. 3. *Comisars*, 46. if a layman be made an abbot, who has consueance of pleas, he shall demand consueance in this court, and the King shall not countermand it for disability of his person; for being abbot, it shall be allowed to him here until he is deprived by themselves. So in 40 E. 3. 28. by *Kyrton*, if a divorce be sued unduly in the spiritual court, yet it shall be allowed in this court, till it be repealed. Which proves that this court has no judicial knowledge of their law. For how can it be? when their laws are continually altered by constitutions, as the common law is by statutes. And how can this court know every constitution? It is not possible. Wherefore here the court have no judicial cause to judge contrary to the agreement of the parties. And the truth in our case is, that he pleaded this matter, and produced his proofs, and they were not sufficient to prove his allegations: if this allegation be not allowed, great mischief and inconvenience will ensue, and the spiritual court cannot determine any matter. For if I be sued in the spiritual court, and I

plead matter of bar, or discharge, when I proceed to proof of it, my proofs fail, whereupon sentence is given against me for default of them; I come here or to the common pleas, but especially here, for by the books the common pleas cannot grant a prohibition, but where the matter which is in suit in the spiritual court is depending in suit before them; but here it may be upon any surmise, and I surmise here, that I offered such matter in the spiritual court, and they refused my plea, or that I had one witness to prove it; then if this surmise be not traversable, I compel the other party to take issue with me here, and the matter shall be tried here again. I have known the whole matter, and all that he could allege in the spiritual court, and now I am prepared to meet him here, which is great inconvenience, intolerable mischief, charge, and delay, to the party. In 1 R. 3. 4. *Hussey* held, that if the original suit ought to begin in the spiritual court, and be there begun; though afterwards a thing come in issue, which is triable by our law, yet it shall be tried by their law. But if these suggestions pass without any check or controul, they will never try a thing triable by the common law, nor a thing triable by their own law; but when a defendant has pleaded in the spiritual court, he will come here, and surmise that he offered such matter in the spiritual court, which they refused, and then he will try it here. So that the admission of these false surmises here, will be the subversion of all law and practice.

But it may be farther objected, that this is but a surmise contained in the declaration, and surmises are not traversable. I must agree that surmises are not traversable: but then that is not a surmise; for every matter alleged in the declaration is not a surmise; for there is matter in fact alleged in it, as well as surmise. As in a *formedon*, the gift is traversable, for that is alleged in fact, but the *deformement* is surmised. The surmise is always the point of the writ, and that cannot be traversed; but all other matters alleged in the declaration are traversable. The point of the writ in our case is, that he sued *contra prohibitionem regiam*, and this, it is true, cannot be traversed. So in 1 EL D. 170. *Pelles* and *Saunderson's* case, (*ante*, 57) it is said, that the defendant ought to defend the contempt, but shall not traverse it. But this matter of the refusal of the plea is a thing alleged in fact, and not a surmise, and so we are not within this rule. But, if it be a surmise, yet in this case it is traversable; for this is a cause which ousts other courts of their jurisdiction, which is prejudicial to the other courts, and therefore traversable; as in 12 H. 4. 13 & 17. and 13 H. 4. 16. the difference is agreed; if a man remove a plea out of another court which is [not] the King's court, for a certain cause, such cause is traversable: but, if it be out of one of the King's courts, it is otherwise; for both are the King's courts, and so no prejudice to any one, otherwise it is where it is removed from the court of a stranger, which is a prejudice. In this case, it is the ecclesiastical court, which is prejudiced by it; so that it is traversable. In 34 H. 6. 15. if a man sue one in the Common Pleas, and he pray his privilege of the Exchequer, for that he is a servant to one of the officers there, and attendant upon him in his office, this is traversable; for he may say, that he is his servant, attendant upon his husbandry in the country, without this, that he is attendant upon him in his office, and this is a good plea.

It may then be objected, that the practice of this court is otherwise, and that such traverse has never been seen here. But that is not so, for several cases have been resolved here upon this point. The first was a case between *Eaton* and *Morris*, E. 30 Eliz. where the plaintiff sued out a prohibition and alleged, that the defendant, as parson of D. having sued him in the spiritual court for tithes, and that he having there pleaded, that the defendant not having read the articles according to the statute of 13 Eliz. so was *ipso facto* deprived, and the spiritual judge having refused to receive that plea, it was moved on the other side, that prohibition would not lie upon this, for it might be pleaded in the spiritual court: and it was alleged that it was false, and used only for delay, upon which the court advised him to traverse it: upon that advice the defendant pleaded, that the spiritual judge did not wholly refuse to allow his plea, and upon this he puts himself upon the country, and upon this the plaintiff demurred, and it was adjudged to be no plea, as it was pleaded, for this

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issue could not be tried, no place being alleged where the court was kept. For it need not be alleged in the declaration, because that contains divers issuable matters, and it is not the practice to allege it. But, when one of them is traversed, the place shall be shewn by way of replication, which might well have been, if he had taken his traverse with an *absque hoc*; but, when he says *quod non recusavit, et de hoc ponit se super patriam*, he has bound the plaintiff, so that he cannot come with his replication to shew the place; and for that reason it was bad; besides, when he says, *quod non penitus recusavit*, this makes the issue uncertain and pregnant: and for these causes it was ruled to be bad; though it was holden that it was traversable, if it had been well pleaded. In Tr. 30 Eliz. there was the case of *Ascoll and Wygon*, where there was the like surmise, that he had pleaded that the parson had not read the articles, and they refused it: the court was informed that this surmise was false, and they advised the defendant to traverse it; and it was urged by *Coke*, that this was not traversable; but notwithstanding that, the opinion of the court was, that it might be traversed. And so they advised Mr. *Lewkner*, who did so. So H. 32 El. prohibition was brought here upon the same surmise again, and the case was moved by *Lewis*, who informed the court that it was brought solely for delay, and that it was false; and the whole court advised him to traverse the offer or refusal. In these three cases, this came in judgment. In many other cases I have known this debated for the King, and agreed that the surmise was traversable. Afterwards, in the case of *Futter and Whisker*, it was moved by Mr. *Attorney*, that if prohibition be sued here, and it be surmised that he pleaded such matter in the spiritual court, and offered one witness to prove it, and the spiritual judge refused it, if the defendant plead that he offered two witnesses in the spiritual court to prove it, *absque hoc* that he offered only one; Mr. *Attorney* said, that this was not a good plea; but all the court held it good; wherefore it is traversable. M. 32 & 33 El. there was the case of *Bennet v. Shortwright*, parson of Washinge, (*ante*, 94,) who had libelled in the spiritual court for tithes of corn: the defendant sued a prohibition, and surmised that in the said parish they had immemorially used to pay the tenth sheaf in satisfaction of all tithes of corn; and in those years in which the subtraction was supposed, he severed it from the nine parts, and the parson had it; and he said, that he offered this plea in the spiritual court, and they refused it. *Godfrey* moved, that a prohibition would not lie, for it was not *modus decimandi*, but tithe in specie; so that it was confessed that the plaintiff had cause of suit in the spiritual court. But the court held the suggestion to be good; for if a parishioner set out his tithes, but the parson will not take them, or they are destroyed by cattle, he shall not have tithes again; wherefore, if the spiritual judge will not allow the plea, prohibition lies. *Godfrey* then said, that he would take issue that they did not disallow it; and the opinion of the court was, that he might do so. H. 32 El. prohibition was sued to the Admiralty Court upon a suit there on a bond, surmising that it was executed in England, and not beyond the sea. There, it was agreed, that if the bond were executed upon land, the suit should be at common law; but, if it were executed beyond the sea, the party has his election to sue in the Admiralty Court, or here; for this reason, that it may be, that all his witnesses whom he has to prove the bond are beyond sea, so that he cannot have any benefit from it here; but in the civil law he may in this case, if the truth be that the bond was executed beyond sea, and that his witnesses are there. If he sue in the Admiralty Court, and the defendant surmise that the bond was executed here upon land to have a prohibition, and this cannot be traversed, it will take away the whole benefit of his bond. And so all these mischiefs, and many which the understanding of man may imagine, will ensue, if these false surmises be not to be traversed.

As to the second point, that their prescription that the bishop and his predecessors, for themselves, their farmers, and tenants for years or at will, have holden and enjoyed the said lands privileged and freed from the payment of all tithes renewing or coming of or upon the said lands, it is not good; for this is a prescription in *non decimando*, by a lay person, which cannot be. In 8 E. 4. 14. The book puts this generally without exception, that a man may prescribe in

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*modo decimandi*, but in *non decimando* he cannot. The reason is, that at first, parsonages consisted solely of tithes, and so several do now; but by the devotion of good men they were afterwards endowed with glebe: if then men might prescribe in *non decimando*, the successors would have nothing to live upon in a little time. However, a difference in this has been taken between a layman and a spiritual man: a spiritual man may prescribe in *non decimando*; and the reason is, this is no prejudice to the church, for the church will still have it. But, if a layman were to have it, then there would be a prejudice to the church. According to this, it was ruled in this court H. 33 El. between *Wickham*, bishop of Lincoln and *Cooper* (ante, 100); for *Cooper* sued the bishop in the spiritual court for tithes, and the bishop sued out a prohibition, and surmised, that he and his predecessors had been seised of the lands of which the tithes were demanded, and that when they were in their possession they had holden them discharged of tithes: and he shewed, that in the time of Edward VI. the lands were granted to the duke of Somerset, and that they afterwards came back again to the bishopric. And it was well debated here if this prescription were good, and yet the prescription was special to hold the lands discharged, when they were in their own possession. But the prescription was holden good; for it was said, that tithes are spiritual things, therefore a spiritual person may prescribe to be discharged, but not a temporal person. But in this case the prescription goes farther; for he prescribes for himself, his farmers and tenants for years or at will; and it seems to me, that this cannot be good for his tenants for years or at will, for they are temporal persons. And this is a thing annexed to the person of the bishop, and not to the lands, so that the lessees cannot partake of it; for of privileges annexed to the person of a man no one else can have the benefit. And therefore in 30 Hen. 8. if one by deed make a feoffment of the glebe, the feoffee shall pay the tithes of it to the feoffor, for he does not partake of the privilege annexed to the parson. So M. 31 & 32 Eliz. it was adjudged here between *Perkins* and *Hind*. If a parson lease his glebe, rendering a small rent, (1) he shall have tithes: but, if a great rent be reserved, near the value of the land, he shall not have tithes; for it shall be intended that this rent was reserved for the tithes, as well as for the land. It will be a hard thing in this case to make this a good prescription as it is laid. It is not good, as it seems to me, because he prescribes in *tenants for years and at will*, viz. by himself and his farmers he has holden discharged, it cannot be good, as in *Chatworth's* case, in 9 Hen. 6. 62. where in trespass the defendant pleaded, that the prior of *St. John of Jerusalem* was seised of such a manor, and that he and his predecessors, and all their tenants at will of the said manor, had had common of turbary in the place where the trespass is supposed, and so as tenants of the said manor, &c. And by the whole court, clearly this is not good, for tenants at will cannot prescribe in such manner; but they ought to say, that the lord of the manor has had common for himself and his tenants at will. And so is 11 H. 7. 6. Then here he lays the usage in his tenants at will, which is such a prescription as if he had said that he and his tenants for years and at will had holden discharged. But if he had prescribed for himself and his tenants, the nature of the thing would shew that that could not be: for he could not hold (the land) discharged for him and his tenants, for tithes are not parcel of the land, nor a thing issuing out of the land, but a collateral profit, to be taken upon the land. This appears by the case of *Sherwood* and *Winchcomb* in 34 & 35 El. (ante, 106) where a man prescribed to have tithes as parcel of a manor: for by *Popham*, nothing can be parcel of a manor but a thing which is part of the land, or issuing out of the land; and tithes are but collateral things to be taken upon the land. That is the reason too of 30 Hen. 8. if a parson make a feoffment of his glebe, or purchase land within his parish, and make a feoffment of that land, yet he shall have tithes from his feoffee; the tithes are not extinct, because they are not things out of the land. So in *Hind* and *Perkins* case (2) it was agreed, that

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(1) 2 *Ware's Rep.* 1 K. B.

(2) *Walter* (in the argument of the case of one *Wright*) cited this case: a parson made a lease

for years of parcel of his glebe of the value of 14l. per annum, rendering 13 shillings rent: if the lessee should pay tithes was the question

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that if a person release to a parishioner all his right in his land, yet this does not extinguish his tithes, for they are not issuing out of the land. Then if they be not issuing out of the land, when he makes a lease for years, he is not chargeable by any means with them; therefore he cannot hold it discharged for himself and for his tenants for years, &c. for his estate was never charged.

But this prescription is not good for another reason: for he prescribes that *Steven, and all his predecessors bishops of Winchester for the time being, seised of the aforesaid manor*, but does not allege that any one of them was seised. This therefore cannot be good, for here is no ground for the prescription. [Br.] 2 Mar. *Prescription*, 100, shews the difference between a custom and a prescription; the one goes to the land, the other to the person. When it is laid in the person he ought to be able to prescribe, otherwise it is void. For it appears, 22 Hen. 6. if a man would plead a custom in a vill, he ought to say that it is an ancient vill, otherwise it is not good. This was adjudged in *Ischam's case*, 6 Edw. 6. where, in trespass for breaking his park, called Illbrewer's park, and eating his grass with hogs, and cutting it, the defendant pleaded that Sir John Arundell was seised of the said park, and granted to him the office of keeper of the said park, &c. that there from time immemorial had used to be common for all their hogs in the said park, and when the grass was grown, to cut it and make it into hay, and so justified the trespass; it was holden that this plea was not good, for he does not plead that this was an ancient park; and also, it is not alleged before the prescription that he was seised, and so enable himself to prescribe. In 35 & 36 El. there was one *Clarke's case*, at St. Alban's (*ante*, 106). He was sued for the tithes of sixteen acres of wood. He surmised in prohibition that these sixteen acres were parcel of such a park, and that he and all those whose estate he had, had used to pay four-pence for every acre of wood, and did not allege, that he was seised of the park, and for that reason the prescription bad. So here, when he says that he and all his predecessors seised of the said manor have been discharged, and does not state that any one was seised, this is not good. For every prescription ought to be certain. But it may be said that these words are averred that he was seised, though the expression should be otherwise than that he was seised, but it is not so as it is here set down, but if the words were put in the ablative case absolute, as in *Adams and Wrottesley's case*, where an ejectment was brought for entering into a house and a hundred acres of land, and it was declared that the prior of M. was seised of the lands and demised them to R. Wilcocks for years; afterwards the said Roger being seised of the said lands, the reversion being in the prior, he leased it to the plaintiff by the name of his brother of *Brosley*, with all lands thereto belonging, *ad tunc in tenura Rogeri Wilcocks*, for sixty years after the end of the first term: exception was taken, that it was not averred that the land was in the tenure of Wilcocks; yet it was held good, for those words being put in the absolute case, are good averment. But here it is not so, but is as if he had said that all his predecessors who were seised, &c. and it might be no one was seised.

This prescription does not extend to discharge the tithe of lamb and wool; for it is, at they hold the said lands discharged of all tithes, which is to be understood tithes of all things which come immediately from the land, as hay, grain, and fruit, and not of the cattle upon it, or the wool of those animals. For prescriptions shall be taken strictly. 5 Edw. 4. 12. if a man prescribe for himself and his tenants at will, that will not serve for copyholders,

and

In this court in prohib. M. 31 & 32 El. between *Parkin and Hind*, and it was adjudged that he shall pay tithes notwithstanding the demise and the reservation of rent, but then it was held that if a rack rent had been reserved to the value of the land leased, that no tithes should be paid, for then it might be quasi a lease inclusive of the tithes with the land. And *POPHAM* smiled at this last opinion, and, as I believe, meant that there was no difference in law.

And in the argument of this case *Walter* further said that 30 El. in this court, it was held that the tithes of land fed, for the whole year, with dry cattle, only shall be paid with regard to the value of the land; as if the land were of the value of 20l. per ann. then for the tithes a tenth part of the value shall be paid to the parson: *Quod nota*, and *Quere*: for *GAUDY* immediately asked the question secretly of *POPHAM*, C. J. if the law were so, and *POPHAM* made no answer to him.

and yet they are but tenants at will. 9 El. it was holden in the case between *Rush* and *Barrington*, where a man prescribed to have common of estovers, as belonging to such a house, that this should not extend to house-bote and plough-bote, but only to estovers to burn. So here this prescription shall not extend to sheep, for these do not become due in respect of the land.

*Coke* the Queen's Attorney.—There are two points; the first, whether the prescription be good or not: and the other, whether the traverse be good; and he argued that the prescription was good; and so for the plaintiff, first he argued who was capable of tithes, at common law, in pernancy, and who was capable in discharge, and in what manner pernancy, and where discharge would be at common law or afterwards by any means. As to the first, he held that no persons but spiritual persons were capable of pernancy of the tithes, for none but they could take tithes. And before the council of Lateran, which was A. D. 1115, and in the time of Dioniseus (3) the emperor, none but spiritual persons could have tithes, for the men of holy church were as apostles, and had nothing certain, but it rested wholly upon the devotion of the people to give what they pleased, and to whom they pleased. As *Parn.* says, in 7 Edw. 3. 5. "that before a constitution lately made, every patron might give his tithes to any parson of any parish." But at all times then this giving of their tithes was done more carefully than at this day, and the church had its tenths. You may see in the time of William the Conqueror the care that was taken touching these things, *de omni annona. tua decima garba insimul de omnibus rebus quas dederit Dominus tuus decima reddenda sunt.* And I have heard Dr. Andrewes say that this was their tenure of God, that none could sue for tithes but only the parson; and 22 Ass. 75. the parson of each parish shall have the tithes; and if they be not within any parish, then the king shall have them; for he is capable of the pernancy of tithes, for he is *persona mista*. And in 44 Ed. 3. in an assise for tithes before *Ludlowe*, he said, that in ancient times every man might grant his tithes to what church he would; so that at all times it must have been a spiritual person who had them by way of pernancy. And to the same purpose he cited 10 Hen. 7. 13. yet the king may have tithes by way of pernancy, for he is *persona mista*. And so E. 7 Ed. 6. [Dy. 38.] it was taken to be a damnable thing for a layman to have tithes. And there is a difference between a parson and the servant of a parson, 33 Hen. 6. 39 & 40 Ed. 3. 28. in suits between the vicar and the parson, the spiritual court shall have jurisdiction: but 45 Edw. 3. 17. if the right of tithes come in question between a farmer of a parson and a layman, this shall be tried at common law and not in the spiritual court. So it appears that the farmer of a parson might have tithes in pernancy; and now the statute of 31 and 32 Hen. 8. gives every layman a remedy for them in the spiritual court. For before this statute a layman might have tithes by way of pernancy, but he had no remedy: then any layman whatever is capable of being discharged of tithes for there he is not put to any action for them, as he is who is capable in pernancy. But he is only capable of being discharged, and this every layman might be: for this he cited 8 Ed. 4. 13. (*ante*, 44) where a layman prescribed to be discharged of tithes upon a composition with the parson and ordinary, who granted that he and his assigns should be discharged, and a good discharge for him and his assigns, and he cited *Fitzherbert's Abr. Prohib. 9.* in his very words. And in the Register, 38. b. such a composition was made by the bishop as patron and ordinary, and it shall be a good discharge, and he read the words of the Register, and so he held that a lay person might be discharged of tithes at common law, but he was not capable of them in pernancy, for that he failed of a remedy to come at them; and it is all one not to have the thing, and to have no remedy for the thing. But now the statute of 32 H. 8. c. 7. gives a layman a remedy to recover the tithes which he is to take. If then he be capable of taking, it is to be seen how this right to them in pernancy arises. This must be

(3) I have copied the MS. though the name of the emperor is incorrect. There were three councils of Lateran, the first under Calixtus the second, A. D. 1119; the second under Pope Alexander the third, A. D. 1180,

which is the most famous, and by which infusions of tithes to laymen were forbidden; the third under Pope Innocent the third, A. D. 1215. See *Seld. Hist. of Tithes*, c. 7.

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be either by composition, or by grant, or by prescription; and so of discharges of the payment of tithes. And then we must give a remedy [in this court] to the party; for if he have no remedy here, he will be without a remedy. For in this point we act contrary to the civilians: they will not allow discharge of tithes, because, they say, that they are due to the church *jure divino*, and therefore a common person being lay, and tithes spiritual, they will not allow any plea in discharge. And then he said that a layman of himself cannot originally be discharged of the payment of tithes by prescription, but the prescription must first settle in a person who can prescribe in discharge, and if it do not first settle in such a person, no benefit can arise therefrom to any one. But, if the prescription be once settled in a man who can prescribe, if he set it over to another, he shall take advantage of it. And for this he relied upon the words of the 32 Hen. 8. c. 7. that "no person or persons shall be sued or otherwise compelled to yield, give or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm are discharged and not chargeable with the payment of any such tithes." So that it appears by the very words of the statute, that the law allows a discharge of tithes, and therefore the statute provides a remedy. And as the civilians will not allow this, it is reasonable that we should give a remedy here. As to the other mode of discharge by grant or composition, he relied upon Fitzherbert's Abr. and the Register; for where it was granted to A. by the patron and ordinary, that he should be discharged; there, if he assigned to B. he should hold it discharged. Then if this settle in a man by grant or composition, and his assignee shall take advantage of it, so it shall be here with the lessee of the bishop. For the bishop has made a lease for years, and here the prescription first began in the bishop and has settled in him, who might prescribe to be discharged: and this discharge runs with the land; and the very words of the statute of 2 Edw. 6. c. 13. provide, "that no person shall be sued or compelled to yield, give, or pay any manner of tithes for any manors, land, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the payment of any such tithes." So the statute allows a discharge of tithes in the land, and that discharge shall follow the land, if the discharge first commenced in any one who might be discharged. And here the discharge commenced in the bishop; and it shall run to his lessee. And there are various manners of discharge, as appears in 10 El. Dy. 277. (ante, 59) where the Templars, Hospitallers, and Cisterciens had a privilege from Rome, *quod non tenentur solvere decimas prædiorum suorum quæ propriis manibus aut sumptibus excolunt*, but their farmers shall pay tithes, &c. In *Knightley and Spencer's case*, (ante, 101) unity of possession is a sufficient discharge from the payment of tithes, and this shall serve for their farmers, as appears by the case of the Templars, who were discharged, but only of the tithes of those lands, *quas propriis manibus aut sumptibus excolunt*; and no doubt that if it had been general for them and their farmers, it had been good. And here we are within such prescription, and for this he cited a case in 18 Eliz. Dy. 349, the case of the parsonage of *Peykirke and Elmeton*, (ante, 66) where the dean of *Peterborough* prescribed that for the manor no tithes were paid by the farmers by lease or at will, except wool and lamb; and the parson libelled against a farmer for tithe of hay and grain, and a prohibition was granted, and the statute was not useless. And this in effect is our case; for there the lessee was discharged by the prescription in the parson for himself and his farmers, and that the parson might prescribe to be discharged of tithes. It was agreed in the 28 El. in the case of the bishop of *Winchester* and the parson of *Buckden*, where the bishop prescribed to be discharged of tithes, and held good; for he who may have tithes paid to him, may prescribe to be discharged of them. But in that case there was no lessee. But in 34 and 35 El. *Knightley's case*, (commonly called the case *de ratione*), it was agreed, that if a parson has been parson imparsonnee time out of memory, so that no one can tell, he by this prescription may be discharged; but, if he makes a lease, his lessee shall pay tithes: but, if he prescribe that he and his lessees may retain, then his lessees shall be discharged

by way of retainer. And he cited a case between *Trott* and *Grevell*, which was like the present case, and he pleaded the same plea; and there by order of the court issue was taken, whether the lessee had paid tithes or not; for if he had not paid them before, then he should be discharged; and there the freehold was out of the spiritual person who prescribed. But in our case the freehold yet remains in the bishop, and so the lessee shall be privileged from the payment of tithes. And so upon that point he prayed a prohibition.

Then as to the traverse it seemed to him, that the refusal was not material, and therefore not traversable. And as it seemed to him to be plain, he would be short upon it, for it has been often adjudged, and he put the case of *Eaton* and *Morrice*, M. 31 & 32 Eliz. where, in a suit for tithes in the spiritual court, the defendant sued a prohibition, and surmised, that he who libelled against him in the spiritual court for the tithes had not read the articles within six months, according to the statute of 13 Eliz. and so was not parson to demand tithes, and that he offered this plea to the spiritual court; and they refused it there; the other said, that they accepted the plea in the spiritual court *absque hoc* that they refused to allow the plea; and upon that joinder in demurrer; and ruled, that the prohibition should stand. And the reason that a consultation was not granted was, that no place of the refusal was shewn, and therefore they could not try it. But the whole court upon the other point said, that notwithstanding this consultation should be granted, because the refusal was traversable in this case, but all agreed, that if he had prescribed *in modo decimandi*, or to be discharged of tithes, then the refusal would not have been traversable, because the spiritual court will not allow any pleas in such cases of discharge; for they say there it is *jus indebibile et non jus divinum*; but they will allow discharges which the statutes make. And so he concluded with the opinion that the refusal is not traversable, and he held this but cheap. (1)

GAWDY. You have cited the case of *Peykirk* and *Elmeton* that the lessee shall be discharged: it is a good case, and it proves directly that the lessee of a parson may be discharged of tithes by the prescription in the parson. Then as to the traverse, he held that the refusal was not traversable, because it was but matter of surmise, and not the substance of his action. And for this he cited the case of *Wimbish* and *Willoughby*, in the *Commentaries*, 76. where upon a surmise the plaintiff had the writ directed to the coroners; and the whole court agreed that he might in an assise, because the assise is, the speediest remedy that can be, the jury coming in at the first day, and therefore is to be favoured, and therefore they said it was good. But the reason why he cited this case was, for that the party was not at any mischief, for he has no remedy for this, it being but matter of surmise, and therefore shall not be traversed, because it is not matter of substance. So here, though the allegation of refusal were true, we could not grant a prohibition upon it; but we grant the prohibition upon the body of the matter, whether the discharge be good; and the surmise is but matter of form, and so not traversable, any more than in a writ of *coinage* the conveyance of the pedigree is traversable, because not matter of substance. For in all actions the substance of the action is traversable, and not that which is but form and of course. As in an action upon the case of trover and conversion, the conversion is not traversable, for that is not the cause of action, but the defendant ought to plead not guilty. So here, the refusal is not the substance of his complaint, but the discharge is the substance and ground of the prohibition; and the spiritual court will not allow of any discharge, and therefore we are used to grant a prohibition. So he held the discharge to be good, and also the prescription, and that it also served for the lessee for years.

FENNER agreed, that the prohibition well laid, and that the refusal was not the cause of the prohibition; for even if the spiritual court would accept the plea, yet we should grant a prohibition, if the matter did not belong to them, or if the party could not have right there. And so if a party have sufficient matter for a prohibition, he need not wait their leisure to see whether they will receive his plea or not. To which opinion POPHAM also agreed; and they all agreed, that the prescription was good for the lessee for years, and that he might well enough take the benefit of the discharge.

(1) "il tient ces forsqe cheap."

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At another day the case was moved again by *Tanfield*, who thought a consultation ought to be granted, and he said that Mr. Attorney had always stated the case to be, that the bishop and all his predecessors had holden the land discharged of tithes, but that the pleadings were not so; for it appears by them that the bishop had the rectory and also the land, &c. and that he and all his predecessors by themselves, their farmers and tenants at will, had holden the land discharged and privileged from the payment of tithes; and that would make a great difference, as it seemed to him: and he agreed that where the land is discharged of tithes by composition real, the lessees and farmers shall hold it discharged; but where it is discharged only from the payment of tithes by unity of possession in the hands of one who might prescribe in *non decimando*, when [the land] is removed out of his possession it shall pay tithes, and the privilege shall not go with the land, for that would be to make a prescription in *non decimando* in a layman, which cannot be. And for this he put a case which was in the exchequer chamber by English bill in the 31 EL. The Queen had lands in her hands: it was holden by all, and so adjudged, that she should not pay tithes. The Queen made a lease for years: it was a great question, whether the lessee should pay tithes; and a case was drawn, and the opinion of the justices was divided; and at length, after great advice, it was resolved, that the lessee should pay tithes, and so it was decreed. And he could not see any difference between the cases: for the bishop having privilege in *non decimando* by reason of his person only, it could not be transferred to another. *POPHAM* said to *FENNER*, that the case was so; but they said that there was a great difference, for the Queen is only privileged by reason of her person.

*POPHAM*. It was lawful for every man to pay his tithe to whom he would, if he were spiritual: for the same reason a spiritual person might retain his tithes, and not pay them to any one, and then the parson had no interest in them.

*Tanfield*. It appears in our case, that the bishop had the rectory and the land, &c. and this appears to be the discharge.

*GAWDY*. Do you say *ratione inde* that he was discharged?

*Tanfield*. No.—Whereupon all the court agreed, that the prohibition should stand, and that no consultation should be awarded upon both points.

[*Lord Coke's Report.*]

Upon demurrer in this case three points were moved: 1. Whether the said prescription for discharge of tithes was good or not. 2. Whether the plaintiff, being a layman, should take benefit thereof. 3. Whether the said traverse was good or no. And as to the first point, three things were considered: 1. Who were by the common law capable of tithes in perannuity, and who not. 2. Who was capable of a discharge of tithes at the common law, and who not. 3. How he, who was capable of a discharge, might be discharged of tithes, *scil.* either by prescription, or by composition, &c.

As to the first it was resolved, that none by the common law had capacity to take tithes, but only spiritual persons, or a mixt person, and regularly no mere layman was at the common law capable of them, unless in special cases; for no layman but in special cases could sue for them at the common law in the spiritual court, *scil.* for the subtraction of them. See the books in 7 E. 3. 5. 11 Ass. 9. 44 E. 3. 5. b. 10 H. 7. 18. a. and 7 E. 6. Dyer, 84. and the books in 43 E. 3. 34. a. and 44 E. 3. 39. a. b. that a farmer of a parson may sue for tithes; but it appears that such farmer was a spiritual man, as vicar, &c. And so it was said by some are all the other books in 31 H. 6. 11. a. 35 H. 6. 39. a. b. 2 E. 4. 15. a. b. 6 E. 3. 4. a. b. 12 H. 7. 24. b. (in which in truth there are but opinions) to be intended: and if the common law had generally enabled a layman to be capable of tithes, the common law would have given him remedy for the recovery of them; but regularly a layman had no remedy for the subtraction of tithes, till the statute of 32 H. 8. c. 7. But see 22 Ass. 75. that the King was capable of tithes at the common law, for he was *persona mixta*, and his patentee also by his prerogative, as it there appears.

As to the second point it was resolved, that a mere layman who was not capable of tithes in perannuity, was notwithstanding capable of a discharge of tithes at the common law in his own land, as well as a spiritual man; for by the

the common law, the person, person, and ordinary might have discharged a parishioner of tithes in his land, &c. or the parishioner might have given part of his land to the person for a discharge of tithes in the residue. And for proof thereof see the book in 8 E. 4. 14. a. b. and Register, 38. where it appears that a layman might be discharged of tithes at the common law; but a layman might be discharged of tithes at the common law by grant, or composition, as it appears in the said books, but not by prescription to be discharged of tithes; for it is commonly said in our books, that he may prescribe in *modo decimandi*, but not in *non decimando*, and the reason thereof is, because he is not, but in special cases, capable of tithes at the common law, and therefore without special matter shewed, it shall not be intended that he hath any lawful discharge. And for this reason, in favour of holy church, although it might have a lawful beginning, the law will not suffer such prescription in this case, to put it to the trial of laymen, who will rather strain their consciences for their private benefit, than yield to the church the duties which belong to it. And the law had great policy therein, for the decay of the revenues of men of holy church, in the end, will be the overthrow of the service of God and of his religion. And therefore it is recorded in history, that there were (amongst others) two grievous persecutions, one under *Dioclesian*, the other under *Julian* surnamed *Apostata*; for it is recorded, that one of them intending to root out all the professors and preachers of the word of God, *occidit omnes presbyteros*, but notwithstanding that, religion flourished, for *sanguis martyrum est semen ecclesie*; and yet the same was a fearful and grievous persecution: but the persecution under the other was more grievous and dangerous, because (as the history saith) *ipse occidit presbyterium*, for he robbed the church, and spoiled spiritual persons of their revenues, and took all from them whereon they might live; and thereupon in short time did follow great ignorance of the true religion and service of God, and thereby great decay of the christian profession; for none will apply themselves, or their sons, or any other whom he hath in charge, to the study of divinity, when they shall have, after long and painful study, nothing to live upon. And it was said, that if a prescription in *non decimando* should be suffered, the church would rather lose than gain in these days. And for this reason such prescription was not allowable. But a spiritual person who was capable of tithes at the common law in perannuity, may prescribe to be discharged of tithes generally; for as he may prescribe to have a portion of tithes in the land of another, so he may prescribe to discharge his own lands of tithes; for it is commonly said in our books, that before the council of Lateran, every man might have given his tithes to any ecclesiastical person he would, and that appears by the books aforesaid. And note, it is recited by the statute of 2 E. 6. cap. 13. that land may be discharged of tithes by prescription, but that cannot be in case of a layman, *ergo*, it ought to be in case of a spiritual man. *Vide* 10 Eliz. Dyer, 277. The orders of the *Cistercians*, *Templars*, and *Hospitalarii*, were discharged of tithes *sub modo*, *scil. quamdiu propriis manibus excoluntur*, &c. and 18 Eliz. Dyer, 340. And as to the second point, the same dependeth upon the first, for if the lands of the bishop were discharged in his hands absolutely by prescription, then the demising thereof to a layman cannot make the same chargeable which were discharged before; and in that it may be more beneficial to the bishop, for in respect of that he might reserve the greater rent, &c. And as to the third point, it was resolved, that the traverse was insufficient, for as it is said in 8 E. 4. 14. a. the spiritual court will not allow any plea in discharge of tithes, and therefore the refusal in such case is not material, for the party may have a prohibition before any such plea pleaded by him in discharge of tithes, and therefore in such cases the allegation of the refusal of the ecclesiastical judge, are rather words of course than of effect and substance. But in some cases the refusal is traversable, as it was adjudged M. 30 and 31 Eliz. in this court, between *Morris* and *Eaton*, where the case was, that *Morris* was sued by *Eaton* in the spiritual court for tithes; *Morris* alleged there, that *Eaton* had not read the articles according to the statute, and that the ecclesiastical judge refused to allow the same; and this refusal was traversable by the judgment of the court, for otherwise, upon such surmise, all matters might be prohibited in the spiri-

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tual court, although the spiritual judge do all that belongeth to law and justice. And in the same case, the party grieved may have remedy by his appeal; but in the other case of discharge of tithes, or *de modo decimandi*, the judges of our law well know, that the ecclesiastical judges will not allow such allegation, and so is the difference.

[NOTE, reader, a man may prescribe, that he and all those whose estate he hath in the manor of Dale in Dale *a tempore cujus*, &c. have paid to the parson of Dale for the time being, a certain pension yearly, for maintenance of divine service there, in contentation of all tithes renewing or arising within the same manor: and further prescribe, that he, and all those whose estate he hath in the said manor, time out of mind, have used, in respect of the said pension so paid the parson, to have all the tithes accruing and arising within the said manor, or any part thereof, *scil.* of all lands holden of the said manor, or parcel thereof: and such prescription was adjudged good in the king's bench, M. 39 & 40 El. Rot. 199. in an action upon the case between *Pigot* and *Hearn*, in which case two points were resolved for good law. 1. That in such special case, a lay person, owner of the said manor, shall sue for the tithes upon the special matter aforesaid in the spiritual court, for it shall be intended at the beginning the lord was seised of the whole manor before the tenancies were derived thereout, and then by composition or other lawful means, the lord should have all the tithes within the manor, for the said pension paid to the parson; and the law intendeth, that at the beginning it was for the maintenance of divine service, and *pro bono ecclesie*, the reason of which intendment is the continual usage, *a tempore cujus*, &c. It was resolved, that upon this special matter alleged, a man may have tithes as appurtenant to a manor; for he prescribeth by a *que* estate in the manor, and therefore cannot have them in gross. But it was adjudged in *Winchcomb's* case, in this court, in a prohibition, Hill. 35 Eliz. that a man cannot prescribe generally in him and all those whose estate he hath in such manor, to have any tithes appertaining to the same; for without such special matter shewed, tithes, which are spiritual things, and due *jure divino*, for the subtraction of which, remedy lieth only in the spiritual court, and no remedy at the common law, cannot be parcel or appurtenant to a manor, or any other temporal inheritance.]

T. 38 El. A. D. 1596. B. R.

*Sherington v. Fleetwood*. [Cro. El. 475.] Moo. 909. Gouldsb. 147. [Godfrey's Rep. p. 247. MS. Hargr. No. 12.] 1 Gw. 189.

1. A modus of a penny for every milch cow, for tithe of milch kine, and beasts agisted, is bad; for tithes for one thing cannot be tithes for another; but a modus of fourpence for all cows and beasts agisted would perhaps be good.

2. Lands drained, although overflown for time

whereof, &c. or grubbed, shall pay tithes presently; for it is sterile but by negligence, and not such as is merely barren, and only made good by foldage, or other industrious means, which alone is within the 2 Ed. 6. c. 13.

3. For beasts agisted for hire, or for dry cattle, which are depastured to be sold, agistment tithe shall be paid; but for dry cattle reared for the plough, or to be expended in the house, none shall be paid; and so is F. N. B. 53. to be understood.

4. Tithes shall not be paid for rakings, unless they be foul rakings.

A PARSON libelled in the spiritual court for tithes of herbage, for that the defendant had grazed barren cows and other dry cattle, and sold them and took money for their pasturage, and also for rakings of tithe hay and corn. The defendant prayed a prohibition, for he prescribed to pay one penny for the tithes of each cow, and a halfpenny for every calf depastured, in satisfaction of all tithes of calves and cows, and herbage, &c.; and as to the tithe corn, he pleaded a prescription, for that he used to set up the tithe corn of the parson in shocks. *Warburton* prayed a consultation, for the first consideration that the plaintiff ought to be discharged of tithes of corn, by reason of setting the tithe corn of the parson in shocks is not a good custom, for the parson has no remedy to compel him to set up the shock in case he refuses. But *non allocatur*, for if the defendant refuse, then he shall pay tithes. But there was great doubt whether the prescription to pay one penny for every cow, &c. and for all other beasts, should extend to those which were fatted in the pasture, and money taken for their pasturage, and those which were grazed [to sell], or only to those



those which manured the land, and maintained the board and hospitality. And it was said that tithe should not be paid for the agistment, for that tithes are paid of the beasts that depasture there, so that he shall not have tithes twice for the same thing, as is N. B. 59. g. ; but it was answered *distingendo*, true it is, that no tithes shall be paid for the agistment of his plough, or for young beasts to keep up his stock, or for fat cattle which are for the support of the house ; but if a man buy dry cattle and depasture them, and sell them again to another to fat, or if he take beast to agist, and take money for them, tithe shall be paid for such agistment. And so it has been adjudged in 15 Eliz. before Sir R. CATLIN, in this court ; and also in C. B. 11 Eliz. in the case of *Lewis*, parson of Kingland, in the county of Hertford, where consultation was granted upon such a prescription as this, to be discharged of all tithes upon payment of one penny for each cow, and it was adjudged to extend only to cattle for breed, and beasts killed in the house, and beasts of the plough. POPHAM. — If this prescription should extend to all his cattle depasturing in the said soil, paying only one penny for every cow, for all beasts, it would be unreasonable, for by such means the defendant might put three cows in his pasture and two thousand sheep, and sell them ; or take a hundred beasts to agist, and take money for them, and be discharged of all tithes for three-pence for the three cows, which would be unreasonable. And therefore the prescription extends only to those beasts which furnish his board, (1) his plough, or provision for his household, and for others consultation shall be granted ; but if the prescription were that five shillings should be paid for such pasture for the tithes of it, it would be good. — FENNER of the same opinion, *et adjournatur*. [*Godfrey*.]

Prohibition for tithes. POPHAM said, if land be overflown with water, and afterwards gained by industry, tithes shall presently be paid thereof, although it had been overflown, time whereof, &c. So if land be full of thorns and bushes, from time whereof, &c. and it is grubbed up and made meadow, or arable land, tithes shall be presently paid thereof, notwithstanding the statute 2 Edw. 6. ; for those lands of their own nature were not barren, but by negligence or ill husbandry became so. And the statute does not intend that tithes shall not be paid within seven years after the manurance, &c. but of such land, which was merely barren, and made good by foldage, or other industrious means ; and this was agreed by the other justices. He also said, that it has been here adjudged, that tithes shall not be paid for rakings, unless they be foul rakings. The parishioners also prescribed, that they used to pay one penny for every milch cow, in satisfaction for the tithe of milch kine and beasts agisted, which was moved not to be a good prescription ; for tithes for one thing cannot be tithes for another : but if he had prescribed, that he had paid one penny for all cows and beasts agisted, that, peradventure, had been good. And this diversity was so ruled in the case of *Dr. Lewes* ; and of that opinion were the court here. Then *Godfrey* moved, that no tithes by the law are payable for beasts agisted, and so is Nat. Br. 53. G. But all the court held, that for beasts agisted for hire, or for dry cattle, which are depastured to be sold, tithes shall be paid ; but for dry cattle reared for the plough, or to be expended in the house, no tithes shall be paid for them. *Sed adjournatur*. [*Croke*.]

(1) Qu. breed.

H. 38 El. A. D. 1596. K. B.

*Ram v. Patenson*. [2 Were's Rep. 203. b.] Cro. El. 477.

Moo. 908. Goldsb. 145.

**R**AM sued a prohibition in this court upon the statute 45 Edw. 3. and surmised that he libelled in the spiritual court for tithes of timber trees, the defendant said that the said trees were and had been for a long time dead and dry and rotten, fit *pro focali*, *Anglicè*, *firescote* only, and not for building, &c. and prayed a consultation, and thereupon a demurrer in law. GAWDY and CLENCH were of opinion, that trees once privileged as timber shall not pay tithes, though they have become rotten, and are cut down for fire-wood. So the branches of trees not lopped for twenty years, and so privileged as timber, shall pay no tithes, though they be afterwards cut every seven years.

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CLENCH held clearly that no tithes should be paid for such trees, for, being above the growth of twenty years, they were once discharged, and therefore shall be always after discharged. FENNER of a contrary opinion. (1)

Another point in the case was this, trees were not lopped for twenty years, so that the branches as well as the trees were discharged of tithes, and afterwards these same trees are lopped every seven years; if for such branches which were not of the age of twenty years, tithes should be paid or not, was the question. GAWDY and CLENCH held that no tithes should be paid for these branches, but FENNER contra; but afterwards, in the same term, FENNER agreed with them, that no tithes should be paid of the branches of timber trees. [And they all held they shall not pay tithes, for as the body is privileged, so are the branches. Cro.]

(1) According to Croke (POPHAM, *absente*.) all the justices agreed.

E. 39 El. A. D. 1597. B. R.

Blinco v. Backsdale, Vicar of Marston. [Cro. El. 479. 578.]

Moo. 457. 910. 1 Gw. 197.

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1. The vicar shall not have tithes of the glebe of the parson, although he be endowed with the small tithes of all the parish, for *ecclesia ecclesie decimas solvere non debet*. But if the parson lease his glebe, the vicar shall have small tithes of the lessee, and the lessor himself shall have the great tithes. But if the vicar be specially endowed with small tithes of the glebe, he shall have them of such as was glebe at the time of the endowment.

2. Glebe discharged of tithes by unity at the dissolution shall be discharged by 31 Hen. 8. and 32 Hen. 8. in the hands of the patentee.

3. If land were discharged from the payment of tithes, by reason of unity, it shall be discharged by 31 Hen. 8. in the hands of the patentee, for that privilege runs with the possession.

Prohibition: Upon demurrer the case was such. A parsonage was appropriated in the time of King Henry III. to a priory, and at the same time a vicarage was endowed by these words: *Salva vicaria, quæ consistit in alteragio, et in minutis decimis totius parochie predictæ ad ecclesiam prædictam spectante; et ulterius, si contigerit ipsos monachos in propriis uibus instauramenta habere infra parochiam prædictam; quod tunc ipsi a præstatione decimarum omnino immunes essent*. At the time of which appropriation, there were six yard-lands of the parsonage glebe within the same parish, which parsonage came by the statute of 31 Hen. 8. at the dissolution, (being then in the prior's hands discharged *de minutis decimis*) to the said King in the same manner; and the King granted those six yard-lands to the plaintiff's ancestor in fee, from whom it descended to the plaintiff. And for the small tithes of those six yard-lands the vicar sues, and the plaintiff brought the prohibition containing all this matter; and it was thereupon demurred. And, on the plaintiff's part, it was argued, that by this endowment of the vicarage no tithes shall be paid unto him of the glebe of the parsonage, although the endowment were of the small tithes of the whole parish, and this land is parcel of the parish; for, at the time of the endowment, this land was not titheable, and the very point was adjudged in this court, 32 Eliz. between *Young and Core*; that no tithes should be paid for glebe land. Coke, Attorney General,

(2) If there be a special custom after the endowment of the vicarage, it is iustuable.—Moo.

General, *s. contra*; for the endowment is of small tithes of the whole parish, and this land is within the parish, and therefore tithes shall be paid thereof. But as long as it continues in the parson's hands no tithes shall be paid thereof, because the Levite ought not to pay tithes to another Levite; but, when the glebe land is conveyed into the hands of a layman, as here it is, it shall be otherwise; and therefore, if a person had let his glebe land, the lessor should have the gross tithes from his lessee, and the vicar should have the small tithes. And therefore it was ruled of late in the exchequer, in one *Griesley's* case, where certain glebe land upon the endowment was allotted to the vicar, and all the small tithes within the parish; that he should not now pay tithes of that land; but if he had leased it over, his lessee should have paid gross tithes to the parson, and small tithes to the vicar his lessor; so here the parson himself should be discharged, but in regard the plaintiff has not the parsonage but the land only, he shall pay tithes. But all the justices held clearly, that tithes shall not be paid in this case, for the vicar cannot, by this endowment, demand small tithes of the glebe land of the parsonage, but he shall have the small tithes from all the parish, where they were due at the time of the endowment, but that was not of the parson's glebe land, *ergo*, &c. But an endowment by express words of *mixta decime* of the glebe land of the parsonage might well have been, and then the parson himself should have paid them to the vicar. (3) And *POPEHAM* said, this clause *et si ulterius contigerit*, &c. was put into the endowment for the benefit of the priory, to discharge them from the payment of tithes for any land which they should have by purchase, as long as they held it in their own hands. And they all held, as it was discharged from the payment of tithes in the hands of the priory at the time of the dissolution; so the plaintiff now, having but some part of land by letters patent from the King, shall be discharged by the statutes of 31 Hen. 8. and 32 Hen. 8. from the payment of tithes for ever after, against the grantee of the parsonage, and all others, in regard it was discharged at the time of the dissolution. And *POPEHAM* said, the difference would be, where the discharge were by reason of the persons who were to pay tithes, as the order of *Cistercians*, &c. then the patentee should pay tithes; but if the land were discharged from the payment of tithes by reason of a unity, it shall then be discharged by the statute in the hands of the patentee, for that privilege runs with the possession. Wherefore it was adjudged for the plaintiff.

(3) Note also, it ought to be ancient glebe at the time of the endowment.—*Moo.*

M. 99 & 40 El. A. D. 1597. B. R.

*Pigot v. Heron.* [Cro. El. 599. Moo. 483.(1)] 1 Gw. 200.

**A**CTION upon the case for trover and conversion, the plaintiff declared that 20th October in the 36th of the Queen in London in the ward of Cheap, he was possessed of twenty cart loads of wheat in garbs, forty cart loads of rye in garbs, twenty cart loads of barley in cocks, forty cart loads of oats, for tithes of grain severed and set out from the nine parts in Harley within the parish of Ovingham in the county of Northumberland, as of his proper goods, and being so possessed 21st October in the 36th year, he casually lost the same at London; and on the same day they came by finding to the hands of the defendant, who knowing, &c. converted them to his own use on the 22d October. The defendant pleaded in bar, that the King and Queen, Philip and Mary, being seised of the manor of Prudehow in the parish of Ovingham in the county of Northumberland in fee in right of their crown, and of the township of Harley within the said manor of Prudehow; that within the townships of Prudehow and Harley within that manor there is a custom and *modus decimandi*,

1. A prescription for the lord of the manor to pay six pounds in satisfaction of all the tithes of the manor, and in consideration of such payment to take the tenth shock, as a temporal profit *apprehend* is good.

2. If the Queen were lady of a manor, she might prescribe *mixta personarum*

scribe to have tithes in perannity, for she is capable of them although they be spiritual; for she *et capax spiritualis jurisdictionis*, and may also prescribe in *non decimando*.

(1) The pleadings and arguments of counsel are more at length in Moore, but the judgment is given more fully by Croke.

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*mandi*, viz. that the lords of the manor have been used to pay to the rector of the church of Ovingham, or his deputy or farmer annually at the feast of St. Michael, or after upon request, six pounds at the church of Ovingham, in full satisfaction and discharge of all tithes of grain within the townships of Prudeshow and Harley, which six pounds the rectors have accepted for all time, &c. in satisfaction of all tithes, &c.; and further, that the lords of the manor for all time have used to take the tenth garb and heap of grain growing within the township aforesaid in satisfaction of the payment of the said six pounds: he conveyed the manor to the now earl of Northumberland by patent and descent, and the tithes by the name of all hereditaments in Prudeshow, Ovingham, Harley, &c. in the same patent, and that the earl had paid the six pounds annually to the farmers of the rectory, and that he was prepared to pay the same at the feast of St. Michael last, and still is prepared; and that the tithes being severed, the earl was possessed of them, until one Halson took them, from whom Heron took them, as the servant of the earl, and was so possessed until the earl at London gave them to him, which is the same finding; and averred that Harley in the declaration, and the township of Harley in the plea, and Hirlaw otherwise Harlaw in the letters-patent, were all one.

The plaintiff replied, that he was seised in fee of the rectory before the tithes came by finding to the hands of Heron the defendant, and being so seised, the tithes were severed from the nine parts, whereby he was possessed of them as of his proper goods, until the earl took them out of his possession at Harley, and that the earl was possessed thereof until Halsoe took them from him; and that Halsoe being so in possession gave them at London to Pigot, whereby he was possessed of them as of his proper goods in prior right, and being so possessed 21st October in the 36th year, casually lost them, whereby they came by finding to the hands of Heron, who converted them 22d October, whereupon he prayed judgment without any traverse. And upon this the case was argued, E. 40 Eliz. by *Lawrence Hyde* for the plaintiff, and *Francis Moore* for the defendant.

*Hyde* argued that the plea in bar was insufficient; because both the prescriptions by which the defendant made title to the corn were against reason and law. For as to the first; it is against reason and law, that one man should make a satisfaction to the parson for the tithes of another man; for the law charges the land and the occupier of the land with the tithes, and he who has not the land and is not in the occupation of it, cannot in reason pay the tithes of the land, and, consequently, cannot prescribe to pay a satisfaction for the tithes of it: wherefore he concluded, that the first prescription, that is, that the lord of the manor had used to pay six pounds to the parson for the tithes of corn and grain within the whole manor, is against law and reason, he being occupier and tenant of only part of the land, and his free tenants of the other parts. The second prescription he took to be more unjust and against reason, that is, that the lord of the manor prescribed to take in recompence of his six pounds the tithes of all corn and grain within the manor: for tithes are due only to spiritual persons, and a layman who cannot administer the sacraments and perform the functions of a minister is not capable of tithes; and for this he vouched several texts of the spiritual law and canons of the church, and therefore concluded the bar insufficient.

*Moore, e contra*; and he maintained both the prescriptions as they were alleged in the bar. As to the first, he said, that a prescription is a thing commencing before time of memory, and of which the commencement is unknown; yet if any reasonable intendment can be made of its commencement, the prescription is good. And it seemed to him that the commencement of this prescription is founded in reason; for the prescription is, that the lord of the manor had used to pay six pounds in satisfaction of all the tithes of corn and grain within the manor; which is reasonable; for it may be intended, that when this manner of tithing began, all the land of the manor was in the hands of the lord in demesne before the grant of any freeholds or copyholds, in which case it was reasonable that he should pay money in satisfaction of all tithes of corn and grain within the manor; and if so, then the land, and all occupiers

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of it thereafter, should be discharged of all other tithe of the land into whose hands soever the land should come. As to the other prescription, he thought it also reasonable that the lord of the manor should, in consideration that he satisfied the parson for the tithes of the whole manor, take the tenth part of the corn from the other tenants within the manor: and in this the words of the plea are mistaken; for the prescription is not, that the lord of the manor had had the tithes of all the corn and grain, but "the tenth garb and tenth heap," which he might take as a temporal custom within his manor. For one may reserve by way of rent the tenth garb, or the fifth garb, or a moiety of the grain, as 44 E. 3. fol. and if it may be good by way of reservation, it is also good by way of custom: as a heriot may be reserved and may be due by custom. And many much stricter customs between the lord and his tenants are allowed in our books: as 8 H. 3. Fitzh. Prescription, pl. 58. the church of Hereford prescribed to have the wardship of their socage tenants. And 15 H. 3. Fitzh. Aide, 33. the lord prescribes in lieu of marchet-service to have a fine when his tenant married his daughter. In 8 R. 2. pl. 117. Aide de Roy, in Fitzh. the lord prescribes that he has used to distrain for satisfaction if any one erected a fold within the vill, though it were not upon the lord's land. So 11 H. 7. fol. the lord prescribes to have three pounds for a pound breach within the manor. The lord, therefore, may likewise prescribe in the principal case to have "the tenth garb, and tenth heap." But it seems, that though the second prescription should not be good, yet the plea in bar is good enough, and judgment ought to be given against the plaintiff. For the first prescription is sufficient to bar the parson of all tithes within the manor; and therefore the tenants are discharged against the parson; and when they set out the tenth part of the grain, the property remains in themselves, and it is not due to the parson; then neither the parson, nor the lord of the manor, had any right to this corn; and if so, it is to be seen and inquired which of them was first possessed of the corn, for he might detain it against the other, and if the other took it from him, he committed the tort; and therefore the plea is to be examined to this point; and for this the plea must be looked to, and by the plea it appears that the earl of Northumberland was possessed until Halsoe took them from him, and that Heron, the defendant, took them by the earl's order, and the earl then gave them to him. Which plea is confessed by the replication and demurrer; for if this were not true, the plaintiff ought in his replication to have traversed *absque hoc*, that the earl was first possessed, so that judgment ought to be against the plaintiff.

And all the justices agreed that both the prescriptions were good. They agreed also, that the first possession was confessed by the replication, without any traverse, to be in the earl of Northumberland, under whom the defendant claimed. And they also agreed, that the last prescription was not material, but that the first was a sufficient title for the earl. For which reasons they entered judgment against the plaintiff, if better cause should not be shewn before a certain day: at which day Coke, attorney, argued for the plaintiff; and *Tanfield* for the defendant. And Coke shewed nothing but this, that the defendant ought to have said in his plea in bar that the lord of the manor had used to take the tenth garb, as appurtenant to his manor. But the whole court was against him; for the prescription in gross is well enough. He then prayed a further day to argue against the patent of the earl, for it seemed to him that it did not pass by the patent, and it was granted to him, so that it is now pending. But afterwards, M. 40 & 41, it was adjudged for the defendant that the plaintiff *nihil capiat per breve vel billam*, for the reasons aforesaid. And note, it was affirmed in this case that the king is *persona mixta*, and capable of tithes in pernaney by prescription, or in *non decimando*. 22 Ass. pl. 75. 33 E. 3. Fitzh. Aide de Roy, 103. & 10 H. 7. 10. [*Moore.*]

Action of trover of certain corn. The matter in law, whereupon the demurrer was grounded, was, the lord of the manor of Pr. within the parish of Ovingham, in the county of Northumberland, prescribed, that he and all his ancestors, and all those, whose, &c. had used, from time whereof, &c. to pay to the parson of O. (the now plaintiff) and all his predecessors, six pounds, for

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all manner of tithes growing within the said parish. And that by reason thereof, he, and all they, whose, &c. lords of the said manor, had need, from time whereof, &c. to have *decimam garbam, sive decimum cumulum garbarum, seu granorum* of all his tenants within the said manor. And whether these were good prescriptions, or not, was the question. POPHAM, GAWAY, and FENNER held, that they were good; and as to the first they conceived, that a *modus decimandi* by the lord for himself, and all the tenants of his manor, to bar the parson from demanding tithes in specie, is good; for it might have a lawful beginning, viz. that before it was a manor, all the lands were in the lord's hands, and six pounds were paid for the tithes thereof. Then, when he conveys parcel thereof to others, it shall be discharged, as it was in the lord's hand, as in the case of *Doctor Cotton*, Mich. 39 & 40. Placito 19. And as to the second prescription, that it was good to have the tenth sheck, &c. for he hath it as a profit appender, as parcel, or a thing appurtenant to his manor, and not as tithes; for a layman cannot have tithes by prescription, because he is not capable of them, in regard they be spiritual. But he may have the tenth sheck, as a temporal profit appender, as 44 Edw. 3. 6. And it well may be parcel of a manor. Otherwise of tithes, which cannot be said to be parcel, or appendant to a manor, as it was adjudged in *Winch's case*, 34 Eliz.; and so is the book of 10 Edw. 3. 5. and therefore, if the lord had prescribed to have had *decimas garbarum*, it had been ill; but when he prescribes to have *decimam garbam*, &c. it is otherwise: for so there is a difference betwixt the pleading for tithes, which are spiritual, and of a tenth, which is temporal. They also agree, that if the queen was lady of a manor, she might prescribe to have tithes, for she is capable of them, although they be spiritual; as 22 Ass 75. for she is *mista persona, et capax spiritualis jurisdictionis*; as 33 Edw. 3. Fitz. Ayd. de Roy. 103. Wherefore, *absente CLINCH*, they adjudged it for the defendant. [Croke.]

M. 39 & 40 Eliz. A. D. 1597. B. R.

*Goodale v. Butler*. [Cro. Eliz. 590. 6 Co. 61. b. (1)]

Moo. 540. Gouldsb. 169. 1 Gw. 204.

Living in any other house in his parish than the parsonage-house is non-residence on the part of the rector. *Sed quere?*

**B**ETWEEN *Goodale* informer, *tam pro se, &c.* on the statute of 21 H. 8. ch. 13. of non-residency, and *Butler*, parson of *Downham* in *Norfolk*; on a special verdict it was resolved by the court, that the parson ought to abide on his rectory, viz. the parsonage house, and not in another house, although it be within the same parish; for the statute intended, not only for serving the cure, and for hospitality, but also for the maintaining of the house and habitation of the parson, not only for himself, but also for his successors, that they also may keep hospitality there. And there it was agreed, that lawful imprisonment without covin, is a good excuse of non-residency; so if there be not any parsonage house there; for, *impotentia excusat legem*; and these cases are excepted out of the act by construction of law. And note, that it was held in the *Exchequer*, Trin. 39 Eliz. that sickness without fraud, was also a good excuse, viz. if the patient remove by advice of his physician, *bona fide*, for better air, and for recovery of his health.

(1) Lord Coke's report corresponds verbatim with Croke's; Moore says the court was divided, and *Goldsborough*, that the case was adjourned.

M. 39 & 40 El. A. D. 1597. *Holliday v. Lee*. [Moo. 541.]

Tithes shall not be paid of beech trees above twenty years old being timber, nor of decayed oaks, [of that age] though not timber, and by reason of rottenness used for firewood.

**I**N prohibition the court held, that tithes shall not be paid of beech trees above twenty years of age, being timber; nor of decayed oaks, although they be not timber by reason of their rottenness, and although they be used for firewood.

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M. 39 & 40 El. A.D. 1597. B. R. *Button v. Long*. [Cro. El. 585.]

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**PROHIBITION.** And surmises in discharge of tithes, that J. S. prior of Bradestoke, was seised of the rectory, whereto, and of the lands, out of which the tithes were demanded, in fee, *simul et sciel*, from time whereof, &c. and at the time of the dissolution; *et ratione inde*, the said land is discharged, &c. The defendant traverses the unity at the time of the dissolution; and thereupon the plaintiff demurred. FENNER and CLENCH (*ceteris iudiciariis obsecutionibus*) held the traverse to be good; for, although there was an unity of possession from time whereof, &c. Yet if it were not at the time of the dissolution, it shall be charged. But if the discharge had been pleaded generally by prescription, and not by reason of unity; then the prescription ought to have been answered, and not the unity. And in Trin. 34 Eliz. betwixt *Calmedy* and *Wyther*, it was so ruled in Common Bench. Wherefore it was adjourned.

time of the dissolution, was held to be good; for although there were a unity of possession from time whereof, &c. yet if it were not at the time of the dissolution, the land shall be charged. But if the discharge had been pleaded generally by prescription, and not by reason of unity, then the prescription ought to have been traversed, and not the unity, and so it was ruled 34 Eliz. in C. B. between *Calmedy* and *Wyther*.

It was pleaded that a prior was seised of a rectory and land, of which, &c. *simul et sciel* from time whereof and at the time of the dissolution, and *ratione inde* the land was discharged, &c. a traverse of the unity at the

M. 39 &amp; 40 El. A.D. 1597. C. B.

*Somerset v. Markham*. [Cro. El. 595.]

**PROHIBITION**, to stay a suit in the Admiralty Court. It was agreed per Curiam, that if one sued in the spiritual court for a matter, whereof they have jurisdiction, and therein a plea is pleaded, which is triable at the common law; yet if they will allow the plea, they shall have jurisdiction thereof, and try it. Otherwise a prohibition lies. It was also held, that if one answer to a suit in the spiritual court, and suffer sentence to pass against him, he never shall have a prohibition: and if he bring an appeal, the defendant in the appeal shall not have a prohibition. And this was the principal case here, and ruled accordingly.

1. Where the spiritual courts have jurisdiction of the principal matter, they may try a plea incidentally which is triable at common law, if they will allow it. 2. No

prohibition shall be granted after sentence, nor to the defendant in an appeal.

M. 39 &amp; 40 El. A.D. 1597. B. R.

*Leigh v. Wood*. [Cro. El. 607.] Moo. 912.

**PROHIBITION** to stay a suit for tithes, wherein he surmises, that he set forth his tithes; and afterwards, for some reasonable causes, (not shewing what in certain,) he had detained part of them, and that the parson had sued him for them in the court-christian: and it was thereupon demurred: and FENNER and CLENCH held it to be good cause for a prohibition. For by setting out the tithes, they are become lay-chattels; for which he may have his remedy at the common law by trespass, or detinue, and there is not any cause of suit in the court-christian. — GAWDY and POPHAM, *e contra*. For against the party himself, who set forth his tithes, a suit is well maintainable in the spiritual court, if he detain them, although the parson (if he would) might have his remedy at the common law. But if a stranger take them after they are set forth, his remedy is only at the common law. And the statute of 32 H. 8. proves it. For the words thereof are, "if any do not set out, or do detain, or withhold his tithes, (which is to be intended after they be set out,) he shall be sued in the court-christian, &c." For otherwise mischief would ensue to the parson, in that he would secretly set his tithes forth, so as the parson should not know thereof, and would afterwards carry them away *Et adjournatur*.

If a man set out his tithes and a stranger take them, the parson has his remedy at common law by trespass or detinue, and not in the spiritual court; but if after setting them out, the owner detain or carry them away, the parson has his remedy either there or at common law; though, according to *Crake*,

the court was divided, as to the remedy in the spiritual court.

M. 39 &amp; 40 El. A. D. 1597. B. R.

*Bedell v. Sherman.* [13 Co. 47.] Cro. El. 609. 613. Moo. 710. 912.

Jenk. 279. (1) 1 Gw. 206.

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A husband was possessed of a lease for years of tithes, in right of his wife; held, that they might well join in an action on 2 E. 6. for the treble value; that such action should be brought in the temporal courts; that the particular kind of corn sown need not be expressed; that the treble value goes to the owner of the tithes, and not to the Queen.

**M**ICH. 39 & 40 Eliz. which is entered Mich. 40 Eliz. in the Common Pleas, Rot. 699. *Cantabr.* the case was this; Robert Bedell, gent. and Sarah his wife, farmers of the rectory of Litlington, in the county of Cambridge, brought an action of debt against John Sherman, in the custody of the Marshal of the Marshalsea, and demanded £550, and declared, that the Master and Fellows of Clare-hall, in Cambridge, were seised of the said rectory in fee, in right of the said college, and in June 10, 29 El. by indenture demised to Christopher Pheasant the said rectory for twenty-one years, rendering £17 : 15s. 5d. and reserving rent-corn according to the statute, &c. which rent was the ancient rent, who entered into the said rectory, and was possessed, and assigned all his interest thereof to one Matthew Batt, who made his last will and testament, and made Sarah his wife his executrix, and died; Sarah proved the will, and entered, and was thereof possessed as executrix, and took to husband the said Robert Bedell, by force whereof, they in the right of the said Sarah entered, and were possessed thereof; and that the defendant was then tenant, and seised for his life of 300 acres of arable lands, in Litlington aforesaid, which ought to pay tithes to the rector of Litlington; and in anno 38 El. the defendant *grano seminavit* 200 acres, parcel, &c. And that the tithes of the same did amount to £150, and that the defendant did not divide nor set forth the same from the nine parts, but took and carried them away, against the form and effect of the statute of 2 E. 6. &c. And the defendant pleaded *nihil debet*, and the jury found that the defendant did owe £55, and to the residue they found *nihil debet*, &c. and in arrest of judgment, divers matters were moved.

1. That *grano seminata* is too general and uncertain, but it ought to be expressed with what kind of corn the same was sowed.

2. It was moved, if the parson ought to have the treble value, the forfeiture being by express words limited to none by the act, or that the same did belong to the queen.

3. If the same did belong to the parson, if he ought to sue for the same in the ecclesiastical court, or in the King's temporal court.

4. If the husband and wife should join in the action, or the husband alone should have the action, and upon solemn argument at the bar and at the bench, the judgment was affirmed.

(1) The reports of this case, as to the propriety of joining the husband and wife in the action, vary; it appears from the pleadings in Co. Ent. 161. (confirmed by Moo. 912.) that this action was brought by husband and wife jointly, and from the determination, that such

joinder was held good. *Jenkins* says, that it lies in the name of the husband alone. *Croke*, 608, says, that exception was taken because the wife was not joined, and p. 613, that the action was well brought in both their names.

M. 39 &amp; 40 El. A. D. 1597. B. R.

*Johns v. Carne.* [Cro. El. 621.] Moo. 911. *Anon.*

An action of debt *qui tam pro rege*, &c. does not lie, (for the crown shall rather have a fine for the contempt by information or indictment,) but the party grieved may have it, and treble damages, and not guilty is a good plea.

**D**EBT upon the statute of 2 Ed. 6. for not setting forth his tithes. The defendant pleaded not guilty, and found against him: and now moved in arrest of judgment; first, that this action of debt lies not; because a certain penalty is not given by the statute; but the treble value, which is uncertain. *Sed non allocatur.* *Vide in Bedell and Sherman's case.* (1) Secondly, because the defendant pleads not guilty, which is not any issue in an action of debt; but he ought to have pleaded *non debet*. *Sed non allocatur.* For this action being founded upon the statute, upon a wrong done, this issue is good enough. Thirdly, because he brought this action for himself, and the Queen; and the Queen cannot have any benefit thereof; nor is it given to the Queen by the statute, but to the parties grieved only. And it was held by the court

to

(1) *Supra.*



to be a material exception, and thereupon the court commanded the judgment to be stayed. [An action of debt does not lie for the Queen, but rather a fine for the contempt upon an information or indictment.—*Moo*.]

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SPENS V. CARNE.

M. 39 &amp; 40 El. A. D. 1597. B. R.

*Barsdale v. Smith*. [Cro. El. 633.] 1 Gw. 207.

**T**RESPASS by a vicar, for taking two loads of hay, and carrying it away. The defendant pleads, that the place where, &c. is within the parish of Maidstone, whereof he is parson *imparsonce*, and it was set out for tithes: and that he used to have *decimas garbarum et feni*. The plaintiff replies, and shews a composition in the time of K. Hen. 3. and that the vicarage was then endowed, which was, that the vicar should have *minutas decimas, et totam deciman garbarum* in Watworth, (which was a hamlet within the said parish, and the place where, &c. and was parcel of that hamlet,) and that at all times, whereof, &c. he and his predecessors (vicars there) had used to have the tithe of hay there. Wherefore, &c. And it was hereupon demurred.—*Tanfield*. By this prescription he cannot have hay. For *garba* is always corn, and therefore this prescription cannot stand with the composition.—*Coke*, e contra. For as the usage hath been, so it shall be expounded. For it was adjudged in the Exchequer, where a patent was made by King John to one, and his successors; and because *Bracton* saith, that anciently *successor* was taken for *heres*, and that always since it had used to descend *jure hereditario*, it was adjudged, that the heir should have it by that charter. Wherefore, &c. And all the court here resolved accordingly; in regard it was an ancient charter, and constantly had been used to extend to hay, the word *garba* might well extend thereto, although at this day it is commonly used in another sense. Wherefore it was adjudged for the plaintiff.

Where by endowment in the time of Hen. 3. the vicar should have *minutas decimas et totam deciman garbarum*, it was held that tithe hay should pass, as the usage had been so, although *garba* is at this day used in another sense, for an ancient charter shall be expounded according to the usage.

M. 39 &amp; 40 El. A. D. 1597. C. B.

*Riesby v. Wentworth*. [Cro. El. 642.]

**P**ROHIBITION upon a suit for tithes, and grounds his prohibition upon the statute of 31 Eliz. cap. 6. supposing, that the said parson had committed simony in coming to the parsonage; and thereby the church was void, and the tithes not appertaining to him. And it was agreed *per curiam*, *GLANVILLE absente*; that a prohibition lay not: for the simony might more aptly be tried in the spiritual court. Wherefore consultation was awarded.

Prohibition does not lie upon a plea of simony, on 31 El. where by the church was void, and the tithes not belonging to him;

for it might more aptly be tried in the spiritual court.

M. 39 &amp; 40 El. A. D. 1597. B. R.

*Somerton v. Cotton*. [Cro. El. 587.] 1 Gw. 199.

**P**ROHIBITION for tithes of wood, and surmises, that within the parish is such a custom, that all the parsons of the said church, time whereof, &c. *Habuerunt, et gavis fuerunt* such land parcel of the manor of Finchley, in recompence of all tithe of wood within the said parish. And it was hereupon demurred.—*Harris*, Serjeant, moved, that this prescription was not good, for the lands now in question, whereof tithes are demanded, were not averred to be parcel of the manor; and then the land, parcel of the manor, cannot be said to be a recompence for all the other lands within the parish, wherewith the lord of the manor has nothing to do.—*POPHAM*. It may be, that at the beginning, all the land within the parish was parcel of the manor, and that then this allowance of the profits of this land, was allotted in discharge of tithes of all the wood within the same parish; and, that at the first, it was all the land of the allotter. Wherefore it was adjudged for the plaintiff, by the assent of all the justices.

A custom that all the parsons of a parish held and enjoyed certain land, parcel of the manor of F. in recompence of all tithe wood within the parish, was held good; for it shall be intended, that at first all the land within the parish was parcel of the manor, and the land of the allotter.

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For broom, furze, or any other fuel spent in a parishioner's house, no tithes are due or payable.

A modus of the tenth cheese, from May-day to August, in lieu of all tithe-milk of the year is good; but to pay the tenth quart of milk [for that time only] is bad; but, perhaps, to pay it at the parsonage house, or any other place, would be good enough.

E. 40 El. A. D. 1598. B. R.

*Austyn v. Lucas.* [Cro. El. 609.] Moo. 909.

IT was held by all the justices, that for broom, furze, or any other fuel expended in a parishioner's house, there are not any tithes due or payable. A prescription also to pay the tenth cheese, made from May-day until the 1st of August, in recompence of all tithe-milk for the whole year, is good. For that comes of labour, and is not due of itself, and therefore is a good discharge: but to pay the tenth quart of milk, is not good; for that is but for what is due. But *Popham* said, to pay the tenth quart of milk at the parsonage house, or at any other place, is good enough.

M. 40 &amp; 41 El. A. D. 1598. B. R.

*Chambers v. Hanbury.* [Moo. 527.] 1 Gw. 208.

Unity of possession does not destroy a modus, for the retainers payment.

ON a trial at bar in prohibition, the suggestion was, that the Queen, and all those whose estate she has, have used to pay to the rector of Kingswood 2s. 4d. yearly, in satisfaction of all tithes of land, called Cowley in Kingswood, in the county of Wilts; upon which prescription the issue to be tried was taken. Upon the evidence it appeared, that the Queen had the estate of the abbot of Kingswood, who was owner of the land, and also rector in fee in right of his abbey, wheresupon it was inferred by *Williams*, Serjeant, and *Francis Moore*, that the prescription was not proved on the part of the plaintiff, inasmuch as the abbot could not pay himself; nor can the Queen, who has now the estate of the abbot: but the prescription ought to have been alleged in this manner; viz. that when the Queen leased the land, the occupiers had used to pay 2s. 4d. in satisfaction of the tithes. *Sed curia*, viz. *Popham*, *Clench*, and *Fenner*, *contra*; for they were clear that unity of the inheritance of both is no perpetual discharge of tithes, nor of the recompence for them; and if so, then the retainers shall be said to be a payment to himself. And so, under this direction, the jury found for the plaintiff.

M. 40 &amp; 41 El. A. D. 1598. B. R.

*Benton v. Trot.* [Moo. 528.] 1 Gw. 208.

An abbot, seized of a rectory and manor within it, demised both to one person, who afterwards demised a part of the lands of the manor to a subtenant, in whose occupation they were at the time of the dissolution, in 31 H. 8. and had been for four years, and had, during that period, paid tithes: it seemed that these

IN prohibition, the suggestion was, that the abbot of Waltham Holy Cross, for time whereof, &c. before the dissolution, and Robert, the abbot at the time of the dissolution, were seised in their demesne as of fee of the manor of Nasing, and the rectory of Nasing, *insimul et seorsim*. And that *ratione premissorum*, they held the manor discharged of the payment of tithes. And the abbot surrendered to the King, by reason whereof, and the statute of dissolution, 31 Hen. 8.; the King also held it discharged, and alleged the branch of the statute, that the King and his successors, and all others who should have abbey lands, should have, hold, retain, keep and enjoy them, discharged and acquitted of payment of tithes, as freely, and in as large and ample manner and form as the abbots held and occupied them, at the day of their dissolution, or coming to the hand of King Henry VIII. And he pleaded also another statute of the same King, that none shall be compelled to pay tithes, who, by the law or statutes of the realm, are exonerated from, or are not chargeable with the payment of any tithes. And so he deduced the manor by conveyance of

lands were not exempt from the payment of tithes by unity, which it was said must be of both in the hands of the abbot, at the day of the dissolution.

*Popham* said, that the unity, in fact, must be traversed, and not the *ratione cuius*, which is matter of law; he also said, that unity for time whereof was not material, and that unity at the time of the dissolution was sufficient, although the land and rectory had been purchased instantly before it.

*Popham* also said, that copyholders of abbey lands, when the abbot was also parson, should not be discharged of tithes by unity, although the abbot had the freehold both of the copyhold and rectory.

of the inheritance, and the rectory to Sir Edward Denmy, Knight, but the manor was in jointure for life to his mother, who had married Grevil, and the rectory was in lease to Trot, the defendant, upon the demise of Sir Edward Denmy. And he pleaded a lease of certain closes, called Great and Little Priestfields, made by Grevil to himself, being parcel of the manor, and complained that Trot sued him in the spiritual court for tithes of these closes; and he alleged also, the statute 2 Edw. 6. that no person shall be compelled to pay tithes for any lands, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the payment of any such tithes, or that he discharged by any composition real. Trot, the defendant, in his plea in bar, confessed the unity of the inheritance, and that the abbot before and at the dissolution, held all such parts of the manor as were in his proper hand, discharged of the payment of tithes; but he further pleaded a lease made 7 Hen. 8. of the manor and rectory by the abbot to Sir Thomas Par, who died possessed of this term, (which was for thirty years) in 8 Hen. 8. whereby Mathilda, his widow, became possessed as his executrix; and she, 29 Hen. 8. before the dissolution, demised the closes to Gowch and Shelley for four years, who, before the dissolution, paid tithes in kind of the closes to Mathilda, as farmer of the rectory; and they, 30 Hen. 8. before the dissolution, and at the dissolution, paid tithes in kind to the Lord Cromwell, to whom Mathilda had assigned her term in the manor and rectory. And he further pleaded his own lease of the rectory, and the dissolution, as the plaintiff had alleged in his declaration; and traversed without this, that Robert, the abbot, held the closes discharged of the payment of tithes at the time of the dissolution, as, &c. To which plea the plaintiff demurred in law, and it was argued by *Forster*, and *Coke*, attorney for the plaintiff; and by *Francis Moore* and *Tynfield*, for the defendant.

And the counsel for the plaintiff took two objections to the plea, one as to the matter, the other as to the form. As to the matter, that the plea allowed unity in the freehold and inheritance of the rectory and manor in the abbot at the time of the dissolution, and the division is but a severance for four years of the closes, whereof tithes are demanded, and that severance not made by the abbot, but by his lessee for years, to whom the manor and rectory was demised. And as the statute 31 Hen. 8. enacts, that all others should hold discharged of tithes, in such manner as the abbot held, and the abbot held the reversion discharged, they thought that the lease being determined, the parties who now held the land, should hold it discharged, for the abbot must have retained it discharged as soon as the lease was ended. The objection in form, was to the traverse, for they thought that the traverse was superfluous, in as much as the unity is, in a manner, confessed, and is avoided by the lease, in case, at the dissolution, wherefore it is not necessary to traverse the discharge; and if the traverse be necessary, yet the traverse as taken is not good, for they traverse without this, that the abbot held discharged at the time of the dissolution, which is matter of law, and not matter of fact.

The counsel for the defendant maintained the plea, notwithstanding these objections; and as to the objection to the matter, they said, that neither by the words, nor by the intent of the statute 31 Hen. 8. any unity was a discharge of tithes, but a unity of the land and rectory in occupation together, at the day of the dissolution in the abbot. And for the better apprehension of the law on this point, it is to be considered how tithes first commenced; and then what kind of discharges of tithes there were at common law before the statute; and thirdly, the words and intent of the statute, as to unity being a discharge by it. First, by the law of God, temporal persons were ordered to give of their substance to spiritual persons for the exercise of their functions, as appears in the 6th chap. of St. Paul to the Galatians: "Let him that is instructed in spiritual things, impart of his goods to him that instructs him." But what part or portion he should give was uncertain, until the church apportioned it by the example of the priests of the old law, who used to take the tenth, as appears by the Judicials of the Jews, which was founded upon the vow of Jacob, in the 28th of Genesis, viz. if God prospered him in his journey,

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he would give the tenth part of all that he had, as appears by the Doctor and Student, in the last chapter. And after the portion to be given was certainly known to be the tenth part, yet the person to whom it was to be given was uncertain; and every temporal man might have given his tithes to whatever spiritual man (having cure of souls) he pleased, until the Lateran Council, and thence it happened that many portions of tithes, issuing from land in many parishes within this realm, were found in the inheritance of religious houses, as given to them before the said Council. But that Council restrained men from giving otherwise than to the parson of the parish within which the tithes grew, (the kingdom being then divided into parishes); and thence it followed, that the spiritual law gave suit against any one detaining tithes from the parson of the church. But from this it plainly appears, that at the beginning, tithes were merely spiritual, and that no temporal man was capable of them. And for this 13 Hen. 3. Fitz. Prohib. [20.] (1) If a parson sell tithes for money, he shall sue for the money in court-christian. And 3 Edw. 3. Fitz. Grants, pl. 70. Appropriation made of a parsonage to the Templars was not grantable over to the Hospitallers, as Herle said there, for the privilege of retaining tithes to their proper use was annexed in confidence to their persons, by the ordinary who made the appropriation, and is not transferable by grant to another, as temporal things are, wherefore an act of parliament was made to transfer such things to the Hospitallers, 17 Edw. 2. And 44 Edw. 3. 5. (2) it is ruled that assise does not lie for tithes, but if the lord had reserved the tenth part of the corn or such thing, he shall have assise for it as a profit *apprender*. So 7 Ed. 6. Dyer, 83. (3) that no temporal action lay for tithes till 31 Hen. 8. gave it, after the dissolution, and that appropriated rectories, and portions of tithes were given to the crown; by which it is proved, that although the abbots had temporal capacities to take land, and also spiritual capacities to take tithes, and that sometimes they had the inheritance in the land, and also the inheritance in the tithes arising from that same land, yet these two inheritances were divided in them in respect of their several capacities, as if they had been in different persons.

As to discharges of tithes, there were three kinds at common law. The first was prescription,—the second privilege,—the third unity. The discharge by prescription was in *non decimando* and in *modo decimandi*. In *non decimando*, spiritual persons only could prescribe, and not temporal, except for lands which they held as farmers to spiritual persons. And for this H. 38 Eliz. *Wright v. Wright*, (4) in prohib. the suggestion was, that the land was part of the possession of the bishop of Winchester, and prescribed that neither the bishop nor his tenants or farmers thereof had paid any tithes, for time whereof, &c. and adjudged a good prescription. So the parson of a church may prescribe for his glebe in another parish; and so all abbeys and religious houses; for as they were capable of tithes, they were capable of discharge of tithes in their own lands, and the commencement of the discharge is not examinable, when had had a continual discharge for time whereof, &c. but it shall be intended to have commenced from a reasonable cause. But this kind of prescription is not alleged in the suggestion in our present case, for it is alleged that the abbot was parson and proprietor of the land from time whereof, and by reason thereof, held the land discharged of payment of tithes, &c. by which conclusion it appears, that the cause and the commencement of the discharge was unity, and no other discharge can be intended or presumed against the plea of the party, as might have been if he had alleged prescription in *non decimando*, without such conclusion. In *modo decimandi* the prescription is common to spiritual and temporal persons; and if land, discharged by a *modus decimandi*, become the inheritance of a rector in right of his church, this does not interrupt the prescription, but the retainer of that which is due for the tithes shall be said to be payment to himself to continue the prescription, in whosoever hands the lands shall come, after a separation thereof from the rectory again, as was resolved *Chambers v. Hanbury*, (5) M. 40 & 41 El. The discharge by privilege is where the

(1) *Ante*, p. 3. (2) *Ante*, 24. (3) *Ante*, 51. (4) *Ante*, 119. (5) *Ante*, 142.

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the pope, who formerly usurped the authority of supreme ordinary, had by bull granted the privilege to be discharged of payment of tithes; but this must always have been to a spiritual person, who might have cure of souls, as 10 El. Dyer, 277. (1) The bull to the religious order of the Cisterstians privileged them from payment of tithes of lands, *quas propriis manibus excoluerunt*, and yet their lessees and farmers paid, and there were many discharges by such privileges in conditions and provisions contained in such bulls. The discharge by unity is more properly a suspension than a discharge; for the unity is of the land in a temporal capacity, and of the tithes in a spiritual capacity, both of equal estate of inheritance in one person, whereby he is discharged for the time from payment of tithes in necessity of reason, because he could not pay them to himself; but when the land comes to the hands of one, and the right of tithes to another, there the necessity is removed, and the tithes are payable for the land. And the conjunction of both inheritances in one person was not any perpetual discharge, for the capacities in which he took were several, so that the spiritual thing could not be extinguished in the temporal, as would be of things temporal, such as rents, commons, profits apprender, and such like; and this is proved by 30 Hen. 8. Dyer, 43. (2) where it was resolved by all the justices and serjeants, that if a parson purchase land within a parish, and demise it for years, or afterwards make a feoffment, he shall have his own tithes from lessee or feoffee; so for such lands he shall pay tithes to his farmer of the rectory, if he lease the rectory, and retain the land in his hands. And so is 7 Edw. 6. Bro. Dismes, 17. (3) Now we are to consider the statute 31 Hen. 8. the intent of which was founded on this foresight, viz. that whereas the makers had now given to the King the lands of religious persons, and the King might dispose of them to his temporal subjects, who were not capable of tithes, nor of such discharges of tithes of lands, as the abbots had before made to them; they now, to avoid contentions, and to encourage the purchasers of abbey lands, would provide that the King, and all others, who should have abbey land, should hold it discharged of payment of tithes, in such manner as the abbots held it at the day of the dissolution, and according to such intent they inserted the said branch of exoneration from tithes in the said statute of 31 Hen. 8. for the dissolution of monasteries; by which, in letter and intent, it is clear that all lands that the abbots held discharged by privilege of a bull, or by any kind of prescription, the King and all others should hold for ever discharged, according to the privilege or prescription; and also where the abbots held lands at the time of the dissolution in their hands discharged of tithes, by reason that they themselves were the persons to whom the tithes were payable, there the King and all others should hold these lands for ever discharged, if the abbot had the land and tithes of equal estate, and this by the words of the statute, that they should retain and keep the land discharged, as freely as the abbot, &c.; but if the abbot were out of possession of the rectory or land, at the time of the dissolution, so that tithes were paid, there the land was not discharged at the time of the dissolution, and therefore shall pay tithes perpetually. For where there is no discharge but unity, there the unity ought to be in occupation together, and no other unity in estate was any discharge at common law, at the time or before the dissolution, as is proved by the cases before, and also expounded by all usage and experience since the statute, as appears by copyholders of abbey lands, where the abbots were also parsons, there was unity in estate of the freehold of the rectory, and of the copyhold, yet the copyholders have always paid tithes since the statute, by which it appears that unity of the freehold and inheritance, without unity in occupation of the land and rectory in the abbot in the principal case, is not such a discharge of tithes, as is within the intent or letter of the statute. And if he, who was lessee for years of both under the abbot, viz. of the land and rectory, had not leased the land from him, it would be a grand question whether this land, by such unity, in the hands of the lessee for years, should

(1) *Ante*, 59.(2) *Ante*, 50.(3) *Ante*, 51. but Brooke refers to 32 Hen. 8. and not to 7 Edw. 6.

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should pay tithes; for the words of the statute are, that the King and his patentees shall hold discharged as freely as the abbot held at the day of the dissolution, and if the abbot did not hold the land and rectory together in occupation, he did not hold the land discharged of tithes *omnino*; and if the holding of his farmer shall be said to be within the statute, as if he himself had held, is doubtful. But here the case is better in the principal case, for the farmer had leased the land and retained the rectory, and took tithes of the land, at the time of the dissolution, in right of his rectory, from the lessee of the land, wherefore neither the land was then discharged, nor did the abbot then hold the land, wherefore, &c.

As to the matter of form of this traverse, they said it was good:—First, because in the whole suggestion there is but one thing material and traversable, and that is the discharge at the time of the dissolution; and upon that the prohibition is founded, which the defendant has traversed; for if he ought to traverse the discharge before the dissolution by unity, for time whereof, &c. that is not material; for, admitting unity for time whereof, &c. this is not material, if there was not unity at the time of the dissolution; and if he traversed the unity in seisin at the time of the dissolution, viz. that the abbot was not seised of the land and rectory together at the time of the dissolution, this would pass against him, for he was seised of both of estate of freehold and inheritance; and therefore the defendant has done well to confess such seisin, and to shew a severance in occupation, and that the land was out of the hands of the abbot by lease for years at the time of the dissolution, and to traverse the discharge at the time, &c.

FENNER, puisne Justice, was with the defendant in both points, viz. as to the matter of law and the traverse. GAWDY with the plaintiff in both; CLEWER and POPHAM with the defendant as to the matter of law, and with the plaintiff as to the insufficiency of the traverse. And POPHAM said, that unity in estate and not in occupation of the land and rectory at the day of the dissolution by the abbot, is not a discharge of tithes within the statute; but if the abbot, at the time of the dissolution, held the land in fee and the rectory also, the land is for ever discharged, and it has been so taken in this court always, upon the words of the statute, that the King shall retain and keep the land as freely discharged as the abbot held it at the day of the dissolution. And it was so ruled in the case of *Knightly v. Spencer*, (1) and in another case between *Green v. Boskin*; (2) and it was also so taken by the justices of C. B. But as to the case of copyholders, he held clearly that they should not be discharged, and if the abbey land was in lease for one year or otherwise, at the time of the dissolution, and not in the proper manurance of the abbot, such land is not discharged by unity of the freehold in him. And as to the traverse he said, that it was matter of law which was traversed, whereas nothing is traversable but matter of fact, for the matter in fact is the unity, and the conclusion thereupon is *ratione cuius* the abbot held discharged; and the traverse of the discharge is a traverse of the conclusion, whereas it should be of the unity which is the matter of fact; and he confessed that unity for time whereof, &c. before the dissolution, is not material, but unity at the time; and if an abbot had purchased land and a rectory instantly before the dissolution, and were seised in demesne and occupation of both at the time of the dissolution, he said that such land should be for ever discharged of tithes. And in the principal case he said that the special matter would have maintained the issue against the seisin in unity sufficiently for the defendant.

(1) *Ante*, 101.(2) *Ante*, 111.

E. 41 El. A. D. 1599. C. B.

*Mallory v. Marriott.* [Cro. El. 666.] Moo. 909.

Anon. Dy. in M. 171. 1 Gw. 130.

**P**ROHIBITION for suing for tithe-pigeons. The defendant in the court-christian pleaded payment, and offered to prove it by one witness, and they refused to admit thereof without two witnesses, and he thereupon brought a prohibition; and ruled, that it well lay, for it would be a great inconvenience to bring two witnesses to prove payment of every sort of tithes, &c. Wherefore, &c.

1599.

Where payment of tithe pigeons was offered to be proved in the spiritual court by one witness, but two were there required, Prohibition lies.

T. 41 El. A. D. 1599. B. R.

*Champion v. Wright.* [Dy. in M. 43.] 1 Gw. 118.

**W**RIGHT libelled in the spiritual court against Champion for tithes arising and renewing out of the manor of Newton Valence in the county of South Surrey. Champion brought a prohibition; and the matter of law was, A man devises his rectory except his own tithes, and afterwards grants his land, shall the grantee be discharged? HOBART thought not, because they are in the grantor by way of retainer.

Hobart thought that if a man devise his rectory except his own tithes, and afterwards grant his land, the grantee should be way of retainer.

not be discharged, because they were in the grantor by

E. 41 El. A. D. 1599. B. R.

*Johnson v. Aubrey.* [Cro. El. 660.] Moo. 910.

**P**ROHIBITION for tithes claimed of hay of the latter maths, and alleges a prescription. That in consideration the occupiers of that meadow had used to make the hay of the first maths into cocks, and to set forth the tenth cock for the vicar, they had used to be discharged from the payment of any tithes for the latter maths. *Williams* moved for a consultation, because the suggestion is not sufficient; for he doth no more than the law requires. But the court held it to be a good prescription, and reasonable. And *Coke* cited one *Nichols'* case to be adjudged in this court, that tithes shall not be paid for the rakings of corn, unless it can be averred, that they were foul rakings, and covinous, to defraud the parson, &c.

1. A custom that all occupiers of meadow ground in a parish have used to make the first vesture into hay, and pay the tenth thereof in satisfaction of the tithe of such first vesture and the aftermeth order to defraud

also, was held good. 2. Tithes shall not be paid of rakings unless they be foul and covinous in the parson.

M. 41 El. A. D. 1599. B. R.

*Green v. Hun.* [Cr. El. 702.] Moo. 910. 1 Gw. 215.

**P**ROHIBITION for suing for tithes of the rakings of barley. And alleges a prescription to make the barley into cocks, and to pay the tenth cock in satisfaction of the tithes of the barley, and of the rakings *minus voluntarie* dispersed. And it was hereupon demurred, because he does not aver, that those rakings were *minus voluntarie* dispersed. For *Bacon*, who moved it, said, that in 31 El. it was ruled in the common bench in one *Adams'* case, (1) that a prescription to pay the tenth cock generally, in satisfaction of all rakings, was not good, for he might leave the greater part of the corn in rakings. But all the court held that the prescription was good, and there needed not any averment. But that ought to come on the other part, if he would. Secondly, he sued for tithe of wool, and alleges a custom to pay it every year at Lammas-day, and that he set it out, &c. And it was thereupon moved, that it was not good,

1. It was held a good custom to make the barley into cocks, and to pay the tenth cock in satisfaction of the tithes of the barley and the rakings *minus voluntarie* dispersed, for that ought to come on the other side.

pay the wool at Lammas-day is good, though it is *de jure* due, when it is clipped. 3. No agistment tithe is due for young cattle reared for plough or pail, if there be a custom not to pay. 4. A custom to pay a hearth penny in satisfaction of all tithes of combustible wood is good. 5. Where certain prescriptive payments were alleged, and that all and singular the parsons, rectors, &c. had used to accept the same; a traverse that *all and singular* had not accepted is bad, for the prescription ought to have been traversed.

(1) *Ante*, 97.

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good, for this is not a *modus decimandi*, but for the time only, which is to be tried in the spiritual court. But the court held it to be good; for it is due *de jure*, when it is clipped. But by prescription it may be set out altogether at another day, and that is good. And if the spiritual court will not allow thereof, as it is here alleged that they will not, it is fit to prohibit them. Thirdly, he prescribed, that for young cattle reared for the pail to be milch-kine, or for the plough, no tithes have been accustomed to be paid: and it was thereupon demurred, and adjudged a good prescription. For they be for the public weal; and the parson is to have benefit of them in another kind; and it was held that for pastures of such cattle no tithes are due for the reason aforesaid. Fourthly, he prescribed, that for all wood combustible he used to pay a penny, called a hearth-penny, in satisfaction for all tithes thereof: and it was thereupon demurred. And it was adjudged to be a good prescription. For other kind of tithes he alleged also other such payments of the like sums, &c. *Et quod omnes, et singula persone, rectores de, &c.* have used to accept thereof, &c. And the defendant traverses *quod omnes, et singula, &c.* had not accepted. And it was thereupon demurred; for he ought to have traversed the custom alleged, and not *quod omnes, et singula, &c.* did not accept. For then, if any of them did not accept, he overthrows the prescription, which is not reasonable. And so was the opinion of the court. Wherefore it was adjudged, *quod prohibitio stet.*

Spiritual-Court.

Tithes had been compounded for, but yet they were set out, the parson takes them; and the parishioner retakes them; prohibition lies to a suit in the spiritual court.

H. 41 El. A. D. 1599. B. R. *Brook's case.* [Noy, 40.]

**G**ODFREY moved for a prohibition, and surmised that the parishioners had compounded with the parson for the tithes; but yet the due tithes were severed and exposed, and the parson took and carried them away. The parishioner met him and took them from him, and upon that the parson sued in the spiritual court. And a prohibition was awarded.

1600.

A custom for the Lord of a Manor to pay six pounds in satisfaction of all tithes of the manor, and in consideration of such payment to take the tenth shock, is good.

H. 42 El. A. D. 1600. B. R.

*Pigot v. Sympton.* [Cro. El. 763.]

**I**N trover. Upon demurrer, the case was, the plaintiff, being owner of the rectory of Evingham, in the county of Northumberland, brought his action in trover, of twenty loads of wheat in Harlow, being the tithes of the rectory set out from the nine parts. The defendant pleaded, that Harlow was a member of the manor of Pridhoe, both which are within the parish of Evingham, and conveys the manor to the earl of Northumberland, and prescribes that the earl of Northumberland, and all those whose estate he had in the same manor, from time whereof, &c. had paid to the parson of Evingham six pounds annually, in satisfaction of all tithes within the said manor; and further, that the said earl, and all those whose, &c. had used to have, in respect of the said six pounds, the tenth part of all the corn within the said manor; and so these tithes within the said manor, being severed from the nine parts, he took by title under the said earl. And it was thereupon demurred, and argued for the plaintiff that this was not any plea; for a layman is not capable of tithes, and therefore no continuance of time can give him any title to that whereof he is not capable, for, by the ancient course of our law, he cannot sue for them: and the civil law did not permit a layman to sue for them there, and so he had not any remedy, and therefore not any right. There is not any also can prescribe in a thing in gross *per que estate*, and here he prescribes, as for a thing in gross: and he cannot prescribe as to a thing appurtenant to a manor; for a spiritual thing cannot be appendant to a temporal; and for that purpose cited a case to be ruled in this court betwixt *Shirwood and Winchcomb*, 36 Eliz.(1) wherefore, &c. But all the court, upon the first motion, resolved to the contrary, that it is a good prescription; for when the lord has used, from time whereof, &c. to pay this sum, &c. and in respect thereof



thereof to have all the tithes within his manor, it shall be intended, that at the beginning the lord had all in his hands, and then might prescribe to pay a sum in discharge of all the tithes within the manor, and when he gave the tenants to hold of him, and always afterwards, used to have the tithes of those lands and tenements, it is a very reasonable prescription: for now he has no more than what he had before, for he had them before by retainer, and now he takes the tithes themselves. And GAWDY said it might be, that the parson before time of memory granted those tithes to the lord of the manor, rendering rent, which was confirmed by the patron and ordinary, and this being before time of memory, may well be so intended; *quod POPHAM concessit*, and said, that, that was their principal reason of the judgment, between *Pigot and Hearn*. And they said, that, in this case, the lord might have good remedy at the common law, or in the spiritual court; wherefore they intended to have adjudged it for the defendant. But then exception was taken to the pleading, that the conversion was supposed 10 Sept. 40 El. and the defendant says that he found them the 20 Sept. 40. and converted them the 10 Sept. which is repugnant in itself, which the court held incurable. Vide 1 and 2 Ph. & Ma. Dy. 3.

1600.  
PIGOT  
v.  
SYMPTON.

M. 42 El. A. D. 1600. B. R.

*Crouch v. Fryer*. [Cro. El. 704. 784.] Yelv. 2. Moo. 608. 8 Gw. 218.

**CROUCH**, copyholder of inheritance of the bishop of Winton, sues a prohibition for staying of a suit for tithes, surmising, that he, and all the copyholders of such a manor, of the bishop, from time whereof, &c. had held their lands discharged of tithes. *Tanfield* moved that this prescription was too general, and it could not be good to prescribe in *non decimando* by the tenants. *Godfrey*: it is as good, as for the farmers of a bishop to prescribe to be discharged. And that was ruled in a case in this court between *Wright and Wright*. (1) — *POPHAM*, it was allowed only for his demesnes. And that was in regard, it is to be intended, that the bishop at first retained the tithes to himself of his own demesnes, but it would be mischievous to allow it to all his copyholders. *CLINCH* and *FENNER* agreed with him. Wherefore, without permitting any declaration or demurrer thereupon, they awarded a consultation. Unless other cause be shewn by such a day. (*GAWDY absente*.)

Copyholders of inheritance of a spiritual person may prescribe under him in *non decimando*, for in consequence thereof it is to be presumed that the lord had the greater fines and rents.

Prohibition for suing for tithes, &c. wherein he surmised, that the bishop of Winton was seised in fee of the manor of Bishops-Walton, whereof the plaintiff is a copyholder in fee. And that he, and his predecessors, from time whereof, &c. had been patrons of the church of E. whereof the defendant is parson, and that he and his predecessors, from time whereof, &c. and all his farmers and copyholders of the said manor, had been discharged of tithes, &c. and shews, that this land is ancient copyhold of the manor demisable, from time whereof, &c. And because the parson sued for tithes, and the court-christian would not allow of that plea in discharge, he brought the prohibition. And upon this surmise the defendant demurred. *Tanfield*, for the defendant, moved, that the surmise is not sufficient to ground this prohibition. For although the bishop himself, being a spiritual person, may prescribe to be discharged, &c. because, by intendment, they might be so before the council of Lateran, by reason whereof their farmers for years, or tenants at will might be so discharged, because they be the possession of the bishop himself; as it has been adjudged in *Wright's case*: yet it is not so for copyholders, which are also grounded by custom, before time of memory; so it cannot by intendment be the possession of the bishop, at the time of such council, but had continued in the hands of the copyholders a long time before, for otherwise it could not be copyhold. And in 29 Eliz. it was ruled by advice of all the justices, upon a case depending in the exchequer, that, although the queen shall not pay tithes for her own possessions, because she is *persona mixta*, and so might well retain them, yet if she grant them by patent, in fee, or her copyholder of inheritance, they shall pay tithes, for they do not participate of the queen's prerogative therein.

(1) *Ante*, 119.

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therein. Add this copyholder, who was before time, &c. cannot prescribe, for then there would be two times of memory, which is repugnant in itself: Wherefore, &c. *Coke e contra*, for although a lay person, at the common law, could not prescribe to be discharged of tithes, because he is not capable of such spiritual things; yet, as being tenant to a spiritual corporation, he may prescribe in them, but not in himself; for all those copyholds are derived out of the manors, which were the possessions of the bishop; and the freehold yet abides in the bishop. For this prescription is for the bishop's benefit; for thereby he shall have the greater fines from his copyholders: especially the lord of the manor, who has the advowson, may so prescribe, because it may be, it was so at the foundation, that he and his copyholders should be discharged. Which is the reason in *Cotton's case*, that the lord of the manor, in respect of a recompense given to the parson, shall have the tithes of his tenants. And so *Pigot and Hern's case* was ruled. Wherefore, &c. But *POPHAM* and *FENNER* held, that this prescription is ill. Because the copyholders are intended to be before the council of Lateran, at which time every one might give his tithes where he would, and spiritual persons might prescribe to retain them to themselves. But they ought to prescribe in themselves and their predecessors, and not in a *Que estate* of the manor. And then a copyholder cannot prescribe to retain them himself, and so, by consequence, he cannot prescribe to be discharged. But a bishop may prescribe to have the tithe of his copyholders, which shall be good against the parson. And upon the creation of the patronage it could not be allowed, that copyholders should retain their land discharged, which always should be out of the lord's possession; and they ought to be appointed how they shall go by him, who had then the possession before the council made, and that was intended to be the copyholder himself. But of lessees for years it is otherwise, for they shall be intended to be the possessions of the bishop himself at the time of the council. Wherefore, &c. *GAWDY* and *CLINCH* doubted thereof. Wherefore *adjournatur*, 8 Ed. 4. 13. Note, That *Pasch. 44 Eliz.* this case was argued again; and then *GAWDY*, *FENNER*, and *YELVERTON* resolved that this prescription was good, for all copyholds are derived out of the manor; and it shall be intended, That this prescription had its commencement at such time, when all was in the lord's hand. And the one prescription is not contrariant to the other, although both were from time whereof, &c. For the one shall give place to the other, and this objection may be, where a copyholder prescribes for common, or the like, which is usual. But *POPHAM* held his former opinion: yet, notwithstanding, it was adjudged for the plaintiff. [*Croke.*]

A parson sued a copyholder in the spiritual court for tithes arising upon the copyhold land; he brought a prohibition, and suggested that the bishop of Winchester, lord of the manor whereof his copyhold is parcel, and his predecessors, &c. from time whereof, &c. for themselves, their tenants and farmers, have been discharged of tithes arising upon the said manor, and shewed that he had been a copyholder of the said manor from time whereof, &c. and prescribed in his lord, now bishop of Winchester. And although here is a prescription upon a prescription, one in the copyholder to make his estate good, the other in the bishop to make his discharge good; yet adjudged by *GAWDY*, *FENNER*, and *YELVERTON*, that the prohibition lies. *Yelverton*, of counsel with the plaintiff, alleged the matter *supra*, which was allowed. Note, the reason:—for a prescription in the lord ought of necessity in common indentment, to precede the prescription in the estate of the copyholder, and the discharge of the tithes in the lord (which may well be in this case, because he is a spiritual person) shall trench to the benefit of the tenant, who is the copyholder, for by these means it is presumed that the lord has the greater fines and rents. Note,—*POPHAM* was against this judgment, because the plaintiff, who is the copyholder, will have in *suo genere* an estate of inheritance distinct from the estate of the lord, who is the bishop. [*Yelverton.*]

H. 42 El. A. D. 1600. B. R.

*Austen v. Pigot.* [Cro. El. 736.] Moo. 911. 1 Gw. 217.

**P**ROHIBITION for suing for tithes : wherein was suggested, that P. prior of the rectory of B. wherein those lands are, and all his predecessors, have had twenty acres of pasture, and another close containing twenty acres of wood, in satisfaction of tithes; and his witnesses being examined, according to the statute of 2 Ed. 6. proved that he had the twenty acres of pasture, but not of wood. And thereupon *Coke*, attorney-general, prayed consultation; for the suggestion is not sufficient, that he had the close, &c. without shewing of what estate, or how. The suggestion also is not proved as it is alleged; but all the court held it to be well enough: for it is sufficient that he had it, and the other cannot shew how. And so *Doctor Cotton's* case was ruled accordingly. The proof also in a prohibition ought not to be so precise; but it appears that the court-christian ought not to hold plea thereof, it suffices; and therefore if there be a prescription that the parson holds an hundred acres of land, in satisfaction of tithes, and the proofs be, that he holds sixty acres only in satisfaction of them, it is well enough. So here the substance is proved, that he held land in satisfaction, &c. Wherefore it was agreed that the plaintiff should declare, and that the defendant should plead to issue.

[And he need not shew how or by what title the parson had the land, but if he had it in any other manner than in satisfaction of tithes, the parson ought to shew it. *Moore.*]

of tithes, it need not be shewn how or by what title he holds it; but if he has it in any other manner than in lieu of tithes, he ought to shew it.

1. Proof in prohibition need not be precise, but it is sufficient to prove enough to shew that the parson ought not to have tithes in kind; so if a prescription be that a parson holds 100 acres of land in lieu of tithes, and the proof be that he so holds 60, it is sufficient.

2. If it be alleged that a parson has a certain quantity of land in lieu

H. 42 El. A. D. 1600. B. R.

*Sibley v. Crawley.* [Cro. El. 736.] 1 Gw. 217.

**P**ROHIBITION for tithes. The defendant shews, that before that time the plaintiff had sued in chancery to stay it by English bill, and afterwards brought a prohibition there, and a consultation was there granted; and that this prohibition is for the same cause, viz. for matter of discharge: wherefore he prayed a consultation upon the statute of 50 Ed. 3. cap. 4. which is, that consultation being once duly granted, there shall not be another prohibition. But the court held that this consultation was not duly granted, according to the intent of the statute, because the prohibition was not duly grantable there, and so out of the statute: for it was not duly granted upon an English bill. And by *POPHAM*, The statute is to be intended where the consultation is granted upon the examination of the matter, and not for the insufficiency of the proceedings. *Quod fuit concessum.* Whereupon it was awarded that the prohibition should stand.

Prohibition shall be granted after consultation, if it were not granted — upon examination of the matter, but for the insufficiency of the proceedings.

Tr. 42 El. A. D. 1600. B. R.

*Wortley v. Herpingham.* [Cro. El. 766.] 1 Gw. 218.

**D**EBT. The plaintiff being farmer of the rectory of Kirk-burton, in Comitatus Ebor. brought debt against the defendant upon the statute of 2 E. 6. for carrying away his corn, the tithes not being set out, and demanded the treble value. The defendant pleaded not guilty. *Coke*, attorney-general, moved, that it was not any issue in this action. But all the court resolved, that it was well enough; for it was not for a *non-feasance*, but for a *mal-feasance*, wherein the tort is supposed. And in an action upon the statute, which prohibits a thing upon which a penalty is demanded, the issue may be *non culp.* or *non debet*, and so it has been oftentimes ruled in this court. Wherefore the issue was joined accordingly.

*Not guilty or nil debet* are good pleas to an action on 2 E. 6. for it is not for a *non-feasance*, but a *mal-feasance*.

1600.

A prescription to be discharged of tithes of all dry cattle, and all other tithes of corn, hay, and cattle, in consideration of having paid the tenth cock of hay, the tenth sheaf of corn, and a modus for calves, is bad, for that which has been paid, is but the tithes in kind, and therefore cannot be in satisfaction of any thing but themselves.

M. 42 El. A D. 1600. C. B. *Ingoldsby v. Johnson*. [Cro. El. 786.]

**P**ROHIBITION for suing for tithes of dry cattle, and surmised that he used to pay the tenth sheaf of corn, the tenth cock of hay, the tenth fleece of wool, the seventh calf, and the parson to pay three half-pence; and the eighth calf, if he had eight, and the parson to pay one penny; and so on to ten; and if he had under the number of seven, to pay only one half-penny for every one; and so after that rate for lambs and colts; and that it was in satisfaction of the tithes of all dry cattle, and for all other tithes of corn, hay, and cattle. And it was thereupon moved that the surmise was not sufficient; for that which he used to pay is but the tithes in kind, and therefore cannot be in satisfaction of the tithes of other things than themselves. And this was the opinion of the whole court. But if he had made this prescription only for his dry cattle, for his plough, or to manure his soil, it had been otherwise. But this general prescription cannot be good, for then thereby he would excuse all feeding cattle, although he kept 500 or more, which is not reasonable. Whereupon consultation was awarded.

E. 42 El. A. D. 1600. C. B.

*Sampson v. Worthington*. [11 Co. 48. 6. in *Liford's Case*.]

If timber trees have been usually topped and lopped, no tithes shall be paid of them; for as the law privileges the body of the tree, being parcel of the inheritance, so it privileges the branches also; and if a man fell his timber trees, tithes shall not be

**I**F timber trees have been usually topped and lopped, no tithes shall be paid for them, for as the law privileges the body of the tree, being parcel of the inheritance, so it privileges the branches also; and therewith agrees *Doctor and Student*, 175. So if a man fell his timber trees, tithes shall not be paid for the germins which are growing *ex radicibus seu stipitibus*, in respect that the root is parcel of the inheritance, as it was held 29 El. in this court. So if a timber tree become *arida, sicca et non portans folia, nec fructus in astate, nec existens moremum*, and the owner sell it, no tithes shall be paid thereof, for the inheritance which was once in him; which privilege extends to it when it becomes dotard; as it was adjudged H. 2 Jac. C. B. *Brook v. Rogers*. So for the bark of oak timber no tithes shall be paid, for the reason aforesaid; and therewith agrees *Doctor and Student*, 175. But for acorns tithes shall be paid, because they grow yearly, as appears in the *Register*, fol. 49.

paid for the germins which are growing *ex radicibus seu stipitibus*, in respect that the root is parcel of the inheritance; nor shall tithes be paid for a timber tree which, from decay, has become unfit for building. Tithes shall be paid of acorns, because they renew yearly.

1601.

*Dodderidge* held that tithes could not be demised by copy of court roll, for although tithes had been immemorably to be paid, yet one parson could not claim them more than any other, until the council of *Lateran*; and so their origin as to a church was by constitution, and not by custom; but *Gawdy* doubted, and thought it well enough if it had been so used from time whereof, &c. Before the council of *Lateran*, every one might have paid his tithes to whom he would; but by that council, they were annexed to the rectory.

E. 43 El. A. D. 1601. B. R. *Sands v. Drury*.

[Cro. El. 814.] Dy. in M. 84. b. 1 Gw. 123. 4. 1569.

**A**CTION *sur trover* of twenty loads of hay. Upon not guilty pleaded, a special verdict was found, that this hay was parcel of the tithes severed from the nine parts, pertaining to the rectory of Hackley, and demised and demisable, time, &c. *secundum consuetudinem Manerii de Hackley*; and that the priory of Newbury was seised in fee of the manor and rectory of H. and in 27 H. 8. demised those tithes, by copy, to H. under whom the defendant claimed; and afterwards, by the dissolution, &c. the manor and rectory came to the king, Hen. 8. who conveyed it to the archbishop of York, who let that rectory to the plaintiff, who claimed those tithes; and the defendant, under pretence of that copy, carried them away. *Et si*, &c. The sole question was, whether those tithes were grantable by copy, &c. And it was moved for the plaintiff that they were not. First, in respect of the nature of tithe, wherein none could have any propriety before the council of *Lateran*, which was in the time of King John; for, before that time, every one might have paid them to whom he pleased; but by those constitutions they are annexed to the rectory: it is then impossible

impossible that there should be any custom to demise them by copy, from time, &c. when as none had interest in them but within time of memory. Tithes also cannot pass, unless by deed; and therefore to grant them by copy of court-roll, cannot be good. There cannot also any thing pass by copy, but that which is parcel of the manor; but it hath been adjudged that tithes cannot be parcel of a manor; wherefore, &c. And of that opinion was POPHAM, for the first and last reasons; for although common, and *prima vestura prati* may be granted by copy, because they be parcel of the manor; yet tithes cannot be so, because they cannot be parcel of a manor; for a manor and tithes are of several natures, although they be united in one man's hand; and then it is not possible that that which is not parcel of a manor can be demised *secundum consuetudinem Manerii*. And therefore it was adjudged in the time of queen Mary, in the case of the duke of Suffolk, that where one had two manors, and granted a copyhold of the one manor, at the court of the other manor, that it was a void grant; for it cannot be a copyhold, according to the custom of a manor, whereof it is not parcel. But GAWDY doubted thereof, and conceived it had been well enough if it had been so used, from time whereof, &c. But because upon the verdict it did not appear that it had been granted by copy, from time whereof, &c. it was held that there was not any title found for the defendant, and therefore adjudged for the plaintiff.

[The question in this case was, whether tithes might be demised by copy of court roll? By *Dodderidge*, they cannot; for although tithes have been immemorially to be paid, yet one parson could not claim them more than another (1) until the council of Lateran; and so their origin as to this church, was by constitution, and not by custom. *Dy. in M.*]

(1) MS. See *ante*, 127 n.

H. 43 El. A. D. 1601. B. R.  
The Parson of *Ramsey's* Case. [Goulsh. 161.]

THE parson of Ramsey sued in the spiritual court for tithes of asp, and a prohibition was awarded. And FENNER said that it was adjudged before that time that asp should not pay tithes; and also it is agreed if a man cut trees for housebote, hedgebote, ploughbote, cartbote, and firebote, tithes shall not be paid of them.

Asp shall not pay tithes; and if trees be cut for housebote, hedgebote, ploughbote, cartbote, and firebote, no tithes shall be paid of them.

E. 48 El. A. D. 1601. B. R. *Beal v. Web.*  
Cro. El. 819. *Dy. in M.* 171. 1 Gw. 220. [Noy, 44.] *Webb v. Petts.*

W. SUES P. in the spiritual court for not setting out the tithes of two acres. P. prays a prohibition, because he had set out the tithes of one acre in specie, and that a party unknown had taken them; and for the other, he suggests a *modus decimandi* for two shillings and sixpence; and upon that issue is joined: and the witnesses said, that for a long time, as they heard say, the occupiers of that farm, whereof that acre, &c. had used to pay annually to the parson three shillings for all tithes, and agreed by the court.

1. As to the first, *quod prohib. stet*. For after the tithes are severed, if any stranger take them away, the parson has his remedy against him at common law, and shall not sue the parishioner in the spiritual court.

2. It was agreed that a proof (by hearsay) was good enough to maintain the surmise within the statute 2 E. 6. But as to the other acre, POPHAM held, that the *modus decimandi* is not well proved. But FENNER and YELVERTON on the contrary; for by that appears that the parson is not to have tithes in specie, and for that had not any cause to sue for them in the spiritual court.

[*Dodderidge* said, that Mich. 34 and 35 El. *Bird* and *Collingworth*, in a like case, a consultation was awarded. POPHAM answered that the opinion of the judges of C. B. is now to the contrary; for when a *modus decimandi* in one sort is suggested, and another proved, we ought not to award a consultation to give them authority to sue for tithes in kind, but to sue for tithes in such kind as is proved. *Dy. in M.*]

1. Hearsay is sufficient proof of a surmise, within 2 E. 6.  
2. No consultation shall be granted where a *modus* appears, though not precisely the same as that suggested; and it was said that the practice of C. B. was in such case to grant a consultation to sue for tithes in such kind as proved.

1601.

**Severance.**

Though the tithes have been in fact set out, yet if the parishioner refuse to let the parson come for them (by locking a gate), the parson may sue for them in the spiritual court, by the statute 2 E. 6.

Tr. 43 El. A. D. 1601. C. B.

*Blackwell's Case.* [Cro. El. 843.] 1 Gw. 220.

**PROHIBITION.** The case was, that a parishioner severed the tithes from the nine parts; but being in a close, the gate was locked, so as the parson could not come at them; and he sued in the spiritual court: and there the question was, whether the gate were locked or open; and thereupon a prohibition was brought, supposing this to have been a temporal matter; for the tithes being severed, are lay chattels. But the court said that although the tithes be severed, yet by the statute they remain suable in the spiritual court, and then the other is but a consequent thereof, and therefore is there triable; and if they refuse to allow his proofs, as it was surmised (but not within the prohibition), it was said that he ought to appeal.

Tr. 43 El. A. D. 1601. B. R.

*Bray v. Partridge.* [Cro. El. 836.] Noy, 23. 37.

If a parson by deed compound for his tithes, and after sue for them in the spiritual court, an action on the case lies; but where an action was brought for that, the parson sued for tithes, and recovered, because there was but one witness to prove the payment, which in fact had been made in the presence of two, but one was dead; held that it did not lie, for the cause was merely spiritual, and therefore differed from 8 E. 4. 13. for there the composition was a temporal contract, although it was for tithes.

**ACTION sur le case.** Whereas the defendant was vicar of Lanham, and the plaintiff a parishioner there, and the tithes appertained to the defendant; the plaintiff had paid him his tithes in the presence of two witnesses; the one of those witnesses being dead, the defendant had again sued him for those tithes paid unto him, well knowing that the proof of payment by one witness is not sufficient in the spiritual court, &c. The defendant pleaded not guilty, and found that the plaintiff had paid his tithes, but one of the witnesses named was dead before the payment, &c. and found all the residue, *ut supra*, Et si, &c. And all the court held that upon this matter the action lies not; for an action lies not for prosecuting at the common law without cause; the same law is for prosecuting a suit in the spiritual court. For **POPHAM** said, when a man complains in court, which has power to give him remedy for the same cause, although his suit be without cause, yet the plaintiff shall not be punished by an action upon the case. But if a man libel in the spiritual court for a temporal matter, there, peradventure, an action upon the case will lie; so it is where a man brings an appeal in the common bench, action upon the case lies; whereto **GAWDY** and **FENNER** agreed, and said how 8 Ed. 4. 13. (1) is, that an action upon the case lies, where he sues one for tithes, who ought to be discharged; yet that is not like to this case, for by the same reason, if one has paid a debt upon an obligation, and is sued for it again, an action upon the case lies, which is not law. Wherefore they all agreed against the plaintiff. *Sed adjournatur.*

[It differs from 8 E. 4. 13. for there the composition was a temporal contract, although it was for tithes. *Noy.*]

(1) *Ante*, 44.

Tr. 44 El. A. D. 1602. B. R.

*Day v. Peckwell.* [Moo. 915.] Cro. Ja. 70. 1 Gw. 221.

1602.

1. In debt on 2 E. 6. the jury must give treble damages, but no costs, or other damages.

2. A farmer of tithes may sue by the equity of the statute, because he has a right to the tithes, though the statute do not give the action to the farmer. Two farmers may join in an action, and an agreement with one shall bind his companion.

**IN** debt for tithes *nil debet* was pleaded, and found that he owed seventy-eight pounds, and for the residue *nil debet* and damages, assessed at one penny and costs at 40 sh. The plaintiff released the damages and costs, and had judgment for the debt. Note. 1st. The statute which gives treble damages, does not allow the jury to give other damages. 2d. No costs being given by the statute, the jury cannot assess costs. 3. Two farmers may join in an action upon the statute. 4. A farmer of tithes may have an action by the equity of the statute, for he has the right to the tithes, although the statute does not give an action to the farmer. 5. Agreement with one farmer shall bind his companion.

Scacc.

Sacc. Anon. [Moo. 915.]

1602.

**T**HE king shall not pay tithes for the demesnes which he holds in his hands of monastery lands, unless the monastery had used to pay tithes. The tenant of the king for life or years shall pay tithes, but not tenant at will, by TAYFIELD, Ch. Ba. Land held in *capite* shall pay tithes.

unless the monastery used to pay tithes. His tenant for life or years, or in *capite*, shall pay tithes but not tenant at will.

The King shall not pay tithes of the demesnes of a monastery in his hands,

H. 44 El. A. D. 1602. C. B.

Robinson v. Bedell. [Cro. El. 673.] 1 Gw. 221.

**T**RESPASS, for taking of certain loads of wood, set out for tithes: the defendant pleaded not guilty. The plaintiff for evidence shews, that in the time of King Ed. 3. the rectory was impropriated, and the vicarage then endowed, and (*inter alia*) the tithes of wood were allotted to the vicar. The defendant shews, that for 160 years last past, there had not been any vicar presented there, until the plaintiff obtained a presentation from the Queen by colour of lapse. And so pretended, that in regard it had continued so long in this manner, that it reunited again to the rectory. But the court informed the jury, that although a vicarage is always taken out of the parsonage, and for the necessity thereof may be reunited to supply the parsonage, yet by continuance of time in not presenting a vicar, which is the default of the parson himself, it ought not to be adjudged to be a discontinuance of the vicarage: but somewhat ought to be shewn of the reuniting thereof, wherefore by the court's direction the jury found for the plaintiff.

Though a vicarage had not been presented to for 160 years, yet it shall not be adjudged to be discontinued, or reunited to the rectory, for it is the default of the parson himself, and somewhat ought to be shewn of the reuniting thereof.

Tr. 44 El. A. D. 1602. B. R.

Heal v. Sprat. [13 Co. 23.] 1 Br. and G. 34. Noy, 152.

4 Gw. 1571. 2 Inst. 649.

**J**OHAN SPRAT libelled in the spiritual court against Walter Heal for subtraction of tithes; the defendant, in the spiritual court pleaded, that he had divided the tithes from the nine parts: and then the plaintiff made addition to the libel (in the nature of a replication) *scil.* that although the defendant divided the tithes from the nine parts, *quod prædict'* the plaintiff *non fatetur, sed prorsus diffinitur*; yet presently after this pretended division, *in fraudem legis* he took and carried away the same tithes, and converted them to his own use; and the plaintiff thereupon obtained sentence in the spiritual court; and to recover the treble value, according to the statute of 2 Ed. 6. cap. 13. And thereupon Heal made a surmise, that he had divided his tithes, and that the plaintiff ought to sue in the spiritual court for the double value, and at the common law for the treble value: and it was objected, that when the owner of the corn divides them, then they are become lay-chattels, for the taking of which an action lies at the common law; and therefore, after severance from the nine parts, the parson shall not sue for them in the spiritual court.

But it was resolved by the whole court, that the said division or severance mentioned in the libel, was not any division or severance within the statute of 2 Ed. 6. c. 13. For the same act provides, that every of the King's subjects shall, from henceforth, "truly and justly, without fraud or guile, divide, set out, yield, and pay all manner" of other predial tithes in their proper kind, so as when he divides them to the purpose to carry them away, he do divide them justly and truly, without fraud or guile; but here is fraud and guile, and no way a just division, and therefore the same is out of the statute, for the makers of the statute respect *quo animo* he divides them (*scil.*) with a mind and intention that the parson carry them away, as in right he ought, or with

1. Though predial tithes have in fact been set out, yet if afterwards they be carried away by the occupier, such setting out is fraudulent within the statute 2 Ed. 6.

2. The owner of corn before severance secretly sold it to one not known, and then as servant to the vendee reaped the corn, and carried it away without setting out the tithes; pretending that neither the vendee, because he did not carry away the corn, nor the vendor because he had no property in

it, for he did not carry away his corn or his tithes, should be within 2 E. 6.; but resolved that the vendor should pay the treble value, for he carried them away in *fraudem legis*.

1602.

REAL V. SPRAT.



with a mind and intention that he himself carry them away, which he ought not, *quia fraud et dolus alicui prodesse, aut simplicitas alicui obesse non debet*: and the same is, *crimen stellionatum*, which we call *fraudis rem et imposturam*: and where the words of the statute are, divide, set out, &c. the predial tithes, &c. And if any person carry away his corn and hay, and his and their predial tithes, &c. And to make an evasion out of these words, this invention was devised; the owner of the corn by covin sold his corn before severance to another, and then, as servant to the vendee, reaped the corn, and carried away the corn, without any severance; pretending that neither the vendee, because he did not carry them away, nor the vendor, because he had no property in them, for he did not carry away his corn, or his predial tithes, should be within that statute: but it was resolved, that the vendor should be charged in that case with the penalty of the statute, for he carried them away *in fraudem legis*, and his fraud and covin should not help him or avail him. See 8 Ed. 3. 290. A real action brought by a man of religion by collusion, although that he hath right, yet he shall not have execution, 9 H. 6. 41. A recovery upon a good title by collusion, shall not abate the writ, 33 H. 6. 5. A sale in open market by covin, shall not bind the property of a stranger: but it was resolved, that the plaintiff could not sue in the spiritual court for the treble value, but for the double value, that he might.

H. 45 El. A. D. 1603. B. R.

*Gibson v. Holcraft.* [Yelv. 31.] 1 Gw. 222.

1603:

Where it was alleged that an abbot of a smaller monastery time whereof, &c. had been seised of a rectory and land *simul et semel et ratione inde* the land was discharged by 31 H. 8. a plea that the abbey was founded 5 E. 1. (and so within time of memory) and confessing the unity afterwards, was held good in bar.

**I**N a prohibition, the suggestion to stay the suit in the spiritual court for tithes was, that the abbot of Vale Royal (1) in Cheshire was seised of the said parsonage of W. and of the grange of Darnal, whereof tithes were demanded by the present parson of W. and that the said abbot and his predecessors from time whereof, &c. were seised of the said parsonage of W. and of the grange of D. in their demesne as, &c. in right of their abbey; and *ratione inde* shewed the unity of possession in discharge of the tithes, upon the statute of 31 H. 8. To which the defendant pleaded that the said abbey was founded 5 E. 1. (which is within time of memory) and shewed and confessed the unity of the parsonage, and of the grange after the time of the foundation. And upon the motion of Coke the attorney-general, (*per totam curiam*) the plea in bar is good; and it is not necessary to traverse the prescription, for the shewing of the foundation of the said abbey to be after the time of memory, is a sufficient confessing and avoiding: but if the defendant against the suggestion of the perpetual unity, would shew that the demesnes before the statute, and in the time of the abbot, were in the hands of the farmers, &c. there he ought to traverse the prescription; for although the possession was chargeable in other hands, yet as to the fee simple which remained in the abbot, it is a discharge in right.

(1) Its possessions at the dissolution were valued at £118: 19s. 8d.

H. 1 Ja. A. D. 1603. C. B. *Holland v. Heale.* [Noy, 108.]

Prohibition to a libel for the tithe of pilchards taken in the sea, upon a suggestion of a custom that the owner of the fishing boat has one moiety of the fish, and the fishermen the other moiety, and that the owner had used to pay the tenth of his moiety, in discharge of all, &c. allowed.

**A** LIBEL in the spiritual court for the tithes of pilchards taken in the sea. And now the party had a prohibition; upon a surmise that the custom there is, that the owner of the fisher-boat has one moiety of the fishes, and the fishermen the other moiety; and the owner has used to pay the tenth of his moiety in discharge of all, &c. And it was held by the court to be a good surmise, for by the common law the parson cannot have the tithes of fishes taken in the sea, because it is not within any parish; and then when the parson, by the custom, ought to have the tithes of them, he ought to take them according to the custom. And that the tenth of the moiety may be a good discharge of the whole. And the parties went to issue upon the custom in Cornhill.



H. 2 Ja. A. D. 1604. B. R.

1604.

*Cornwallis v. Spurling.* [Cro. Ja. 57.] Moo. 913. Dy. in M. 277.  
1 Gw. 224.

**D**EBT. By the parson of Grovel, upon the statute of 2 Ed. 6. for not setting out tithes; a special verdict found, that those lands whereof the tithes are demanded were parcel of the possessions of the Templars, who were dissolved in the time of E. 2. And those possessions by act of parliament 17 Ed. 2. were given and annexed to the priory of St. John of Jerusalem with all privileges, &c. and it was found that the Templars had a special privilege, time whereof, to be discharged of tithes of those lands which *propriis manibus excoherent*: and it was found, that by special act of parliament, Anno 32 H. 8. the possessions of the priory of St. John were given to the King by general words, of all lands, tenements, &c. *In tam amplis modo et forma* as the abbot had them: and from the King those lands came to the defendant; and whether he should hold them discharged from the payment of tithes as the abbot had them, was the question: and it was argued by *Tanfield* and others for the defendant, and by *Paget* and others for the plaintiff; and after argument all the court resolved, that he should not have the privilege to be discharged; for by the common law a lay person was not capable of such a privilege: and if such lands had come to the King by the relinquishment or dissolution of any monastery, the King should not have had the benefit of that privilege, until the statute of 31 H. 8. and by that statute it is appointed, that all monasteries, abbeyes, &c. which before had come, or afterwards should come to the King, by suppression, surrender, &c. the King should have in such manner and form, &c. and that he should have them discharged from the payment of tithes as abbots, &c. so that the makers of that law intended, that by the first clause, without the last, they should not hold them discharged, and therefore they added that clause: but this statute extends only to such possessions which came to the King by surrender, &c. and should be vested in him by force of the said act; and does not extend to possessions which vested in him by another act of parliament, so not by the first; according to the rule which is taken in Coke 2. fol. 46. in the archbishop of *Canterbury's* case. (1) And these lands were here given to the King by a special act of parliament, 32 H. 8. which has the same words in the first clause, as the act of 31 H. has, but has not the second; and therefore is no cause of holding them discharged from tithes: and so it was adjudged accordingly for the plaintiff: and in this same term a like judgment was between the same parties in a prohibition upon a demurrer.

Lands of the Hospitallers given to the King by 32 H. 8. c. 24. are not discharged of tithes either by that act, or 31 H. 8.

(1) *Ante*, 113.

M. 2 Ja. A. D. 1604. B. R.

*Hall v. Fettiplace.* [Cro. Ja. 42.] Moo. 758. 1 Gw. 222.

**P**ROHIBITION. For tithes; whereas he was seised in fee of three acres of meadow *infra parochiam de Sunning*; and that within the said parish there is such a custom, that every one seised of any meadow within the same parish have used, time whereof, &c. to cut down the grass upon such a meadow growing at their proper costs, and the said grass to ted and shake abroad, and the said grass so dispersed and cast abroad, to gather into weeks and windrows, and to put into small cocks: *et post primam circumlationem inde*, the tenth cock *inde*, to set forth for the parson, or his farmer, in satisfaction of all tithes, as well of the first mowth as of the latter mowth of that meadow for the same year: which the parson, &c. had used to accept, &c. and alleges *in facto*, that he did so, in such a year; and that the defendant sued him for tithes of the latter mowth, &c. And hereupon the defendant demurred: and it was moved for the defendant; that this prescription was not good: because there

A custom to make the first crop of hay into small cocks, and to set out the tenth cock, in lieu of all tithes as well of the first mowth, as the latter mowth of a meadow for the same year, is bad; but to make it into great cocks, or to carry it to

the parson's barn would have been good; and *POPHAM* said, that of right without any special custom alleged, no tithes shall be paid for hay of the latter mowth, for the rule in our law is, that tithes shall be paid *et annuatim renovantibus simul et semel*.

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HALL

FETTERPLACE.

there is no more given to the parson than he ought to have: for by giving unto him the tenth cock, it is that which the law appoints, and therefore cannot be recompense for another thing: for the tenth of the hay of the first mowth cannot be satisfaction for the tenth of the after mowth. But because it was alleged, that he at his own costs had tedded and shaken it abroad, and gathered it into weeks and windrows, and made it into little cocks, and so was at a greater labour and charge than the law appoints, and the parson has benefit by the labour; it is a good cause of discharge: and a precedent was shewn, in this court betwixt *Aubrey* and *Johnson*, (1) which was held to be all one with this case in question. And *POPEHAM* said, he had known it to be resolved, that of right without any special custom alleged, no tithes shall be paid for hay of the later mowth; for the rule in our law is, that tithes shall be paid *ex unanimitate reuocantibus simul et semel*. Wherefore without view of any precedents, or hearing argument therein, they agreed, that the prohibition should stand.

[In prohibition the question was, concerning tithes of aftermowth. The plaintiff prescribed to make the first crop into little cocks, in lieu of all tithes of the first and second crop, *sed non allocatur*; but if he prescribed to make it into great cocks, or to carry it into the parson's barn, it would be a good prescription, as in *Johnson's* case.]

(1) *Ante*, 147.

H. 2 Ja. A. D. 1604. B. R. or C. B.

*Broke v. Rogers*. [Moo. 908.] Cro. Ja. 100.

A timber tree once privileged shall not be titheable because rotten; and if a tree, having attained the age of twenty years before it be lopped, shall after that age be lopped every ten or seven years, no tithes shall be paid of the loppings; but if it have been lopped before the twenty years, tithes shall be paid of subsequent loppings.

**A** PARSON sued in court-christian for tithes of branches of trees, surmising that the trees were *arida*, *cava*, or *columnis putrida*. Yet the prohibition stood, and no consultation was granted, for the tree itself was once privileged, being timber and above twenty years growth. And it was held, that if a tree which has once attained the age of twenty years without having been lopped, shall, after the twenty years, be lopped every ten or seven years, yet no tithes shall be paid for the loppings; but if it be lopped before the twenty years, and after twenty years be lopped every ten or seven years, tithes shall be paid for such loppings.

that age be lopped every ten or seven years, no tithes shall be paid of the loppings; but if it have been lopped before the twenty years, tithes shall be paid of subsequent loppings.

M. 2 Ja. A. D. 1604. B. R.

*Webb v. Warner*. [Cro. Ja. 47.] Moo. 683.

Libel for tithes of rough hay growing in the marshes and fenny lands of Mildenhall; for prohibition, it was alleged, that because the parishioners had not sufficient grass within the parish to sustain their beasts in winter they used to gather this hay called fenny fodder, for the sustenance of their beasts, for the better increase of their husbandry; and for this cause had always been freed from the payment of tithes, &c. And it was demurred in law; and after argument at the bar adjudged for the defendant, that this surmise was not sufficient; for one may not prescribe in *non deducendo*; and in that it is alleged, they bestow it upon their cattle there, &c. and for this cause did not pay tithes, that is not any cause of discharge; for so they may prescribe for corn spent in their family, or for corn given for provender to their cattle, whereby no tithes should be paid. Wherefore it was adjudged an ill surmise, and a consultation was awarded.

**P**ROHIBITION. The case was, that Sir Henry Warner libelled in the spiritual court, for tithes of rough hay growing in the marshes and fenny lands of Mildenhall; and the plaintiff brought a prohibition, surmising that there were 2,200 acres of fenny land within the parish, and 600 acres of meadow; and that the parishioners paid tithe of hay and grain growing upon the meadow and the arable land, and had paid 2½d. for every cow, and 1d. for every calf. And because they had not sufficient grass within the parish to sustain their beasts in winter, they used to gather this hay, called fenny fodder, for the sustenance of their beasts, for the better increase of their husbandry; and for this cause had been always freed from the payment of tithes, &c. And it was demurred in law; and after argument at the bar adjudged for the defendant, that this surmise was not sufficient; for one may not prescribe in *non deducendo*; and in that it is alleged, they bestow it upon their cattle there, &c. and for this cause did not pay tithes, that is not any cause of discharge; for so they may prescribe for corn spent in their family, or for corn given for provender to their cattle, whereby no tithes should be paid. Wherefore it was adjudged an ill surmise, and a consultation was awarded.

M. 2

and for this cause had always been freed from the payment of tithes for it. Upon demurrer it was held insufficient, for so they might prescribe for corn spent in their family, or for corn given for provender to their cattle.

M. 2 Ja. A. D. 1604. B. R. *Anon.* [Yelv. 55.]

1604.

**T**HE suggestion in a prohibition was, that the plaintiff from time whereof, &c. had paid for tithes of wool and lambs 2*d.* and in proof of suggestion *per testes*, spoke nothing of wool, but only that 2*d.* had been paid for tithes of lambs; and thereupon *Henden* moved the court to have a consultation as well for the lambs as for the wool, because the surmise is of a joint prescription in *modo decimandi* for wool and lambs; and now no proof being for the wool, he has failed in the whole; but (*per curiam*) there is a difference between a suggestion to have a prohibition, and a prescription comprised in it, and a prescription made in defence, or by way of plea in any original action; for in the latter case of a joint prescription made for two things, a failure in one destroys the whole, because that is by way of title; but otherwise here, because this prohibition is only to give jurisdiction to the King's court; and therefore, although the plaintiff supposes that the court ought to hold plea both of the tithes of the wool and of the lambs; and for the wool it remains payable in kind, and so to be determined in the ecclesiastical court; yet for the lambs, in which the *modus decimandi* is proved, the court shall retain jurisdiction, for now upon the proof it shall be taken, that the prescription, which makes the plea temporal, was only for the lambs. *Quod nota.* *Per FENNER, YELVERTON, and WILLIAMS*, the others being absent.

For prohibition moduses were suggested for wool and lambs, but proved for lambs only; held that it should stand as to lambs, for it is but a prescription contained in a suggestion, to give the temporal court jurisdiction; but if it had been a prescription in defence or by way of plea in an original action, the variance would have been fatal.

H. 2 Ja. A. D. 1604. [12 Co. 109.]

**I**N the last term, by commandment of the King, the justices of the king's bench, and the barons of the exchequer, were assembled before the Lord Chancellor *ELSMERE*, at York-house, to deliver their opinions, whether there was any authority in our books, that the justices of the common bench may upon information to the court (which commonly is called suggestion) grant prohibitions, or whether of necessity every plea ought to be pending in the court for such cause, and the King would know their opinions in this case; and the judges took time to deliver their opinions until this term. And then *FLEMING*, Ch. J. *TANFIELD*, Ch. B. *SNIGG*, *ALTHAM*, *CROOK*, *BROMLEY*, and *DODDERIDGE*, (*YELVERTON* and *WILLIAMS*, justices, being dead since the last term,) did deliver their opinions to the said Lord Chancellor. That the precedents of each court are sufficient warrants for their proceedings in the same court; and therefore as well in the king's bench, in the exchequer, as in the common bench, the judicial precedents in them are good warrants of their proceedings; and therefore for a long time, and in many successions of reverend judges, prohibitions upon information, without any other plea pending, have been granted, issues tried, verdicts and judgments given upon demurrer; all which being in force, they were unanimously agreed to give no opinion against the court of the common bench in this case, and none of the judges of the common bench were called, or present at any conference concerning this matter; and yet *laqueus confractus est et nos liberati sumus. Et magna est veritas et provalet.* See my particular treatise of the jurisdiction of the common bench in this point, by which the jurisdiction of the court evidently appears.

Both the king's bench and common pleas may grant prohibitions, and the common law is instead of an original, and a prohibition in itself, where no plea is depending.

M. 2 Ja. A. D. 1604. B. R. *Parrey v. Chauncey.* [Noy, 15.]

**P**RESCRIPTION by a parishioner to pay the tenth part of corn, for *modus decimandi* for the hay also that grows upon the head-lands, is not good, because the tenth part is due for the corn. But such prescription for the corn and after-rakings is good, with an averment that they are *sparae minus voluntarie*.

So bay upon the head-lands is bad, for the tenth due for the corn. 2. Prescription to make up the first crop is a good discharge of the after crop.

1. A prescription to pay the tenth part of corn, for the tithe of the corn and also of the

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FABREY

v.

CHAUNCEY.

So prescription of the tenth part of hay, for the after-grass. See H. 15 Jac C. B. by HUBBARD, Ch. J. prescription to make up the first crop is good, *modus decimandi* for the after-crop, and note M. 29, 30 El. B. R. rot. 250. Baynard against Adams, prescription, as in the first case, is good. But note that judgment was given against the party, because he had not well pleaded the prescription.

M. 2 Ja. A. D. 1604. B. R.

*Bott v. Sir Edward Brabalon.* [Noy. 15.]

A prescription to pay tithes to the curate, is not good ground of discharge of tithes to the rector, for the curate cannot prescribe against his master, who may remove him at his pleasure.

**BOTT** sues a prohibition against Sir Edward Brabalon, and suggests that the defendant is parson impropriate of W. acre, in Warwick, and that there, time out of mind, &c. there has been a curate or an incumbent, by the appointment of the said rector, who administers the sacraments, &c. and that the custom of that parish time out of mind, &c. was that the curate should have all tenths renewing within that parish, except *decimas granarum* which were paid to the parson, and that every parishioner who had so paid the tenths to the curate, was discharged against the parson. And that notwithstanding that, &c. Sir Edward had sued him, &c. and now he prays a prohibition, and had it, but after that the surmise was adjudged insufficient, without argument, by the court, and a consultation granted, for such curate cannot prescribe against his master, that may remove him at his pleasure, and for that it was not good prescription for the parishioners.

Tr. 2 Ja. A. D. 1604. B. R. *Reynolds' case*, [Moo. 762.]

1. No tithes are due of the loppings of [timber] trees above twenty years of age, whether lopped within twenty years or not.

2. Tithes are due of acorns severed.

**IN** a prohibition by Reynolds upon a suit in the spiritual court for tithes of loppings of trees above the age of twenty years, it was ruled by the whole court, that tithes were not due, for the branch is privileged as the body itself is, according to the opinion of ASKEW, 11 Hen. 4. 89. (1); and it is not material whether they were lopped usually within twenty years or not, by the opinion of POPHAM, and the whole court. But of acorns severed, tithes are payable.

(1) *Ante*, 28.2 Ja. A. D. 1604. *Randall v. Knowles.* [Noy, 147.]

When the right of tithes is confessed, and the only question is whether they belong to the parson or the vicar, the common law courts will not interfere.

**A** PROHIBITION was prayed upon a surmise, that the tithes, for which the suit was, belonged to the vicar, and not to the parson. By the court, a consultation shall be granted, for the right of tithes is confessed; and if they belong to the parson or the vicar, that is merely spiritual. And so it was ruled in one *Bush's case*, (2) the parson of Pancras; and in one *Milbray's case* it was adjudged accordingly.

(2) *Ante*, 90.2 Ja. A. D. 1604. *Phillips v. Slacke.* [Noy, 147.]

The spiritual courts shall not try the bounds of parishes.

**BY** the court. A prohibition shall not be granted, upon a bare surmise, that he is sued for tithes by the parson of D. of lands in the parish of S. unless it appears in the pleadings in the spiritual court, (3) for they there shall not be judges of the bounds of the parish, *vide* 5 Hen. 5. 10. (4) 22 Edw. 4. 24. (5)

(3) "That the boundaries of parishes will come in question," this sentence seems necessary to render the article intelligible.

(4) *Ante*, 30.(5) *Ante*, 47.

2 Ja. A. D. 1604. *Sharpe v. Sharpe*. [Noy, 148.]

**A** PROHIBITION was prayed upon a suit in the spiritual court for tithes in kind of a park now converted into tillage, upon a surmise *de modo decimandi*, to pay a buck and a doe for all tithes; and allowed by the court and agreed,

1. Although they are *feræ naturæ*, yet they may be given for tithes. So to pay pheasants, &c.

2. Although they are not titheable of themselves, yet they may be given for *modus decimandi*; as a great tree may be given for tithe of trees titheable.

3. That that is a discharge to the very soil, and the park is not but a liberty, and the owner may furnish it with game when he pleases. But after a consultation was granted, because the surmise was not proved within the six months. So adjudged, H. 6 Jac. C. B. The vicar of Clare in Suffolk, who sued for hops; and there also a prohibition was granted upon such a surmise; but after a consultation was granted in that case. For the *modus decimandi* was alleged for discharge of tithes of hay and herbage, and not of all tithes, where the libel was for tithes of hops. And Coke, Ch. J. vouched one *Shibden's* case, that such a *modus decimandi* generally for the park, is not good, if it be disparked. But it shall be particularly, for all the acres contained in the park.

1604.

*Park.*

Payment of a buck and doe for all tithes is good; for though they are *feræ naturæ* and not titheable themselves, yet they may be given as a *modus*, as a great tree may be given for tithe of trees titheable.

E. 3 Ja. A. D. 1605. B. R.

*Champernon v. Hill*. [Yelv. 63.] Cro. Ja. 68. Noy, 3. Moo. 914.

1 Br. &amp; G. 86. 1 Gw. 225.

**I**N an action on the statute of 2 E. 6. for not setting forth of tithes; the plaintiff shewed that the rector of Modbury had two parts of the tithes in three parts to be divided, and that the vicar of the same place had the third part of the tithes; and laid it to be by prescription as to the manner of the receipt of the tithes by the parson and the vicar, from time whereof, &c.: he further shewed, that the parson and vicar had by several leases demised the tithes to him; and so he being *proprietary* of the tithes, the defendant sowed so many acres within the parish, viz. wheat, rye, &c. and carried them away without setting forth *decimam partem decimarum prædictarum* to his damage, &c. And upon *nil debet* pleaded, it was found for the plaintiff; and in arrest of judgment it was shewn, that the plaintiff has in this writ comprised several actions upon the statute; and this appears by his own shewing; for he does not claim the tithes under one title, but under the several titles, of the parson, viz. of the two parts, and of the vicar, viz. of the third part: and no more than the parson and vicar can join in this writ, by reason their titles are divided; no more can the plaintiff, who claims severally under them. And it seems, that the parson cannot have this action against several tenants for not setting forth their several tithes, though all the tithes belong to him, because he cannot comprehend two actions in one; *quod FENNER concedit*; but all the other justices *contra*; for although the vicar and the parson in this case cannot join, because they claim the tithes severally by divided rights, yet when both their titles are conjoined in one person, as they are here in the plaintiff, then the matter of the title is likewise conjoined in one; and it is sufficient to shew generally, that the plaintiff is *firmarius* or *proprietary* of the tithes, without saying by what title; for this is but a personal action founded merely upon the contempt against the statute, in not setting forth the tithes; and also he doth not demand any tithes by this action, so that the title cannot come in debate; but the defendant is only to excuse himself of the contempt: yet it was agreed by all, that the plaintiff should recover the tithes in damages, and should not demand them again by any suit after his recovery in this action. *Quod nota*.

1605.

One action may be brought upon 2 Edw. 6. upon several titles, as parson and vicar, if those titles be joined in the plaintiff; and the tithes are recovered in damages, and cannot be demanded again by any suit, after a recovery in this action.

Tr. 3 Ja. A. D. 1605. Cam. Scacc.

*Dagg and Kent v. Penkevon.* [Cro. Ja. 70.] Jenk. 316.

1605.

1. Debt by two on 2 E. 6. who recover treble value and damages and costs, they release the damages and costs, being in doubt whether they ought to have them, and take judgment for the treble value: error was brought in the Exchequer Chamber, for that it was shewn by plaintiffs for title, that the Queen let the rectory to A. for life, who let it to the plaintiff for years, but they did not say by letters patent produced here in court; but held, that as plaintiffs had but parcel of an estate, viz. a lease derived out of a lease for life, and because the letters patent did not belong to them, and for that the action was to punish a tort, and not to demand the tithes, and the title shewn in the declaration was but a conveyance to the action, the declaration was good without shewing the letters patent, but otherwise if it had been pleaded in bar. 2. A farmer may sue for the treble value on 2 E. 6. in the temporal courts. 3. In an action brought by two farmers, it is sufficient to say, that the defendant did not agree with them, for if he agreed with one of them, he ought to shew it.

**D**EBT. Upon the stat. 2 Ed. 6. for not setting forth of tithes, and demand the treble value of the tithes, viz. £630. The defendant pleaded *non debet*, and the jury found *quod debet* £78 *et quod residuum non debet*, and assess 1*d.* for damages, and 40*s.* costs; and the plaintiff, after divers motions in arrest of judgment, had judgment for the debt, and released the damages and costs, because he was in doubt whether he ought to have had the damages and costs in this action, wherein he recovered the treble value of the tithes: and the statute by the express words does not give costs: wherefore to avoid error *in hac parte* he released the damages and costs, and took his judgment for the debt only: and error was brought upon this judgment in the Exchequer Chamber. The first error assigned was: for that the plaintiff for his title shews, that the Queen by her letters patent let the rectory of M. to Ed. Prieux for life, and he let to the plaintiff for years, &c. And he does not say by letters patents *hic in curia prolata*; and this exception was taken before in the King's Bench. *Sed non allocatur*: for inasmuch as the plaintiff has but parcel of the estate, viz. a lease derived out of a lease for life; and because the letters patents do not appertain to him; and for that this action is to punish a tort, for not setting out tithes, and is not an action to demand the tithes; and the title shewn in the declaration is but a conveyance to the action: therefore the declaration is good without shewing the letters patents. Secondly, it was alleged, that this statute does not give the treble value to the farmer of a parsonage. And that the suit for the forfeiture ought to be before the spiritual judge, and not at the common law. *Sed non allocatur*. Thirdly, for that the action is brought by two farmers, who demand the forfeiture: for that he carried away the corn without setting forth the tithes, not agreeing with them, being farmers for the corn: and he does not say, that he did not agree with them, nor either of them: for if he agreed with any of them it suffices; *sed non allocatur*: for when he says, that he did not agree with them, it shall be intended, that he did not agree with them, nor either of them: and if he agreed with one of them, the other [party] ought to shew it: wherefore the judgment was affirmed.

And that the action was to punish a tort, and not to demand the tithes, and the title shewn in the declaration was but a conveyance to the action, the declaration was good without shewing the letters patent, but otherwise if it had been pleaded in bar. 2. A farmer may sue for the treble value on 2 E. 6. in the temporal courts. 3. In an action brought by two farmers, it is sufficient to say, that the defendant did not agree with them, for if he agreed with one of them, he ought to shew it.

Tr. 3 Ja. A. D. 1605. B. R. *Talentine v. Denton.* Cro. Ja. 111.

A bishop by indenture demised his tithes for three lives, rendering the ancient rent, and it was held that it was void against his successor, there being nothing let but tithes, which lie in *prender*, nor any place where a distress might be taken, nor any remedy if the rent should be denied, being a freehold.

**T**RESPASS for twenty cocks of barley, &c. for tithes cast out from the nine parts, and taken and carried away: upon demurrer the case was, the Bishop of Carlisle was seised in fee of the tithes in right of his bishopric, and by indenture demised the tithes of ——— to Summers, and two others, for three lives, rendering the ancient rent; and it was averred, that they were anciently let for that rent. Afterward the bishop died, and the successor made a new lease for years, &c. And whether this first lease for three lives, rendering the ancient rent, was good by the statute of 1 Eliz. (1) was the question; and after argument at the bar, YELVERTON, WILLIAMS and TANFIELD held, that this lease was void against the successor: for being for lives rendering rent, there being nothing let but the tithes which lie in *prender*, nor any place wherein a distress might be taken, nor any remedy for the rent if it should be denied, (for he cannot have debt, because it is a freehold, nor can he have an assise, because there is not any seisin; and if there were seisin, yet the assise would fail, because there is not any land to be put in view,) therefore by consequence the lease is void. But if it had been a lease for years, (for which he might

(1) 1 El. cap. 19. public. 17. private.

might have had his remedy by action of debt,) it had been otherwise: and *Williams* said, he had known it to be so adjudged upon this difference: so it is of all other things which lie in *prender* or *render*, where no distress can be taken. *Note*, that here the defendant pleaded this lease for life by way of bar, without mentioning any confirmation or rent: or averment, that the ancient rent was reserved, or that the land was anciently used to be let: the plaintiff entitles himself by a lease for years, and the defendant by way of rejoinder shews, that the tithes were usually let, and for that rent which was the ancient rent; and it was thereupon moved, admitting it to be a good lease, yet the plea was ill, because it is a departure, and that there is not any confirmation; but because they resolved for the plaintiff upon the principal matter, they spake not to those exceptions, but gave rule, that if other cause were not shewn, judgment should be entered for the plaintiff. *Note*, *POPHAM* was absent, who upon a former motion in this cause, said, he much doubted of the case, and that it was a common case for all tenants in tail, bishops, deans and chapters, to make such leases; and they had been accounted good, and they all were in one degree: wherefore, he said, he would well advise thereof; and it was afterwards adjudged for the plaintiff. And after that, a writ of error was brought of this judgment, and the error assigned in the matter in law; and because the statute of 1 Eliz. was not specially pleaded; it was resolved that the court should not take notice thereof, because it is but a private statute; and then the sole question was, whether it were a good lease by the statute of 32 Hen 8. For if it were good within the statute, it should bind the successor without confirmation: otherwise, at the common law, it should not bind the successor; and it was resolved, that it was not good, because there is not any remedy for the rent by distress or assise: wherefore it is out of the intent of the statute. And the judgment was affirmed.

M. 3 Ja. A. D. 1605. B. R.

*Hutton v. Barnes.* [Yelv. 79.] 1 Gw. 225.

**HUTTON** being sued in the spiritual court, in Durham, for tithes, brought a prohibition there, and suggested that the prior of Durham was seised of the grange of Sægersonwick, in right of the church, viz. the priory; and prescribed in the prior and his predecessors to hold that grange without payment of any tithes; and shewed the dissolution of it, and how it came to H. 8. and the statute 31 H. 8. to hold it as the house of religion held it before; and derived to himself a lease for fifty years from Queen Eliz. and after his prescription laid in *non decimando*, shewed how the defendant sued him in the spiritual court for the tithes of forty fleeces of wool. To this the defendant pleaded that he sued the plaintiff for the tithes of 400 fleeces of wool, and prayed a consultation; and for the variance between the libel and the suggestion, the justices of assise awarded a consultation, and adjudged double costs to the defendant. And *Yelverton* assigned both these matters for error. And *per curiam* they are error; for the variance is not material here, because the plaintiff prescribes in *non decimando*, and thereby ousts the spiritual court of all manner and power of jurisdiction for any tithes arising from this grange, because it is discharged in *æ*; but if the suggestion had been on a *modus decimandi*, then it would be otherwise; for there the suit for tithes belongs originally to the spiritual court; and therefore there the suggestion ought to agree with the libel; for if the parson libel for tithe of hay, and the other will suggest a custom for tithe of corn, that is not to the purpose; for it is not for the same thing: the same law where they vary in the quantity of the tithes demanded, because the suggestion is grounded upon the libel, and the plaintiff is to stay the proceedings there but for one cause certain: but in the case *supra* the suggestion discharges the spiritual court from all manner of power for any tithes at all; and therefore the variance is not material. 2. The judgment for double costs was error on the express letter of the statute 2 E. 6. which gives double costs only for want of proof of the suggestion, and for no other cause. *Quod nota.*

1605.  
TALENTINE  
v.  
DENTON.

Prohibition.  
Costs.

1. A variance between the suggestion and the libel, where the plaintiff in prohibition prescribes in *non decimando* is not material; *secus* where in *modo decimandi*.  
2. The stat. 2 E. 6. gives double costs only for want of proof of the suggestion, and for no other cause, on the express letter.

1605.

3 Ja. A. D. 1605. Cam. Scacc. Anon. [Jenk. 281.]

Tithes are payable for agistment, viz. the feeding of dry cattle, which do not serve for the plough or pail, nor are spent in the family. In the king's forests cattle are taken by the king's officers to agist them, and they are accountable for this agistment, that is a sum for feeding cattle there. And it is called agistment because the cattle are suffered *agiser*, that is, to be *levant et couchant* there.

**R**ESOLVED by all the judges of England, in the Exchequer Chamber, that tithes are payable for agistment, viz. for the feeding of dry cattle, which do not serve for the plough, or pail, nor are spent in the family. In the King's forests, cattle are taken by the King's officers to agist them; and they are accountable for this agistment, that is a sum for feeding cattle there. And it is called agistment, because the cattle are suffered *agiser*, that is, to be *levant et couchant* there. And many great farms are employed to this purpose: and the subtraction of tithes for them is *occisio presbyterii*.

1606.

E. 4 Ja. A. D. 1606. B. R.

Grene v. Austen. [Yelv. 86.] Cro. Ja. 116.

1. A custom to cut the grass and make it into cocks, and set out the tenth cock for the parson in discharge of all tithes whatsoever renewing or arising upon the land from which the hay was taken in the same year, is good.

2. If one pay tithe of wheat or rye by the sheaf, no tithe is due for the haulm on the same land; for it is but part of the stalk upon which the tithe sheaf grew.

3. Payment of tithes to the parson is a sufficient discharge against the vicar, for of common right no tithes belong to the vicar, but only on an endowment or prescription, which must be shewn on the part of the vicar, for the court will not intend it.

**A**USTEN, vicar of Aveley in Essex, libelled in the spiritual court for tithes of herbage, and agistment of cattle on the grounds there after harvest. This was against Grene, who brought a prohibition, and laid a custom within the parish: *Quod quilibet persona habens et possidens aliquod pratum sive fundum in aliquo uno anno infra parochiam predictam, unde fanum eodem anno nactum fuit sive provenit a tempore cujus, &c. usa fuit et consuevit aptis temporibus anni illius gramen super hujusmodi pratis sive fundis crescens ad expensas suas proprias metere et defalcare, et gramen sic messum postea ad similia custagia, &c. in cumulis, vocat' Cocks, congerere, et quemlibet decimum cumulum sic inde congest' a ceteris novem cumulis, &c. ad usum rectoris ecclesie parochial' prae'd' sive ejus firmarii, &c. dividere et exponere, in plenam et integram contentationem, solutionem, satisfactionem, et exonerationem ac nomine et loco omnium et singular' decimarum quarumcunque dein vel super aliquibus hujusmodi pratis sive fundis unde fanum in hujusmodi anno nactum fuit, eodem anno surgen', renovan', &c. quem quidem decimum cumulum, &c. in forma, &c. congest', &c. omnes et singuli rectores, &c. in plenam et integram contentationem, &c. ac nomine et loco, &c. acceptaverunt, &c.* And alleged in *facto* a performance of the custom, the same year in which the vicar libelled, &c. and thereupon the defendant, being vicar, demurred, and it was adjudged for the plaintiff. And two points were resolved: 1st. That payment of the tithes to the parson is a sufficient discharge against the vicar, because all tithes of common right belong to the parson, and the vicarage is derived out of the parsonage; so that no tithes *de jure* belong to the vicar, but only on an endowment or prescription, which ought to be shewn *ex parte* of the vicar, and the court cannot intend it, for the vicarage is a diminution and impairing of the parsonage, of which the court will not take notice, unless the parties shew it. 2d. That the custom *supra* is good; for in regard the owner of the ground pays tithe of hay, he is thereby discharged of common right from tithe of agistment of the same land in the same year; because one land shall answer but one tithe for one year, and the agistment is but the profit by the mouths of the beasts of the same land, of which before the parson had tithe of hay. And TANFIELD, J. said, that it was adjudged in one *Edolphe's case de Com' Oxon'*, that paying tithe of rye or wheat by the sheaf, he cannot afterwards pay tithe of haulm of the same land, for this haulm is but part of the stalk of which the tithe sheaf grew. According to F. N. B. 53. b. *Yelverton pro Quer'*.

M. 4 Ja. A. D. 1606. B. R.

Lady Waterhouse v. Bavode. [Cro. Ja. 133.] 1 Gw. 227.

**A**CTION upon the case. And declares, Whereas by the statute 45 Ed. 3. cap. 3. tithes ought not to be paid for gross trees; and by the statute 32 Hen. 8. cap. 7. none ought to be sued for tithes of gross trees; that she had

An action on the case does lie for being sued in the



cut down such timber trees being above the growth of twenty years, and that the defendant, as parson, sued her for tithes of them against the said statute. Upon this declaration, it was demurred, for it was moved, when a statute prohibits suing, and gives no special penalty, there action upon the case lies not for doing a thing against the prohibition of a statute; as where a man distrains *extra feodum*, or in the highway, &c. And all the court held, that the action lies not; for none shall be punished for suing in the spiritual court for any matter which is properly demandable there, although peradventure he have not any cause of action: but if he sue in the spiritual court for matter which appears by his libel is not suable there, nor the said court has any jurisdiction thereof, but the common law has jurisdiction, there action upon the case lies, for it is a suit for vexation, and seeks to take away the jurisdiction of the courts of the common law. But if the suit be there for a thing demandable and recoverable there, by any thing which appears by the libel, and by the defendant's plea, or by any collateral matter, he is barrable there; no action upon the case lies. And here although the statute be, that none shall be compelled to pay tithes of gross trees, yet it is lawful for the parson to draw it in question in the spiritual court, whether they were gross trees or not. And they held, that where a statute prohibits a thing and adds no penalty, true it is, that an action lies for doing against the prohibition of that statute. But that ought to be by an action brought *tam pro Rege quam pro seipso*, because in such case the king is to have a fine: and for that, this action is brought only by the party, and not *tam pro Rege quam pro seipso*. Therefore they all held, although otherwise an action might lie, yet for this cause it was not well brought; wherefore it was adjudged for the defendant.

In Hob. 206. the case of *Lady Waterhouse v. Moodie* is mentioned, and it is said that an action on the case was brought against him as farmer of the parsonage of Woodchurch, in Kent, for suing in the spiritual court for tithes of trees not titheable, whereupon he demurred, and the court disliked the action, and so it rested without any further proceeding.

1606.

WATERHOUSE

v.

BAWD. 

spiritual court for tithe of gross trees; for it is lawful to try there whether they were gross trees or not; but if one be sued for what is not suable there, and of which the spiritual court has no jurisdiction, it lies, for it is a suit for vexation.

M. 4 Ja. A. D. 1606. B. R.

*Hawkes v. Brayfield*. [Cro. Ja. 137. Yelv. 94.] Hob. 176.

**P**ROHIBITION to stay suit for tithes, and surmises that the Lord Chandois was seized in fee of a capital messuage and demesne lands thereto appertaining in the parish of D. and that he agreed with the defendant, being parson of D. in consideration of ten pounds, to be annually paid by the Lord Chandois to the defendant during their joint lives and his continuing parson, in satisfaction of all tithes growing upon the said lands, that he, his farmers and tenants of the said lands should be discharged from the payment of tithes of those lands, and should retain the lands without payment of any other tithes. And shews that the Lord Chandois paid the ten pounds annually according to that agreement; and that he is farmer of that land to the Lord Chandois, and that the defendant, notwithstanding this agreement, sued him for tithes. And upon this declaration made, and a motion thereupon, without any argument, the court held that it is not a sufficient surmise to maintain a prohibition; for an agreement to be discharged from tithes, may be for a year by *parol*, and shall be good; but to have such an agreement during the parson's life, or for years, cannot be without deed. And although it were objected, that this agreement being in way of contract, by retainer, is not any lease of them, but only a contract, (which may be for many years by way of discharge to the party himself who ought to pay them, by retaining them without payment, as well many years as one year,) yet the court held, that it could not be, because the law will permit it for a year, it being *quasi* by way of sale. But for many years, (which sound in nature of a lease,) in cannot be. And TANFIELD said, that such a surmise was in a case betwixt *Nelson* and *Pretiman*, to be discharged for years, and ruled to be void; *a multo fortiori*, to be discharged during the parson's life, and such a case was ruled betwixt *Rolls* and *Rolls*.

Where.

1. An agreement to be discharged of tithes may be by *parol* for a year; it being *quasi* by way of sale; but for the parson's life or years, which sound in nature of a lease, it cannot be without deed.
2. An agreement to retain is good by *parol* for years but not for life, and such an interest cannot be assigned, for there is but a personal privity of contract, which does not extend to a stranger.

1606.

HAWKES

v.

BRAYFIELD.

Wherefore without further argument it was adjudged for the defendant, and a consultation was awarded. [*Croke.*]

If a parson grant to a parishioner his own tithes by way of retainer, although it be not by deed, but only by parol, it is good, and a prohibition shall be maintained on this grant by way of suggestion, if it be for years; otherwise if it be as long as the parties live, or such like; for although it do not sound in interest by way of contract, but only by way of discharge, yet it is good without deed; for it is in the nature of a personal composition, which may be without writing, only by parol. But between *Nelson* and *Woodward* and *Pretimas* it was ruled, that if a parson by way of contract by parol agree that J. S. shall have all his tithes for three years, or such term, by virtue whereof J. S. takes the tithes, and is sued for them in the spiritual court, J. S. shall have a prohibition on this matter; for although it do not enure by way of interest to make it a lease of the tithes, because it is without deed, yet the contract between them shall bind as to the perception of the tithes, of which contract the temporal court shall judge; but if he assign the benefit of his contract over to J. D., J. D. shall not have a prohibition on a suit in the spiritual court, because no interest was transferred by the contract, but only a personal bond between them, which runs only in personal privity of the contract, and does not extend to a stranger. According to the principal case was *Rolls* and *Rolls*, a Cornwall case, that on the agreement to retain tithes, if it be without deed, a prohibition will lie. *Hawkes v. Brothwich*. [*Yelv.*]

E. 4 Ja. A. D. 1606. B. R.

*Pringe v. Child*. [*Moo. 780.*] Noy, 3.

A vicar endowed with the small tithes, libelled for them in the spiritual court; upon which the defendant pleaded a prescription in the parson against the endowment made in 1310; and because the spiritual court allowed this plea the plaintiff had a prohibition to stay his own suit.

**P**RINGE, vicar of Easton in the county of Oxford, libelled in the spiritual court for small tithes upon the composition between the vicar and the parson upon the appropriation (1) against Childe, upon which the defendant in the spiritual court pleaded prescription in the parson against the composition; and because the spiritual court allowed the prescription to be pleaded against the composition, Pringe had had a prohibition in the King's Bench to bar his own suit in the spiritual court, and after many arguments the prohibition stood. And it was also decreed in Chancery for Pringe that the prescription was not legal against the composition, and an injunction was granted for the vicar to stay the suit of the parson for the tithes limited to the vicar by composition.

(1) A. D. 1310. Noy.

H. 4 Ja. A. D. 1606. Scacc. *Anon.* [*Lane, 16.*]

Prohibition will be granted to a suit for tithes of headlands, but (by some) it ought to be suggested that they are but small headlands, and that there is a custom of discharge in consideration that they are but small headlands, and that there is a custom of discharge in consideration that tithes in kind were paid of meadows. It was said by *WILLIAMS* that if a man keep sheep in one parish until shearing time, and then sell them into another parish, the vendee shall pay the tithe-wool to the parish in which they were depastured for the greater part of the time of the growing of the wool.

**I**F a man sue in the ecclesiastical court for tithes of headlands, the defendant may have a prohibition, but by some he ought to suggest that they are but small headlands, and that there is a custom of discharge in consideration that he paid tithes in kind of meadows, and in this case *WILLIAMS* said, that if a man keep sheep in one parish until shearing time, and then sell them into another parish, in this case the vendee shall pay the tithe wool to the parish where they were depastured in the greater part of the time of the growing of the wool. See the Tithing Table the fifth question.

H. 4 Ja. A. D. 1606. Scacc. *Skelton v. Lady Airie*. [Lane, 17.]

1606.

**I**N a prohibition the plaintiff says, that ——— was seised of the manor of Calthrop, and also of the rectory of Haughton Calthrop, and that the land whereof the tithe is demanded is copyhold, and holden of the said manor, and that this was also found by special verdict accordingly, and that it had been always discharged of payment of tithes, and it was argued, that the prohibition did lie, for it was adjudged M. 34 & 35 Eliz. that a perpetual union of the parsonage, and the land charged is a sufficient discharge of the tithes, and a prescription may be well enough to be discharged of the payment of tithes, as it appears by a case put in the archbishop of *Canterbury's* case: Co. lib. 2. *George Crook* of counsel on the other side, and he conceived that a perpetual unity was no perpetual discharge, and he said there was no judgment given in the case cited before, and he also said, that the jury in this case found not a discharge of payment of tithes, but only a new usage to pay by unity of possession, and he cited 10 H. 7. or 6. where the manner of tithing is set down; also he cited the bishop of *Winchester's* case, Co. lib. 2. and he cited the prior of *D's* case to be resolved in 40 Eliz. that a copyholder may prescribe to be discharged of tithes by pleading that he was always tenant by copy to a spiritual corporation: also he cited the case of *Pigot and Heron* (1) mentioned in Co. lib. 2. in the bishop of *Winton's* case, fol. 45.(2) and he said, that it was adjudged in *Sheddington's* case, that if a man prescribe to be discharged of payment of tithes by reason of payment of another kind of tithe, that this is not good.

1. A copyholder may prescribe to be discharged of tithes by pleading that he was always tenant by copy of a spiritual corporation.

2. If a man prescribe to be discharged of payment of tithes by reason of payment of another kind of tithe, it is not good.

(1) *Ante*, 135.

(2) *Ante*, 149.

T. 5 Ja. A. D. 1607. B. R. *Rickman v. Garth*. [Cro. J. 173.]

1607.

**T**RESPASS: upon a special verdict the case was, that John bishop of Carlisle let a portion of tithes to John Rickman, Francis and Thomas his sons, for their lives successive, rendering the ancient rent; and afterward died. Henry bishop of Carlisle the successor, accepts the rent for divers years, and afterwards makes a new lease of those tithes for twenty-one years which lessee took those tithes; and the plaintiff, being the first lessee, brings trespass, *et si*, &c. The first question was, whether this was a good lease within the statute of 32 H. 8. & 1 El. Secondly, if it were not a good lease, whether the acceptance of this rent by the successor makes it good against him during his time: it was resolved as to the first, that it was a void lease; for no lease is good, unless the ancient rent be reserved, and annually due and payable according to the reservation: but this rent being reserved upon a lease of tithes for life, there is not any remedy for it by distress or assise, so the lessee is not compellable to pay it; and because it is not payable as the law appoints, it is therefore void. Vide 5 Ed. 3. 30 Ass. 5. Rent reserved out of a lease of an hundred, for life, is void for that reason; and TANFIELD said, that this point was first adjudged in 29 El. between *Morington* and *Trie*. Secondly, it was resolved, that the lease being void, the acceptance should not make it good; for it is made absolutely void by the statute law against the successor, but not against the bishop himself; and it is not like to leases by the common law, made by a bishop or a parson for three lives; there it is not void, but only voidable, which by acceptance may be made good; but the statute of 1 El. in this case takes away the course of the common law: wherefore it was adjudged accordingly.

A bishop by indenture let a portion of tithes for three lives at the ancient rent, and died; his successor accepted the rent, but afterwards made a new lease; held that the first lease was void; for the rent having been reserved upon a lease of tithes for life, there was no remedy for it by distress or assise, and that it was not made good by the acceptance of rent by the successor, for by the statute it was merely void against him.

M. 5 Ja. A. D. 1607. B. R. *Anon*. [Cro. Ja. 199.] 1 Gw. 228.

**P**ROHIBITION; it was held *per curiam*, that tithes of birch shall be paid, although it be of twenty years growth, and more; so of holly, alders and maple; and (the principal question being concerning birch) a consultation after some advisement, was awarded; and Coke cited one *Leonard's* case, 34 El. to be so adjudged,

Tithes shall be paid of birch though above twenty years old; so of holly, alders and maple.

M. 5

1607.

M. 5 Ja. A. D. 1607. B. R. *Anon.* [1 Br. & G. 98.]

It was agreed in K. B. and has many times been ruled, that if a man sell his tithes for years by word it is a deed.

good, but if the parson agree that one shall have his tithes for seven years it is not good, because by FLEMING, C. J. it amounts to a lease, and he held strongly that tithes cannot be leased for years without deed.

**NOTE**, it was agreed by the whole court of King's Bench, and has many times been ruled, that if a man sell his tithes for years by word, it is good; but if the parson agree that one shall have his tithes for seven years by word, it is not good, by the opinion of FLEMING, C. J., because it amounts to a lease: and he held strongly, that tithes cannot be leased for years without a deed.

M. 5 Ja. A. D. 1607. *Nicholas Fuller's Case.* [12 Co. 41.]

1. A prohibition may be granted in vacation.

2. No consultation can be granted by all the judges out of term, nor in term, by any of them out of court.

3. When a libel in the spiritual court contains many articles, if any do not belong to the consueance of that court a prohibition may be granted generally, and upon motion made, consultation may be granted, as to those things which do belong to the spiritual jurisdiction.

**I**N the great case of Nicholas Fuller of Gray's Inn, these points were resolved upon conference had with all the justices and barons of the Exchequer.

1. That no consultation can be granted out of the term, for this, that it is an award of the court, and is final, and cannot be granted by all the judges out of the term, nor by any of them within the term out of court: and the name of the writ, viz. a writ of consultation, imports this, that the court upon consultation amongst them ought to award it.

2. That the construction of the statute 1 Eliz. cap. 1. and of the letters patent of high commission in ecclesiastical causes founded upon the said act, belongs to the judges of the common law; for although that the causes, the cognizance of which belongs to them, are merely spiritual, and the law by which they proceed is merely spiritual, yet their authority and power is given to them by act of parliament, and letters patent, the construction of which belongs to temporal judges: and for this the consultation which was granted is with this restraint. *Quatenus non agat de autoritate et validitate litterarum patentium pro causis ecclesiasticis vobis vel aliquibus vestram direct' aut de expositione et interpretatione statuti de anno primo nuper Reginae, &c.* In the same manner as if the King have a benefice donative by letters patent, although that the function and office of the incumbent be spiritual; yet inasmuch as he comes to it merely by letters patent of the King, he shall not be visitable, nor deprivable by any ecclesiastical authority, but by the chancellor of the King, or by commissioners under the great seal.

3. It was resolved when there is any question concerning what power or jurisdiction belongs to ecclesiastical judges, in any particular case, the determination of this belongs to the judges of the common law, in what cases they have cognizance, and in what not; for if the ecclesiastical judges shall have the determination of what things they shall have cognizance; and that all that appertains to their jurisdiction, which they shall allow to themselves, they will make no difficulty *ampliare jurisdictionem suam*: and according to this resolution, Bract. lib. 5. Tract. de except. cap. 15. fol. 412. *Cum iudex ecclesiasticus prohibitionem a Rege suscipit, supersedere debet in omni casu, saltem donec constiterit in curia Regis, ad quam pertinet jurisdictionem; quia si iudex ecclesiasticus aestimare debet an sua esset jurisdictio, in omni casu indifferenter procederet non obstante Regia prohibitione. Vide Entries, fol. 445.* There was a question whether the court-christian should have cognizance of a lamp. And a prohibition was granted, *quod non procedant in curia christianitatis, quousque in curia nostra discussum fuerit, utrum cognitio placiti illius ad curiam nostram vel ad forum ecclesiasticum pertineat.* And so the determination of a thing, whether it belongs to court-christian, does appertain to the judges of the common law, and the judges of the common law have power to grant a prohibition. And all this appears in our books, that the judges of the common law shall determine in what cases the ecclesiastical judges have power to punish any *pro lesione fidei*, 2 H. 4. fol. 10. 11 H. 4. 88. 22 Ed. 4. 20. So of the bounds of parishes in 5 H. 5. 10. 39 Ed. 3. 23. So it belongs to the judges of the common law, to decide who ought to certify excommunication, and to reject the certificate, when the ordinary or commissary is party, 5 E. 3. 8 E. 3. 69, 70. 18 E. 3. 58.

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12 E. 4. 9 H. 7. 1. 10 H. 7. 9. For this it was resolved clearly, that if any person slander the authority or power of the high commissioners, this is to be punished before the judges of the common law, for that the determination of their authority and power which is given to them by the statute, and the letters patent of the King, belongs to them, and not to court-christian: and for this, that the many articles objected against Fuller concerning the slander of their authority and power, were solely determinable and punishable before the judges of the common law. One other restraint was added in the consultation: *et quatenus non agat de aliquibus scandalis, contemptibus, seu aliis rebus, quæ ad communem legem aut per statuta regni nostri Angl<sup>i</sup> sunt punienda et determinanda.*

4. It was resolved, that if a counsellor at law in his argument shall scandal the King or his government, temporal or ecclesiastical, this is a misdemeanour and contempt to the court; for this he is to be indicted, fined, and imprisoned, and not in court-christian: but if he publish any heresy, schism, or erroneous opinion in religion, he may be for this convened before the ecclesiastical judges, and there corrected according to the ecclesiastical law: for the rule is, *quod non est juri consonum quod quis pro aliis quæ in curiis nostris acta sunt, quorum cognitio ad nos pertinet, trahatur in placitum in curiâ christianitatis*, as it appears in the Book of Entries, fol. 448. so that the intent is, that heresy, schism, or such enormous opinions in religion, do not appertain to the cognizance of temporal courts: for this cause a consultation was granted, *quod schismata, hæreses, et inormiam impiam, vel perniciosam opinionem in religione, fide, seu doctrinâ christianâ piè et salubriter stabilitâ infra regnum nostrum Angl<sup>i</sup>, quorum cognitio ad forum ecclesiasticum spectat, &c. Vide Mich. 18 H. 8. Rot. 78. in Banco Regis.* The case was, that a leet was held *die Jovis post festum Sancti Mich. Arch.* 17 H. 8. of the prior of the house of St. John de Bethlehem de Sheine, of his manor of Lewisham in the county of Surrey, before John Beare the steward there, a grand jury was charged to inquire for the King of all offences inquirable within the said leet, where one Philip Aldwin, who was resident within the said leet, appeared at the said leet, *Idemque Philippus sciens quandam Margaretam, uxorem Johannis Aldwin apud East Greenwich, infra jurisdictionem letæ prædictæ, pluries per antea corpus suum in adulterio vitiosè exercuisse, ac volens ipsam Margaretam pro republica in exemplum taliter offendere volentium legitime punire, ad dictam magnam juratam se personaliter exhibuit, et eisdem sic juratis de dictâ malè et vitiosè vitâ præfata Margaretæ instructionem et informationem veraciter dedit.* Upon which the said Margaret did draw the said Philip into the court of the archbishop of Canterbury, and there did libel against him for defamation of adultery; and that the said Philip said in *hæc Anglicanis verbis*; Margaret Aldwin is a whore and a bawd, and it is not yet three weeks ago since a man might take a priest betwixt her legs; which English words were parcel of the words by which he informed the grand inquest at the said leet: and upon this he had by award of the court a prohibition, by which writ it appears, *Quod per leges hujus regni Angl<sup>i</sup> omnes et singuli quicunque domini Regis subditi coram quibuscunque ipsius domini Regis justiciariis seu quocunque alio viro judiciali officio seculari fungente in aliquam juratam patriæ jurati, vel ad aliquas instructiones seu informationes alicui hujusmodi jurat<sup>i</sup> in evidentiis dandas comparantes et evidentiis dantes, ab omni impetitione et calumnia in aliqua curiâ christianitatis propterea fienda, quieti et liberi esse debent, et in perpetuum penitus irreprehen<sup>di</sup>.* And by this record it appears, and by the statute of 10 Ed. 3. c. 11. by which it is provided, that indictors of lay people, or clerks in turns, and after delivering them before justices, shall not be sued for defamation in court-christian, but that the plaintiff who finds himself grieved shall have a prohibition formed in the Chancery upon his case, which was but an affirmance of the common law, for that the statute provides only for indictors in the turn only: and yet as well all indictors in other courts, and all witnesses, and all others who have affairs in the temporal courts, shall not be sued or molested in court-christian. *Vide Pasch. 6 Eliz.* in the reports of the Lord Dyer, (which case is not printed) John Halles in the case of marriage between the Earl of Hereford and the Lady Catharine Gray, declared his opinion against the

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the sentence given by commissioners delegates of the Queen, in a cause ecclesiastical under the great seal: and that the said sentence in disaffirmance of the said marriage was unjust, wicked, and void, and that he thought that the said judges delegates had done against their conscience, and could not render any reason for the said sentence: and what offence this was, was referred to divers judges to consider; by whom upon great deliberation it was resolved, that this offence was a contempt as well against the Queen as to the judges; and every of them were punishable by the common law, by fine and imprisonment: and that the Queen may upon that sue for it in what court she shall please; for the slander of a judge in point of his judgment, be it true or false, is not justifiable, &c. And all this appears by the report of the Lord Dyer, so that in the said consultation it was well provided, that the high commissioners should not intermeddle with any scandal by the common law.

5. It was resolved, that when any libel in the ecclesiastical court contains many articles, if any of them do not belong to the cognizance of court-christian, a prohibition may be generally granted; and upon motion made, consultation may be made as to things which do belong to the spiritual jurisdiction: for the writ of consultation with a *quoad*, is frequent and usual, but a prohibition with a *quoad* is *rara avis in terrâ nigroque simillima cygno*. And for these reasons it was resolved by all, that the prohibition in the case at bar was well granted, which in truth was granted by FENNER and CROKE, Justices, in the time of the vacation.

Note these general rules concerning prohibitions, *quæ sparsim inveniuntur in libris nostris*.

*Non debet dici tendere in prejudicium ecclesiasticæ libertatis quod pro Rege et repub. necessarium videtur.*

*Non est juri consonum, quod quis super iis quorum cognitio ad nos pertinet in curia christianitatis trahatur in placitum.*

*Episcopus teneat placitum in curia christianitatis de iis quæ mere sunt spiritualia.*

*Prohibeatur de cætero Hospitalariis et Templariis ne de cætero trahant aliquem in placitum coram conservatoribus privilegiorum suorum de aliquâ re cujus cognitio ad forum spectat regium.*

*Non concedantur citationes priusquam exprimatursuper qua re fieri debet citatio.*

The knowledge of cases testamentary, matrimony, &c. by the goodness of the princes, and by the laws and customs of the realm, appertain to spiritual jurisdiction.

6. It was resolved, that this especial consultation being only for heresy, schism, and erroneous opinions, &c. that if they convict Fuller of heresy, schism, or erroneous opinion, that he shall never be punished by ecclesiastical law: and after the said consultation granted, the said commissioners proceeded and convicted Fuller of schism and erroneous opinions and imprisoned him and fined him £200: and after in the same term, Fuller by his counsel moved the court of King's Bench to have a *Habeas corpus*, et ei conceditur, upon which writ the gaoler did return the cause of his detention.

E. 5 Ja. A. D. 1607. B. R.

Tanner v. Small. [Yelv. 95.] Noy, 121.

An agreement to retain one's tithes for seven years is good without deed, otherwise if for life, and so it has been often adjudged.

**NOTA.** In a prohibition, the plaintiff suggested, that he being a parishioner compounded with the defendant to retain his tithes for seven years, rendering 50s. *per ann.* and it was moved that it was not good, because it is not alleged to be by deed: but *tota curia contra*, and they took a difference between such composition, to have for years, and to have for life; the first is good without deed, the second not. And so it has been often adjudged.

M. 5 Ja. A. D. 1607. B. R. *Tanner v. Small*. [Yelv. 102.]

**S**MALL sued for tithes, and the plaintiff suggested a concord and agreement (he being a parishioner) for 40s. yearly to retain his own tithes, and did not prove it within six months: and *per curiam*, he need not, for such proof goes only to a *modus decimandi*, and not to another suggestion on a lease or contract: and so is the experience in the King's Bench.

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A suggestion of an agreement to retain tithes, need not be proved within six months, for such proof only goes to a *modus*.

M. 5 Ja. A. D. 1607. B. R. *Cox v. Senor*. [Yelv. 102.]

**I**N a suit for tithes of lambs and wool, &c. for sheep depastured in a close called Greenhill in Balking in Com' Berks. The plaintiff brought a prohibition, and suggested, that Greenhill had always paid 10s. in discharge of all tithes of lambs, wool, &c. And *Yelverton* moved for a consultation, because the same suggestion had been made before in four several prohibitions for the same close, and the same manner of tithing alleged, and a consultation always granted for want of proof within six months; yet, *per curiam*, it being only for want of proof, and not on the right or trial of the custom, and being also for tithes of another year, which were not in demand before, the suggestion is good; for the statute 50 E. 3. goes to a suggestion made upon the same libel, and to a consultation duly granted, which is not done in the case above, but only for negligence in not having his proofs ready. *Nota*.

A customary payment of 10s. was alleged, and although four consultations had been before awarded upon the same suggestion, for want of proof within six months, yet the court granted a prohibition, as the former consultations were demanded.

were not upon the right or trial of the custom, and besides the tithes of another year

H. 5 Ja. A. D. 1607. C. B.

*Cobb v. Hunt*. [Yelv. 119.] 1 Br. & G. 98.

**C**OBBS sued a prohibition in the Common Pleas against Hunt, parson of D. in Kent, and suggested a *modus decimandi* as to part of the tithes demanded against him in the spiritual court, and as to the residue suggested a contract executed and performed between him and the parson in satisfaction of the residue; and because he did not prove his suggestion within six months, Hunt, the parson, had a consultation and costs assessed by the court at 50s. and damages 50s. which by the statute 2 E. 6. shall be doubled, but in truth there was no judgment given to recover them, viz. *ideo considerat' est quod recuperet* was omitted; yet Hunt thinking that all was perfect, brought debt in the Common Pleas for the costs, &c. and declared on the whole matter *supra*, and that damages were assessed, *super quo tunc considerat' fuit quod recuperet*, &c. and that the costs were not paid, *per quod actio accrevit*, &c. and thereupon he recovered against Cobb by *non sum informatus*: and thereupon Cobb brought error *tam in recorde et processu*, &c. of the prohibition, as of the debt for the costs; and assigned generally for error, that the judgment in the Common Pleas should be for Cobb where it was for Hunt. But *Yelverton* alleged two errors in special. 1. That there was no judgment in the prohibition to recover the costs, but only an assessment of them, without more, which is not sufficient; for the assessment alone is but matter of office in the court, but no judgment of the court that will bind. *Quod fuit concessum per totam curiam*. 2. Error, that no costs at all ought to be assessed or adjudged in the case *supra*; because the prohibition is grounded as well on a *modus decimandi*, which wants proof, as on a contract between the parties, which does not want proof; and the suggestion being entire, and part of it wanting no proof, they cannot give any costs at all; for that is only where the whole matter in the suggestion wants proof; so the joining of the contract with the manner of tithing privileges the whole as to costs: but they may grant a consultation as to that part of the suggestion of the manner of the tithing, and *statit pro residuo*. *Quod fuit concessum*. So both the judgments reversed. *Quod nota*.

Where a suggestion is partly of a *modus*, which requires proof within six months, and partly of a contract which does not, and the suggestion is entire, no costs can be given upon default of proof within the time.

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E. 5 Ja. A. D. 1607. C. B. *Man v. Somerton.* [1 Br. & G. 94.]

1. Beech was said, by the common law, not to be timber; but in a country where wood is scarce, and it is reputed timber, no tithe shall be paid.

2. *Silva cædua*, for which tithe shall be paid, is under the growth of twenty years; but for wood which is not timber, tithes shall be paid, though above the growth of twenty years.

**T**HE plaintiff being parson of Henley, brought an action of debt for six hundred pounds, upon the statute of E. 6. for not setting forth tithes of wood, and the plaintiff shews that the defendant had cut down two hundred loads of wood, to the value of two hundred pounds, and saith, the tenth part of that did amount to two hundred pounds, and so he brought his action for six hundred pounds upon the statute, and the plaintiff was non-suit for one fault in his declaration, for whereas he means the price of the wood to be two hundred pounds, it was mistaken, for it should have been two thousand pounds, for he demanded more for the tenth part than the principal is, by his own shewing, and **TANFIELD, J.** held, that beech, by the common law, is not timber, and so it was adjudged in *Cary* and *Paget's* case, and it was held, that tithes shall not be paid for beech above the growth of twenty years in a common country for wood: as in Buckinghamshire; for there it is reputed timber, but in a plentiful country of wood, it is otherwise, for there it is not timber, and tithes shall be paid for such wood. *Silva cædua*, for which tithes shall be paid, is under the growth of twenty years, but tithes shall be paid for such wood which is not timber; which is above the growth of twenty years.

H. 5 Ja. A. D. 1607. B. R. *Meadhouse v. Taylor.* [Noy, 190.]

1. A reservation by lessee for life, in London, who leases for years to A., is not sufficient to bind him in the reversion, to pay tithes according to that rate.

2. A rent for half a year and then for another half year, is a

yearly rent within the meaning of the decree. And as the same was last let, is not intended last before the decree, but before the demand of tithes.

**A** PROHIBITION for a suit in the spiritual court, for tithes of rent in London. It was held by the court, that by 37 H. 8. cap. 12. the suit ought to be before the mayor of London, by complaint in writing, and not by word of mouth only, in nature of a *monstrans de droit*, declaring all the title. And if the suit be in the spiritual court for tithes in London, that court may grant a prohibition, and yet that court has not power to meddle with them.

2. It was resolved, that a reservation by lessee for life, who leases for years to A., is not sufficient to bind him in the reversion, to pay tithes according to that rate.

3. That a rent for half a year, and afterwards for another half year, is a yearly rent within the meaning of the decree, and note, as the same was last let, is not intended last before the decree, but before the demand of the tithes.

H. 5 Ja. A. D. 1607. B. R. *Anon.* [Noy, 192.]

1. Copyholder of inheritance may prescribe in the name of his lord, to be discharged of tithes.

2. If the parson of a church not impropriate, lease his glebe, the lessee shall pay tithes. But otherwise of an impropriate church, because of the stat. 31 H. 8. c. 13.

**I**N a long prohibition, it was agreed by the court, that a copyholder of an inheritance may prescribe in the name of his lord to be discharged of tithes. And that in 44 Eliz. *Crowch* against *Fryer*, (1) it was adjudged accordingly. And *Serjeant Hatton* vouched *Brewer* and *Vesey's* case, in an action of trespass in the Exchequer, that if the parson of a church which is not impropriate lease his glebe, the lessee shall pay tithes. But otherwise if it had been an impropriate church, because of the statute of [31] H. 8. of dissolutions. And that it was ruled accordingly. Note, *Dyer*, 43 a.

(1) *Ante*, 149.

E. 6 Ja. A. D. 1608. B. R.

*Oliver v. Collins.* [Yelv. 126.] 1 Br. & G. 100.

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Where it was moved in arrest of judgment that the plaintiff had declared on

a statute made 4 Nov. 2 E. 6. and that there was no such statute, for the parliament commenced 1 E. 6. and continued by prorogation till 4 Nov. 2 E. 6. the court held the declaration good, as all the precedents were so.

**T**HE plaintiff brought debt on the statute for not setting forth of tithes, and shewed that he is parson of the parish church of *parva Lavar in com' Essex*, and that the defendant had so many acres *infra paroch' de parva Lavar*

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sown with wheat, whereof the tenth severed from the nine parts came to £28. And shewed that the defendant *apud parvam Lavar prædict'* took and carried away the wheat, not setting out the tithes, contrary to the statute, whereby he forfeited £60, which the plaintiff demanded treble value, &c. to his damage £100, and on *nil debet* it was found for the plaintiff, and alleged in arrest of judgment, 1. That the statute was misrecited; for where the plaintiff declares, *quod cum* 4 Novemb' 2 E. 6. it was enacted, &c. it was said, there is no such statute, for the parliament began 1 E. 6. and continued *per prorogationem* till 4 Novemb' 2 E. 6. So the plaintiff is mistaken in it. *Sed non allocatur*; for a hundred precedents are contrary: and in respect of the continual use to lay the statute in this form as the plaintiff has declared, the court said, they would not alter it, for that would be to alter all the judgments that were ever given in this court. In the case of *Barnard v. Costerdam*, which concerned the Earl of Clanrickard, (with whom *Yelverton* was counsel,) it was resolved, that the issue being on the custom of tithing, which is found against the defendant, he shall pay the value expressed by the plaintiff in his declaration; because by the collateral matter pleaded in bar, the declaration is confessed in the whole.

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T. 6 Ja. A. D. 1608. B. R.

*Burges and Dixon v. Ashton.* [Yelv. 128.]

**T**HE defendant, vicar of A., libelled severally against the plaintiffs in the spiritual court, for small tithes, and also for herbage, wood, milk; the plaintiffs joined in prohibition, and surmised for all (but for small tithes) a custom of tithing. And, *per totam curiam*, the prohibition is not well brought in both their names; for the suit below being upon several libels, they cannot join in a prohibition, for the tortious vexation of the one does not extend to the other, no more than two can join in an action for slanderous words; as appears, *Dyer, quod nota*. Yet the court did not grant any consultation, because the matter being on a custom triable by the common law, they of the spiritual court were justly prohibited, though not in such due form as they ought to be; and therefore they awarded that the plaintiffs should make several declarations, and so proceed as upon two prohibitions.

Where a vicar libelled severally against persons, a joint prohibition is not good, but the matter being on a custom triable at common law, the court refused a consultation, and directed that several declarations

should be made, and the proceedings be as upon several prohibitions.

T. 6 Ja. A. D. 1608. B. R.

*Edmonds v. Booth.* [Yelv. 131.] 1 Gw. 228.

**B**OOOTH, parson of B. in Suffolk, leased all his tithes of 200 acres of land, whereof Rabbit was then seised, to him and his wife and the heirs of Rabbit, to the said Rabbit by indenture, habend' from Mich' next to him and his heirs during the life of Booth; Rabbit died, and E. his wife had these 200 acres for her jointure; she married Fowler, who demised the 200 acres to Edmonds the plaintiff, and the heir of Rabbit granted also to the plaintiff the tithes of these acres at will, and being sued by Booth for tithes in the spiritual court against his own lease, he brought a prohibition on the matter aforesaid; and upon demurrer it was adjudged for the defendant, and that he should have a consultation: wherein the point was, whether the lease was void, because it was to commence at a day to come, and it was for life? And FLEMING, Ch. J. FENNER and WILLIAMS conceived, that it is void; for although the tithes are spiritual, and are not extinct in the land, yet in the conveyance of them, they ought to follow the nature of the land, rent or other hereditaments, which being *in esse*, as 8 Hen. 7. 3. is, cannot be granted to commence at a day to come, if an estate for life be limited; and as 21 Hen. 6. 46. tithes are always *in esse*. But by *YELVERTON* and *CROOKS* contrary; for here the lease is made but of those tithes, which should be due for the land of which Rabbit was then owner, so that it does not enure by way of interest, but by way of discharge and retainer, for Rabbit cannot have tithes

A lease of tithes for life, being a freehold, cannot commence in future.

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marrows  
a  
booth.

tithes of his own land ; and then a discharge may well commence at a day to come, as to be discharged from suit to a mill, or such like. But by the chief justice and WILLIAMS, as the lease is pleaded, it cannot be taken to enure by way of discharge ; for the plaintiff pleads, by force whereof Rabbit was seised of the tithes to him and his heirs for the life of Booth ; so that the plaintiff having pleaded it by way of interest, they as judges cannot intend or construe it otherwise. And, by FLEMING, Ch. J. this lease cannot enure by way of discharge, for there are no such words in the lease ; which proves it was not intended by the parties to operate but by way of interest, and that was more beneficial for the lessee ; for if it should enure by way of discharge only, it is such a privilege annexed to the land, as cannot be granted over ; but if by way of interest, it may well be granted over. And so much appears also in this case ; for the wife of Rabbit is owner of the land, but the son takes upon him to be owner of the tithes, which cannot be, if the first lease had enured by way of discharge. And YELVERTON inclined much thereto, that the pleading of the lease, and of the seisin by force of the lease, was not good. *Quod nota.*

H. 6 Ja. A. D. 1608. *Anon.* [1 Br. & G. 30.]

If one set out his corn and after take it away, he may be sued in the spiritual court, or by action of trespass ; but if the parson sue a stranger in the spiritual court for taking away tithes set out, he incurs a *presumere*.

**I**F I set out my corn, and after take it away, the parson may sue me in the spiritual court, or bring an action of trespass against me ; but if the parson sue in the spiritual court a stranger for taking away the tithes which were set out, this is a *presumere* in the parson.

H. 6 Ja. A. D. 1608. C. B. *Anon.* [1 Br. & G. 31.]

If a bishop hold land discharged of tithes, and sell it, the purchaser shall be discharged ; so if the King grant forest land which he had discharged ; and it is a general rule that he who may have tithes may be discharged of them.

**T**HE court were of opinion, that where a bishop holds land discharged of tithes, and makes a feoffment of the land, the feoffee shall be discharged of tithes ; and the like, if the King have ancient forest-land discharged of tithes, and the King grant this land, the grantee is discharged of tithes ; and it is a general rule, that he who may have tithes, may be discharged of tithes.

M. 6 Ja. A. D. 1608. C. B. *Langdale's case.* [12 Co. 59.]

1. Express prohibitions are of two kinds, the one founded upon a suggestion, the other upon record ; upon suggestion, when no plea is depending, but the suggestion is the foundation ; upon record when a plea is pending.

2. Both B. R. and C. B. may grant prohibitions, and the common law is instead of an

**I**N the case of *Langdale* in this very term, in a prohibition to the high commissioners, two points were moved, the one, if a feme-covert may sue for alimony before the high commissioners ; the other, if the court of common pleas may grant a prohibition, when no plea is pendent in the common pleas ; as in this case no plea can there depend betwixt husband and wife. And forasmuch as this concerns the jurisdiction of the court, this was first of all debated ; and divers objections were made against it.

1. That this court has no jurisdiction to hold plea without an original, unless it be by privilege of an attorney, officer, or clerk of the court, unless that it be an especial case, viz. when there is an action there depending for the same cause ; then it was agreed that a prohibition shall be awarded out of the common pleas, in respect that the court had an action there depending for the same cause, and so being possessed of the cause, it gave the court jurisdiction to award prohibition out of the same court : and for that the prohibition ought to recite, *quod cum tale placitum pendet, &c.* and the defendant, *pendente placito predicto*, hath pursued in court-christian : and with this accords F. N. B. 43. g. where it is said, that if a man be sued in the common pleas for

original, and a prohibition of itself, where no plea is depending.

for a trespass, if the plaintiff also sue in the court-christian for the same cause, the defendant may sue for this in the common pleas, and shall have a prohibition then directed to the judges; and so always when the matter is pendent in the common pleas, if suit be for the same cause in court-christian, he shall have a prohibition; but a man shall have a prohibition out of the chancery or king's bench upon his surmise, surmising that he is sued in court-christian for a temporal cause. And 2 Edw. 4. 11. 6. was cited, where it is held that *ne admittas*, which is a prohibition, doth not lie unless that the *quare impedit* be pendent.

But it was answered and resolved by COKE, Ch. J. WARBURTON, DANIEL, and FOSBERG, Justices, that the common pleas may award a prohibition, although that no suit be there pendent, for this, that the common pleas is the principal court of common law for common pleas; for it belongs to the jurisdiction of the common pleas to determine all common pleas.

*Communio placita non sequantur curiam nostram*, as it is enacted by *Magna Charta*, which hath thirty-two times been confirmed by other acts of parliament; then if the ecclesiastical judges inroach upon the jurisdiction of the common pleas to hold plea of any thing against the common law of the land, or of any thing triable by the law, there the principal court of common law shall grant a prohibition, and that without original writ, for divers causes.

1. For that no original writ of prohibition which issues out of the chancery is returnable either into the king's bench or common pleas, but is directed to the judge or party or both, and is not returnable at all; but it appears in the register, that if the prohibition be contemned, then the chancellor may award an attachment to punish this contempt, returnable either in the common pleas or in the king's bench: but an attachment in such case is but as a judicial writ; and this appears by the register, fol. 33. And if the attachment in such case be returnable into the common pleas, &c. the plaintiff in the declaration shall make mention of an original writ in the chancery, and of the contempt, &c.

2. There was great reason that no original writ of prohibition shall be returnable, for the common law was a prohibition in itself, and he who did inroach upon the jurisdiction of it incurred a contempt; and with this agree our books, as 9 H. 6. 56. (1) in attachment upon a prohibition in the common pleas, before WILLIAM BARNETON, then chief justice of the bench, concerning a suit in court-christian of tithes of gross trees: and there *Falthrop*, the serjeant, took exception to the count, for this, that the plaintiff in his count did not declare upon any statute, nor that any prohibition, *scil.* original writ, was directed unto him. And there it is held that the statute of 45 Edw. 3. and the common law also was a prohibition in itself; and thus the rule of the book, 19 Hen. 6. 54. prohibition for this, that one had sued in a court-baron against the common law: and there *Acue* said, the statute is a prohibition in itself; and so it is held in 8 Rich. 2. title *Attachment sur Prohibition*, 15. Note by *Clopton*, in the common pleas, who then was a serjeant, that if a plea be held in court-christian, which belongs to the court of the King, without any prohibition in *facto*, the plaintiff shall have an attachment upon a prohibition, for this, that the law is a prohibition in itself; for by the law they ought to hold no plea, but that which doth belong to their jurisdiction; *quod fuit concessum, &c. Register 77 Estrepmont. Precipimus quod inhibeamus, &c. Fitz. N. B. 259. Register 112. Supersedeas* to a court-baron, for holding plea *vi et armis*, for above forty shillings; and F. N. B. a writ of consultation is as much an original as a prohibition, yet the common pleas hath granted infinite consultations; *ergo* prohibitions, *qui habet jurisdictionem absolvendi, habet jurisdictionem ligandi*; and one writ is as original as the other.

Note, there are several writs of express prohibition, *scil.* prohibitions with this word, *prohibemus vobis*, and letters in nature of prohibitions, as *supersedeas*, by which it is commanded, *quod supersedeat in placito predicto*. And an injunction is a prohibition also in its nature, for the words are an injunction to the party, not to the judge; and a *supersedeas* is to an officer or judge, not to the party.

Express prohibitions are in two manners, the one founded upon a suggestion, the

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the other upon record; upon suggestion where no plea is pendent, but the suggestion is the foundation, for it is not so when a plea is pendent; upon record when a plea is pendent. Prohibitions founded upon record, as *ne admittas*, &c. ought to recite the plea pendent, for all those which are founded upon record ought to recite a plea pendent. So a writ to the bishop to admit a clerk, is a judicial *latitat*, as Dyer defines it; and as to the book of 2 Edw. 4. it is well agreed, that this does not lie in the common pleas, unless a *quare impedit* be depending; for this ought to recite a writ to be depending: and it should be against reason to restrain any to present, or to make waste by *estrepment*, unless that a writ be pendent: and as to the opinion of *Fitzherbert*, it was affirmed for good law, for every one agrees it, that if a plea be pendent in the common pleas, then a prohibition there lies, and the pendency or not pendency of a plea is not material for divers causes.

1. The pendency of a plea may give a privilege to the party, but no jurisdiction to the court in a collateral suit; and there is a diversity betwixt privilege to the party, and jurisdiction of court, for a plea pendent may give privilege to the party, *cundo, redeundo, et morando*, but doth not give jurisdiction to the court to hold plea by bill by collateral suit against any other, as an officer, attorney, or clerk may.

2. The prohibition in such a case where plea is pendent is no process judicial upon the record, for it is a collateral suit.

3. If the common pleas, which is the proper court for common pleas, cannot grant a prohibition without a plea pendent; certainly the king's bench, which holds plea of common pleas, by secondary means, cannot do it: and so the Archbishop of Canterbury, in his articles concerning prohibitions, holds that neither the one court nor the other may grant prohibitions in such a case; but inasmuch as the common law is instead of an original, as has been said, both courts may grant it.

4. Infinite precedents may be shewn of prohibitions out of the common pleas, without recital of any plea pendent, as is agreed on the other part; and true it is, that it ought not to be so, if the court have not jurisdiction to grant any without plea pendent. Every petty clerk of the common law shall have by his privilege a prohibition without plea pendent; *a fortiori* the common law itself may prohibit any one, who against the common law shall incroach upon its jurisdiction, and enquire of things done against the jurisdiction of the court. Plea pendent is cause of privilege and not of jurisdiction, 4 Ed. 4. 37. 37 Hen. 8. 4. Action or information upon the statute of 2 Hen. 5. c. 5. is but an information to the court of wrong done to the common law, for this, that no original writ lies, as upon penal law, upon *malum prohibitum*, this is, *maius in se, de quo curia intelligi et informari voluit*.

5. A precedent is in 22 Edw. 4. where a prohibition was granted out of the common pleas, for that the plaintiff might have a writ of false judgment at the common law: the record itself agrees with the report.

6. Officers and clerks, as well in the common pleas as in the exchequer, and farmers of the King in the exchequer, may have, by privilege of court, a prohibition without original; *a fortiori* the law itself shall have greater privilege than an officer or clerk, and certainly to enforce the party to bring an action, will be a means to multiply suits to no end, for the law itself in Ed. 4. fo. 37. if any man, upon the statute of 2 Hen. 5. for not delivering of a libel, be brought into the common pleas; and if he cannot have a prohibition without such suit this shall be a cause, as hath been said, to multiply suits, and is against the public weal; for he will bring his action upon the statute before that he will be deprived of his prohibition, and by that he gives himself cause of prohibition; every prohibition is as well at the suit of the King as of the party, as is held in 28 Edw. 3. 97. false Latin shall not abate, nor excommunication in the plaintiff is no plea; for this is the suit of the King, as well for his jurisdiction as for the party, who by law may choose his court, 15 Edw. 3. title Corody 4. The King may sue for this contempt where he pleases.

Note, that although the original cause was in the king's bench for corody, excommunication is no plea in disability of the plaintiff, because it is the suit

of the King for contempt to his law. *Vide* 21 Hen. 7. 71. Kelway 6. In *quare non admittit*, 4 Edw. 4. 37. for not delivery of a libel, in the common pleas, and then he shall have a prohibition by all the justices. So upon the statute of 2 Edw. 6. cap. 13. for suing for tithes where there is a prescription, &c. and this shall be to introduce multiplication of suits, when himself gives cause of prohibition, 38 Hen. 6. 14. 22 Edw. 4. 20. 13 Edw. 3. title Prohibition, 11. After a judgment in the common pleas, after which the patron sues the recoveror in chancery, surmising equity, attachment upon a prohibition out of the common pleas, yet no plea pendent.

Note, the reporter reports this attachment to issue out of the common plea, for the chancellor would not prohibit him.

32 Hen. 6. 34. An attorney in the palace assaulted and menaced, the court shall take a bill and inquire of it, 4 Edw. 4. 36, 37. there a prohibition without view of libel, for this, that action was pendent. Statham, Prohibition, 3.

*Prohibition super articulis*, title Prohibition, plea 5. gives a prohibition before, *scil. coram justiciariis nostris apud West.* *Vide* F. N. B. fol. 69. b. in a writ of *pone, Register Judic' coram justiciariis nostris apud West.* is the common pleas F. N. B. 64. d. 38 Edw. 3. 14. stat. 2 Edw. 6. cap. 13. such courts grant prohibition who have used to grant them; *Hale's* case in my reports. Note, the reason that many prohibitions were granted in the king's bench, for that no writ of error lies but in plains.

M. 6 Ja. A. D. 1608. C. B.

The Case of *Modus Decimandi*. [13 Co. 12.]

**S**HERLEY, Serjeant, moved to have a prohibition, because that a person sued to have tithes of *silva cadua* under twenty years growth in the Weild of Kent; where by the custom of it, which is a great part of the country, tithe of any wood was never paid. And if such a custom in *non decimando* for all lay people within the said Weild, were lawful or not, was the question; and to have a prohibition it was said, that although one particular man shall not prescribe in *non decimando*, yet such a general custom within a great country might well be, as in 43 E. 3. 32. and 45 E. 3. Custom 15. It was presented in the King's Bench, that an abbot had purchased tenements after the statute, &c. And the abbot came and said, that he was lord of the town, &c. And the custom of the town was, that when the tenant cesseth for two years, that the lord might enter until agreement be made for the arrearages; and that he who held these tenements was his tenant, and ceased for two years, and he entered: and the rule of the court is, because it was an usage only in that town, and not in the towns, that is, in the country adjoining, he was put to answer. So as by the same it appears, that a custom was not good in a particular town, which perhaps might be good and of force in a country, &c. See 40 Ass. 21 and 27. 39 E. 3. 2. A custom within a town, that an infant, &c. might alien, is not good; but yet such a custom within Kent, has oftentimes been adjudged to be good. See 7 H. 6. 26. b. 16 E. 2. Prescription, 53. Dyer, 365. 22 H. 6. 14. 21 E. 4. 15. and 45 Ass. 8. See Doctor and Student, lib. 2. c. 55. A particular country may prescribe to pay no tithes for corn, hay, and other things, but that is with this caution, so as the minister have sufficient portion besides to maintain him, to celebrate divine service: and fol. 172. it was holden, that where tithes have not been paid of underwoods under twenty years growth, that no tithes shall be paid for the same, because that they do not renew nor increase from year to year, so as they are not due to the parson but by custom. And he says, fol. 174. that such a custom of a whole country, that no tithes of a lordship shall be paid, is good; and it is to be observed, that in all libels for tithes of woods, they allege a prescription to have tithes of them: but the court would advise, whether such a custom for a town or country should be good: but in ancient times,

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One may be discharged from the payment of tithes five manners of ways:

1. By the law of the realm, that is, the common law; as tithes shall not be paid of coals, quarries, bricks, tiles, &c. F. N. B. 53. and Reg. 54. nor of the after-pasture of a meadow, &c. nor of rakings, nor of wood to make pales, or mounds, or hedges, &c.
2. By the statutes of the realm, as by 31 H. 8. c. 13. the stat. 45 Edw. 3. &c.
3. By privilege, as those of St. John of Jerusalem, in England, the Cisterians, Templars, &c. as appears by 10 H. 7. Dy. 277.
4. By prescription, as by *modus decimandi*,

or an annual recompense in satisfaction of them. 5. By real composition, as where two acres of meadow have been given in lieu of tithes of hay of certain land, which is good.

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the parishioners have given or procured to the parson a wood or other lands, &c. to have and to hold to him and his successors, in satisfaction of all tithes of wood in the same parish; and the parson is now seised of the same wood, and that without question is a good discharge of his tithes; and that in such case, if he sue for tithes of wood, a prohibition lies: and for that it has been said now of late, that such opinions were new and without any antiquity, unto the great prejudice of the church: I will cite you an ancient judgment many years past, Mich. 25 H. 3. Wilts. Rot. 5. before the King at Westminster. Sampson Foliet brought an attain upon a prohibition, against Thomas, parson of Swynden, because he sued him in the spiritual court for a lay fee of the said Sampson, in Draycot, contrary to the King's prohibition, &c. The defendant pleaded, *quod coram iudicibus delegatis petit de eodem decimas fani de quodam prato ipsius Samsonis in Walcot unde est in possessione per sententiam iudicium suorum, et fuit, antequam prohibitio dom' Regis ad eum pervenerit, et quod pratum prædict' est in Walcot unde ipse est persona, et non in Draycot*: to which the said Sampson replied and said, *quod antecessores sui antiquitus dederunt duas acras prati ecclesie de Draycot pro decimis fani quas prædict' Thomas modo petit in eodem prato, quas quidem duas acras prati eadem ecclesia adhuc habet, et semper hucusque habuit, unde videtur ei quoad illud quod prædict' Thomas ultra petit, est de laico feodo suo, et dicit quod pratum illud in quo idem Thomas petit decimas est in Draycot sicut brece dicit, et non in Walcot, et de hoc ponit se super patriam*: and the jury found, *quod prædict' T. persona de Swyndon secutus fuit placita in curia christianitatis de laico feodo prædict' Sampsonis contra prohibitionem dom' Regis, petendo ab ipso decimas fani de quodam prato ipsius Samsonis in Draycot unde antecessores sui antiquitus dederunt ecclesie de Draycot duas acras prati pro decima fani quam prædict' Thomas modo petit, et quas eadem ecclesia adhuc habet et semper hucusque habuit, &c. Et quod pratum prædict' in quo idem Thomas petit decimas est in Draycot, et non in Walcot, &c. Ideo consideratum est quod prædict' Thomas sit inde in misericordia et reddat prædict' Samsoni 20 marcas quas versus eum pro damnis, &c.* Which ancient judgment I have recited at large, because that the same agrees with the rule and reason of the law continued until this day: for judgments or precedents in the time of Ed. 2. E. 1. H. 3. John, R. 1. and more ancient, are not authorities or precedents to be now followed, unless that they concur and agree with the law, and common experience and practice at this day; for many acts of parliaments (and some of them not extant) have changed the ancient laws in divers cases: and desuetude hath antiquated, and time and custom have taken away divers others; and so as the rule is good, *quod iudiciis posterioribus fides est adhibenda; et a communi observantia non est recedendum.* There are two points adjudged by the said record.

1. That satisfaction may be given in discharge of payment of tithes; and if the successor of the parson enjoys the thing given in satisfaction of the tithes, and sue for tithes in kind, the defendant shall have a prohibition, because that he charges his lay fee with tithes, which is discharged of them. By which it appears that tithes may be discharged, and altogether taken away and extinct: and herewith agrees the Register, which is the most ancient book of the law, f. 38. *Res, &c. tali iudici, &c. salutem. Monstravit nobis A. tenens quandam partem manerii de D. quod licet E. nuper dominus manerii prædict' per quoddam scriptum indentat' dedisset et concessisset F. nuper persone ecclesie de D. quatuor acras terre cum pertin' in eodem manerio habend' et tenend' eidem F. et successoribus suis personis ecclesie prædict' in perpetuum. Et idem F. per prædict' scriptum de assensu et voluntate Episcopi Lincoln' diocessani loci prædict' et J. tunc patroni ecclesie prædict' concessit pro se et successoribus suis quod idem E. heredes et assignati sui essent quieti de decimis vitulorum, &c. in manerio prædict' pro prædict' quatuor acris sibi datis, &c. Et tamen nunc persona ecclesie prædict' tenens prædict' quatuor acras terre prædict' A. assignat' prædict' E. super decimam huiusmodi vitulorum, &c. in eodem manerio, sibi presentand' trahit in placitum, coram, &c. in curia christianitatis, &c. Et quia discussio huiusmodi donationis de laico feodo in regno nostro in curia nostrâ, et non alibi tractari et fieri debet, vobis prohibemus, quod placitum aliquod super laicum feodum in regno nostro non teneatis in curia christianitatis, nec quicquam in hac parte quod in enervationem dicti*

*dicti scripti aut donationis, et concessionis præd' quæ in curia nostrâ et non alibi tractari sicut præd' est decernere poterit attentetis, sive attentim faciatis quovismodo*: by which also it appears, that tithes may be discharged, and that the matter of discharge ought to be determined by the common law, and not in the spiritual court: and it is to be observed, that neither in the said judgment, nor in the Register, any averment is taken of the value of the thing given in satisfaction of the tithes. Also by the act of *Circumspectè agatis*, made 13 E. 1. it is said, *si rector petat versus parochianos oblationes, et decimas debitas, seu consuetas, &c.* which proves that there are tithes due in kind, and other tithes due by custom, as a *modus decimandi*, &c. And yet it is resolved in 19 E. 3. Jurisdiction, 28. that the ordinance of *circumspectè agatis* is not a statute; and that the prelates made the same *sans assent*, &c. and yet then the prelates acknowledged, that there were tithes due by custom, which is a *modus decimandi*. By which it appears also, that tithes by custom may be altered into another thing: so where a man grants a parcel of his manor to a parson in fee to be quit of tithes, and makes an indenture, and the parson with the assent of the ordinary (without the patron) grants to him that he shall be quit of tithes of his manor for that parcel of land: afterwards, if he or his assignee be sued in the spiritual court for tithes of his manor, he or his assignee shall have a prohibition upon that deed. And if that deed were made before time of memory, and he has so continued to be quit of tithes, he shall have a prohibition upon that deed, if he be sued for the tithes of that manor, or of any parcel of the same upon that matter shewed. See 8 E. 4. 14. F. N. B. 41 G. *Vide* 3 E. 3. 17. 16 E. 3. 1. Annuity, 24. 40 E. 3. 3 b. and F. N. B. 152. And therefore, if the lord of a manor has always holden his manor discharged of tithes, and the parson had before time of memory, or in ancient times, divers lands in the same parish, of the gift of the lord, of which the parson is seised at this day in fee, in respect of which, neither the parson, nor any of his predecessors, ever had received any tithes of the said manor; if the parson now sues for tithes of the manor, the owner of the manor may shew that special matter, and that the parson and his predecessors, time out of mind, have holden those lands, &c. of the gift of one who was lord of the said manor, in full satisfaction of the tithes of the said manor; and the proof that the lord of the manor gave the lands, that tithes should never be paid, at this day, is good evidence to prove the surmise of the prohibition. And so of the like; and 19 E. 3. t. Jurisdiction, 28. it is adjudged, that title of prescription shall be determined in the King's court, and therefore a *modus decimandi*, which accrues by custom and prescription, shall be sued in the King's court. And it appears by the statute of 7 H. 4. c. 6. that the Pope by his bulls discharged divers from payment of tithes, against which the act of parliament was made; and by stat. 31 H. 8. c. 13. that the possessions of religious persons given to the King, were discharged of payment of tithes in certain cases: and by statute 32 H. 8. c. 7. it is provided, that all and singular persons shall divide, set out, yield and pay all and singular tithes and offerings aforesaid, according to the lawful customs and usages of the parishes and places where such tithes or duties shall come, or immediately rise or be due: provided always, and be it enacted, "that no person or persons shall be sued or otherwise compelled to pay any manner of tithes, for any manors, lands, tenements, or hereditaments, which by the laws or statutes of this realm are discharged, or not chargeable with the payment of any such tithes:" and the statute 2 E. 6. c. 13. enacts, "that every of the King's subjects shall from henceforth justly and truly, without fraud or guile, divide, set out, &c. all manner of their predial tithes in their proper kind as they shall rise and happen, in such manner and form as hath been of right yielded and paid, within forty years next before the making of this act, or of right or custom ought to be paid." So as it appears by this, that tithe is due of right, and by custom: and also in the same act there is a proviso in these words; "provided always and be it enacted, that no person shall be sued, or otherwise compelled to yield, give, or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the

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"payment of any such tithes, or that be discharged by any composition "real:" so as it appears by that act, that one may be discharged from the payment of tithes five manners of ways.

1. By the law of the realm, that is, the common law; as tithes shall not be paid of coals, quarries, brick, tiles, &c. F. N. B. 53. and Register, 54. nor of the after-pasture of a meadow, &c. nor of rakings, nor of wood to make pales, or mounds, or hedges, &c.

2. By the statutes of the realm: as by the statute of 31 H. 8. c. 13. the statute of 45 E. 3, &c.

3. By the privilege, as those of St. John's of Jerusalem in England; the Cisterians, Templars, &c. as it appeareth by 10 H. 7. 277. Dyer.

4. By prescription, as by *modus decimandi*, or an annual recompense in satisfaction of them, as appears before by the authorities aforesaid.

5. By real composition, as appears by the said writ cited out of the Register: and so you have one or two examples (for many others which may be added) of these five manners of discharges of tithes. And by them all it appears, that a man may be discharged of the payment of tithes, as before it is said: so as now it apparently appears by the laws of England, both ancient and modern, that a layman ought to prescribe in *modo decimandi*, but not in *non decimando*; and that in effect agrees with the opinion of Thomas Aquinas, in his *Secunda secundæ, quæst. 86. art. ultimo*. For there he saith, *quod in veteri lege præceptum de solutione decimarum partim erat morale inditum ratione naturali quæ dictat quod is qui divino cultui ministrant ad salutem totius populi necessaria victui debent ministri juxta illud, 1 Cor. 9. Quis militat, &c.* Who goes to war at his own charges, &c. *Partim autem erat judiciale ex divini institutione robur habens, (scilicet) quantum ad determinationem certæ partis.* And all that agrees with our law; and he goes farther, in *tempore vero novæ legis etiam est determinatio partis solvendi auctoritate ecclesiæ* (that is, by their canons) *instituta secundum quandam humanitatem, ut scilicet non minus populus novæ legis ministris Novi Testamenti exhibeat, quam populus veteris legis ministris Veteris Testamenti exhibebat, præsertim cum ministri novæ legis sunt majores dignitate, ut probat Apostolus, 2 Cor. 3. Sic ergo patet quod ad solutionem decimarum tenentur homines partim quidem ex jure naturali, quantum ad hoc quod aliqua portio data est ministris ecclesiæ, partim vero ex institutione ecclesiæ quantum ad determinationem decimæ partis.* See Doctor and Student, lib. 2. cap. 56. fol. 164. That the tenth part is not due by the law of God, nor by the law of nature, which he calls the law of reason; and he cites John Gerson, who was a Doctor of Divinity, in a treatise which he calls *regulæ morales (scilicet) solutio decimarum sacerdotibus est jure divino, quatenus inde sustententur, sed quoad partem hanc vel illam assignare aut in alios redditus commutare, positivæ juris est.* And afterwards, *non vocatur portio curatis debita propterea decima, eo quod est decima pars, imo est interdum vicesima aut tricesima.* And he holdeth, that a portion is due by the law of nature, which is the law of God, but it appertains to the law of man to assign *hanc vel illam portionem*, as necessity requires for their sustentance. And further he says, "that tithes may be exchanged into lands, "annuity, or rent, which shall be sufficient for the minister," &c. And there he says, that in Italy, and in other the east countries, they pay no tithes, but a certain portion according to the custom, &c. And all this is true, if not, that tithes be discharged or changed by one of the said five ways: and forasmuch as it appears from themselves that the tenth part or value was part of the judicial law only, certainly the same doth not bind any christian commonwealth, but that the same may be altered by reason of time, place, or other consideration, as it appears in all punishments inflicted by the judicial law, they do not now bind any; for felony is now punished by death, &c. which was not so by the judicial law, &c. Also forasmuch as now it is confessed, that the tenth part is now due only *ex institutione ecclesiæ*, that is to say, by their canons, and it appears by the statute of 25 H. 8. c. 19. that all canons, &c. made against the prerogative of the King or his laws, statutes, or customs of the realm, are void, and that was but a declaratory law; for no statute or custom of the realm can be taken away or abrogated by any canon, &c. made out of or within the



realm, but only by act of parliament; and that well appears by 10 H. 7. f. 17. c. 18. that there is a canon or constitution, that no priest ought to be impleaded at the common law. And there Brian says, that a grave doctor of the law once said unto him, that priests and clerks might (notwithstanding) be sued at the common law well enough; for he said, that *Rex est persona mixta*, and is *persona unita cum sacerdotibus statutis ecclesie*. In which case the King might maintain his jurisdiction by prescription; by which it appears, that prescription does prevail against express canons or constitutions, and is not taken away by them, which proves that the statute of 25 H. 8. was but a declaration of the ancient law before: and there is an express prohibition in Numb. 18. *Nihil aliud possidebunt, sed decimarum oblatione contenti quas in usus eorum et necessaria separavi*: which was not part of the moral law, or law of nature, but part of the judicial: and therefore men of the church at this day do possess houses, lands, and tenements, and not tithes only.

The second point, which agrees with the law at this day, which was adjudged in the said record of 25 H. 3. is, that the limits and bounds of towns and parishes shall be tried by the common law, and not in the spiritual court; and in this the law has great reason, for thereupon depends the title of inheritance of the lay fee, whereof the tithes were demanded for fines, and recoveries are the common assurances of lay inheritances; and if the spiritual court should try the bounds of towns, if they determine that my land lies in another town than is contained in my fine, recovery, or other assurance, I shall be in danger to lose my inheritance, and therewith agrees 39 E. 3. 29. 5 H. 5. 10. 32 E. 4. t. Consultation, 3 E. 4. 12. 19 H. 6. 20. 50 E. 3. 20. and many other precedents until this day. And note, there is a rule in law, that when the right of tithes shall be tried in the spiritual court, and the spiritual court has jurisdiction thereof, that our courts shall be ousted of the jurisdiction, 35 H. 6. 47. 38 H. 6. 21. 2 E. 4. 15. 22 E. 4. 23. 38 E. 3. 36. 14 H. 7. 17. 13 H. 2. Juried. 19. but that is; and when debate is between parson and vicar, or when all is in one parish; but when they are in several parishes, then this court shall not be ousted of the jurisdiction. See 12 H. 2. tit. Jurisdiction, 17. 13 R. 2. ibid. 19. 7 H. 4. 34. 14 H. 4. 17. 38 E. 3. 56. 42 E. 3. 12. And yet there is a canon expressly against this, which see in Linwood, *titulo de penis*, 55. And so folio 227, 228, amongst the canons or constitutions of Boniface, *anno dom.* 1277. And the cause wherefore the judges of the common law would not permit the ecclesiastical judges to try *modum decimandi*, being pleaded in their court, is, because that if the recompense which is to be given to the parson, in satisfaction of his tithes, do not amount to the value of the tithes in kind, they would overthrow the same: and that also appears by Linwood, amongst the constitutions *Simonis Mepham, titulo De Decimis, cap. Quoniam propter, fol. 139. 6. verbo consuetudines: consuetudo ut non solvantur, aut minus plene solvantur decima, non valet*; and *ibidem secundum alios, quod in decimis realibus, non valet consuetudo ut solvatur minus decima parte, sed in personalibus, &c.* And *ibidem Lit. M. verbo, integre, faciunt expresse contra opinionem quorundam theologorum, qui dicunt sufficere aliquid dari pro decima*. And that is the true reason in both the said cases, *scil. de modo decimandi, et de limitibus parochiarum, &c.* that they would not adjudge according to their own canons; and therefore a prohibition lies: and therewith agrees 8 E. 4. 14. and the other books abovesaid, and infinite precedents; and the rather after the statute of 2 E. 6. cap. 13. And also the customs of the realm are part of the laws of the realm, and therefore they shall be tried by the common law, as is aforesaid. See 7 Ed. 6. Dyer, 79. and 18 Eliz. Dyer, 349. the opinion of all the justices.

M. 7 Ja. A. D. 1609. C. W. *Stafford's Case.* [Ley. 14.]

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**A**NNO Domini 1266, 51 H. 3. the parsonage of Laxton, in the county of Northampton, was appropriated to the prior and convent of Finshead, and their successors, within which parish the said priory was situated, not a mile distance asunder, and a vicarage was then endowed. After, the said priory

A parsonage was appropriated to a priory in 1266, and a vicarage being

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dowed, afterwards the priory becoming poor, the vicarage in 1422 was again united to the rectory, to be holden to the prior and convent, they to serve the cure by a secular chaplain or one of their own canons; held that this was a restitution, and not an appropriation void by 4 H. 4. c. 12.; and if such union had been defective, as the restitution was good in reputation, the statute of dissolution had fully settled the same in the crown.

being consumed with fire, and their possessions diminished, and they grown exceeding poor, the said vicarage, by Richard the bishop of Lincoln, ordinary of the place, 1 H. 6. was united, annexed, and consolidated to the said rectory and parsonage, to be holden to the prior and convent, and their successors, and thereby ordained, that they, and their successors, after the death of the then incumbent, should hold the things wherewith the vicarage was endowed in proper use, and they to serve the cure by a secular chaplain, or by one of their own canons; as by an instrument or deed, bearing date in December, 1422, whereunto the said bishop caused the seal *ad causas* to be put; appears; in which instrument or deed, these words, *videlicet, vocatis omnibus, et singulis de jure in hac parte vocandis, ac servandis in hac parte omnibus servandis, juriqve ordine requisitis plenius servat, &c.* were contained, as by this deed appears, which so continued, and the cure served accordingly, till by the statute of 31 H. 8. by force of their surrender, the premises, as appropriate, came to the crown, in such plight, as the prior and convent held, as by the statute appears; it appears upon record in the Exchequer, that upon the suppression, a salary of 100*l.* per annum, was allowed to a curate to serve the cure of the said parish-church of Laxton, and that there was not any endowed of a vicarage there, and the same continued till 7 Ed. 6. that the King by letters-patent under the great seal of England, for money, did grant to Sydney and Halswel, their heirs and assigns, *totam rectoriam, et ecclesiam nostram de Laxton in comitatu Northampton, cum suis juribus, et pertinentiis universis, super prioratus de Finshead, &c. ac unum messuagium, ac omnia terras, prata, pasturas et hereditamenta nostra, cum pertinentiis, modo vel nuper in tenura, sive occupatione Johannis Batchelor, et Richardi Lightfoot in Laxton, dicto super prioratus de Finshead, &c.* in as ample a manner as the prior had the same, and as it came to the crown; from the said patentees it came to the ancestors of William Stafford, gentleman, his Majesty's ward, and from them to him by descent, and so found by office after the death of Sir William Stafford, the ward's father, who have, and still do cause the cure to be served by a preaching minister; now within this year, since the office found, the defendant Crosse has gotten a presentation from the King to himself of the said vicarage, and thereupon has procured admission and induction.

Question. Whether Crosse by his presentation, admission and induction, shall have and enjoy from the ward, the things wherewith the said vicarage was endowed; whereupon a case being drawn, and after delivered to the Chief Justices, FLEMING, COKE, and TANFIELD, Chief Baron, they, upon mature deliberation, did resolve, that forasmuch as the said vicarage after the endowment thereof was in the first year of King Henry 6. by the bishop of Lincoln, then ordinary of that diocese, and by the prior and convent, being patron thereof, restored to the said prior and convent, and their successors, in respect of their poverty, to hold the said vicarage reunited to the said church and parsonage inappropriate, with proper use, after the decease of the said vicar, to the said prior and convent, and their successors for ever, therefore the same is to be taken as a restitution, and not an impropriation of the vicarage and so the same is no appropriation of a vicarage, made void by the statute of 4 H. 4. c. 12. and further, for that the same church and parsonage of Laxton was holden, together with the said vicarage, from and after the death of the then vicar, until the dissolution of the said priory, and at the time of the dissolution, were holden as one entire church, without any vicar; so as the same church and parsonage came to the crown by the dissolution of the said priory, discharged of the said endowment and of a vicarage; and therefore the same neither can nor ought to be now presented unto, nor enjoyed by any that shall claim the fruits thereof; the endowment was made as vicar or incumbent of the vicarage; but the same church and parsonage, free of that endowment of a vicar, were given by the crown by force of that statute, and of the surrender of the said prior and convent, in as large and ample manner, and in the same plight as the prior and convent had or held the same; and if the same restitution or union had been any way defective, the same being good in reputation, the statute of dissolution of monasteries has fully settled the same in the crown, as

by the two notable precedents then shewed forth; the first being a decree in Chancery, upon aid prayed, in case of the Lord *St. John*, 29 El. and the other, being a decree in the Exchequer chamber, between *Thomas Grimes* and *Henry Smith*, (1) Tr. 30 El. upon which resolution of the said lords, judges assistants, a decree was had accordingly.

(1) *Ante*, 95.

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Tr. 7 Ja. A. D. 1609. Debated before the King.
The Case *De Modo Decimandi* and Prohibitions. [13 Co. 37.]

RICHARD BANCROFT, archbishop of Canterbury, accompanied with the bishop of London, the bishop of Bath and Wells, the bishop of Rochester, and divers doctors of the civil and canon law, as Dr. Dunn, judge of the Arches; Dr. Bennet, judge of the Prerogative; Dr. James, Dr. Martin, and divers other doctors of the civil and canon law, came attending upon them to the King to Whitehall the Thursday, Friday, and Saturday after Easter term, in the council chamber, where the chief justice and myself, DANIEL, Judge of the Common Pleas, and WILLIAMS, Judge of the King's Bench, by the command of the King, attended also: where the King being assisted by his privy council, all sitting at the council table, spake as a most gracious, good, and excellent Sovereign, to this effect, "As I would not suffer any novelty or innovations in my courts of justice ecclesiastical or temporal; so I will not have any of the laws, which have had judicial allowances in the times of the Kings of England before me, to be forgotten, but to be put in execution. And forasmuch as upon the contentions between the ecclesiastical and temporal courts, great trouble, inconvenience, and loss may arise to the subjects of both parts; namely, when the controversy ariseth upon the jurisdiction of my courts of ordinary justice; and because I am the head of justice immediately under God, and knowing what hurt may grow to my subjects of both sides, when no private case, but when the jurisdictions of my courts are drawn in question, which in effect concerneth all my subjects; I thought that it stood with the office of a King, which God hath committed to me, to hear the controversies between the bishops and other of his clergy, and the judges of the laws of England, and to take order, that for the good and quiet of my subjects, the one do not encroach upon the other, but that every of them, hold themselves within their natural and local jurisdiction, without incroachment or usurpation the one upon the other." And he said, that the only question then to be disputed was, if a parson, or vicar of a parish sue one of his parish in the spiritual court for tithes in kind, or lay-fee, and the defendant allege a custom or prescription, *de modo decimandi*, if that custom or prescription *de modo decimandi*, shall be tried and determined before the judge ecclesiastical where the suit is begun; or a prohibition lies, to try the same by the common law. And the King directed, that we who were judges should declare the reasons and causes of our proceedings, and that he would hear the authorities in the law which we had to warrant our proceedings in granting of prohibition in cases of *modo decimandi*. But the archbishop of Canterbury kneeled before the King, and desired him, that he would hear him and others who were provided to speak in the case for the good of the church of England; and the archbishop himself inveighed much against two things. 1. That a *modus decimandi* should be tried by a jury, because that they themselves claim more or less a *modum decimandi*; so as in effect they were triers in their own cause, or in the like cases. 2. He inveighed much against the precipitate and hasty trials by juries; and after him Dr. Bennet, judge of the Prerogative Court, made a large invective against prohibitions in *causis ecclesiasticis*: and that both jurisdictions as well ecclesiastical as temporal were derived from the King; but all that which he spake out of the book which Dr. Ridley has lately published, I omit as impertinent: and he made five reasons, why they should try a *modum decimandi*.

A *modus decimandi* is when lands, tenements and hereditaments have been given to the parson and his successors, or an annual certain sum or other profit always, time out of mind, to the parson and his successors, in full satisfaction and discharge of all the tithes in kind in such a place.

A *modus decimandi* extinguishes tithes in kind, and it shall be intended that the *modus* began at first by real composition, by which the lands were discharged of the tithes, and a yearly sum in satisfaction of them assigned to the parson.

And the first and principal reason was out of the Register, fol. 58. *quia non*

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est consonans rationi, quod cognitio accessarii in curia christianitatis impediatur ubi cognitio cause principalis ad forum ecclesiasticum necesse pertinet. And the principal cause is right of tithes, and the plea of *modus decimandi* sounds in satisfaction of tithes; and therefore the consurance of the original cause, (*scil.*) the right of tithes appertaining to them, the consurance of the bar of tithes, which he said was but the accessary, and as it were dependent upon it, appertained also to them. And whereas it is said in the bishop of *Winchester's* case, in the Second Part of my Reports, and 8 E. 4. 14. that they would not accept of any plea in discharge of tithes in the spiritual court, he said, that they would allow such pleas in the spiritual court, and commonly had allowed them; and therefore he said, that that was the mystery of iniquity founded upon a false and feigned foundation, and humbly desired the reformation of that error, for they would allow a *modus decimandi* being duly proved before them.

2. There was great inconveniency, that laymen should be triers of their own customs, if a *modus decimandi* should be tried by jurors; for they shall be upon the matter jurors (*i. e.* judges) in their own cause.

3. That the custom *de modo decimandi* is of ecclesiastical jurisdiction and consurance, for it is a manner of tithing, and all manner of tithing belongs to ecclesiastical jurisdiction: and therefore he said, that the judges, in their answer to certain objections made by the archbishop of Canterbury, have confessed, that suit may be had in spiritual courts *pro modo decimandi*; and therefore the same is of ecclesiastical consurance; and by consequence it shall be tried before the ecclesiastical judges: for if the right of tithes be of ecclesiastical consurance, and the satisfaction also for them of the same jurisdiction, the same shall be tried in the ecclesiastical court.

4. In the prohibitions of *modus decimandi*, averment is taken, that although the plaintiff in the prohibition offer to prove *modus decimandi*, the ecclesiastical court refuses to allow of it, which was confessed to be a good cause of prohibition: but he said, they would allow the plea *de modo decimandi* in the spiritual court, and therefore *cessante causa cessabit et effectus*, and no prohibition shall lie in the case.

5. He said, that he could shew many consultations granted in the cause *de modo decimandi*, and a consultation is of greater force than a prohibition; for consultation, as the word imports, is made by the court with consultation and deliberation. And *Bacon*, solicitor-general, being (as it is said) assigned with the clergy by the King, argued before the King, and in effect said less than Dr. Bennet said before; but he vouched 1 R. 3. 4. the opinion of Hussey, when the original ought to begin in the spiritual court, and afterwards a thing comes in issue which is triable in our law, yet it shall be tried by their law: as if a man sue for a horse devised to him, and the defendant say, that the devisor gave to him the said horse, the same shall be tried there. And the Register, 57 and 58. If a man be condemned in expenses in the spiritual court for laying violent hands upon a clerk, and afterwards the defendant pay the costs, and get an acquittance, and yet the plaintiff sue him against his acquittance for the costs, and he obtain a prohibition, for that acquittances and the deeds are to be determined in our law, yet he shall have a consultation, because the principal belongs to them, 38 Ed. 3. 5. Right of tithes between two spiritual persons shall be determined in the ecclesiastical court. And 38 Ed. 3. 6. where the right of tithes comes in debate between two spiritual persons, the one claiming the tithes as of common right within his parish, and the other claiming to be discharged by real composition, the ecclesiastical court shall have jurisdiction of it.

And thereupon the said judges made humble suit to the King, that forasmuch as they perceived that the King in his princely wisdom did detest innovations and novelties, that he would vouchsafe to suffer them with his gracious favour to inform him of one innovation and novelty which they conceived would tend to the hinderance of the good administration and execution of justice within his realm.

Your Majesty, for the great zeal which you have to justice, and for the due administration

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administration thereof, has constituted and made fourteen judges, to whom you have committed not only the administration of ordinary justice of the realm, but *crimina læsæ majestatis*, touching your royal person for the legal proceeding: also in parliament we are called by writ, to give to your Majesty and to the lords of the parliament our advice and counsel, when we are required: we two chief justices sit in the Star-chamber, and are oftentimes called into the Chancery, Court of Wards, and other high courts of justice: we in our circuits do visit twice in the year your realm, and execute justice according to your laws; and if we who are your public judges receive any diminution of such reverence and respect in our places, which our predecessors had, we shall not be able to do you such acceptable service as they did, without having such reverence and respect as judges ought to have. The state of this question is not in *statu deliberativo*, but in *statu judiciali*; it is not disputed *de bono* but *de vero, non de lege fienda, sed de lege lata*; not to frame or devise new laws, but to inform your Majesty what your law of England is: and therefore it was never seen before, that when the question is of the law, that your judges of the law have been made disputants with him who is inferior to them, who day by day pleads before them at their several courts of Westminster: and although we are not afraid to dispute with Mr. Bennet and Mr. Bacon, yet this example being *primæ impressionis*, and your Majesty detesting novelties and innovations, we leave it to your grace and princely consideration, whether your Majesty will permit our answering in *hoc statu judiciali*, to this charge upon your public judges of the realm? But in obedience to your Majesty's command, we, with your Majesty's gracious favour, in most humble manner will inform your Majesty touching the said question, which we, and our predecessors before us, have oftentimes adjudged upon judicial proceedings in your courts of justice at Westminster: which judgments cannot be reversed or examined for any error in law, if not by a writ of error in a more high and supreme court of justice, upon legal and judicial proceedings: and that is the ancient law of England, as appears by the statute of 4 H. 4. c. 22.

And we being commanded to proceed; all that which was said by us, the judges, was to this effect: that the trial *de modo decimandi* ought to be by the common law by a jury of twelve men, appears in three manners of proof: first, by the common law: secondly, by act of parliament: and lastly, by infinite judgments and judicial proceedings long time past without any impeachment or interruption.

But first it is to see, what is a *modus decimandi*? *Modus decimandi* is, when lands, tenements, or hereditaments have been given to the parson and his successors, or an annual certain sum, or other profit always, time out of mind, to the parson and his successors, in full satisfaction and discharge of all the tithes in kind in such a place; and such manner of tithing is now confessed by the other party to be a good bar of the tithes in kind.

2. That *modus decimandi* shall be tried by the common law, that is, that all satisfactions given in discharge of tithes, shall be tried by the common law: and therefore put that which is the most common case; that the lord of the manor of Dale prescribes to give to the parson 40s. yearly, in full satisfaction and discharge of all tithes growing and renewing within the manor of Dale, at the feast of Easter: the parson sues the lord of the manor of Dale for his tithes of his manor in kind, and he in bar prescribes in manner *ut supra*: the question is, if the lord of the manor of Dale may upon that have a prohibition, for if the prohibition lies, then the spiritual court ought not to try it; for the end of the prohibition is, that they do not try that which belongs to the trial of the common law; the words of the prohibition being, that they would draw the same *ad aliud examen*.

First, the law of England is divided into the common law, statute law, and customs of England; and therefore the customs of England are to be tried by the trial which the law of England does appoint.

Secondly, prescriptions by the law of the holy church, and by the common law, differ in the times of limitation; and therefore prescriptions and customs of England shall be tried by the common law. See 20 H. 6. fol. 17. 19 E. 3.

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Jurisdiction, 28. The bishop of Winchester brought a writ of annuity against the archdeacon of Surry, and declared, how that he and his ancestors were seised by the hands of the defendant by title of prescription, and the defendant demanded judgment, if the court would hold jurisdiction being between spiritual persons, &c. — STONE, J. Be assured, that upon title of prescription we will here hold jurisdiction; and upon that, WILBY, C. J. gave the rule, answer over: upon which it follows, that if a *modus decimandi*, which is an annual sum for tithes by prescription, come in debate between spiritual persons, that the same shall be tried here: for the rule of the book is general, (*scil.*) upon title of prescription, we will hold jurisdiction, and that is fortified with an asseveration, know assuredly; as if he should say, that it is so certain, that it is without question. 32 E. 3. Jurisd. 26. There was a vicar who had only tithes and oblations, and an abbot claimed an annuity or pension of him by prescription: and it was adjudged, that the same prescription, although it was betwixt spiritual persons, should be tried by the common law. Vide 22 H. 6. 46 and 47. A prescription, that an abbot time out of mind had found a chaplain in his chapel to say divine service, and to minister sacraments, tried at the common law.

3. See the record of 25 H. 3. cited in the case of *modus decimandi* before; and see Register, fol. 38. when lands are given in satisfaction and discharge of tithes.

4. See the statute of *circumspectè agatis, decimæ debitæ, seu consuetæ*, which proves that tithes in kind, and a *modus* by custom, &c. differ.

5. 8 E. 4. 14. and F. N. B. 41. G. a prohibition lies for lands given in discharge of tithes. 28 H. 3. 97. a. There suit was for tithes, and a prohibition lies, and so abridged by the book, which of necessity ought to be upon matter of *modo decimandi*, or discharge.

6. 7 E. 6. 79. If tithes be sold for money, by the sale the things spiritual are made temporal, and so in the case of *modo decimandi*, 42 E. 3. 12. agrees.

7. 22 E. 3. 2. Because an appropriation is mixt with the temporality, (*scil.*) the King's letters patent, the same ought to be shewn how, &c. otherwise of that which is mere temporal: and so it is of real composition, in which the patron ought to join. Vide 11 H. 4. 85. Composition by writing that the one shall have the tithes, and the other shall have money, the suit shall be at the common law.

Secondly, by acts of parliament.

1. The said act of *circumspectè agatis*, which gives power to the ecclesiastical judges to sue for tithes due first in kind, or by custom, i. e. *modus decimandi*: so as by authority of that act, although that the yearly sum sound in the temporality, which was paid by custom in discharge of tithes, yet because the same comes in the place of tithes, and by constitution, the tithes are changed into money, and the parson has not any remedy for the same, which is the *modus decimandi* at the common law; for that cause the act is clear, that the same was a doubt at the common law: and the statute of *Articuli Cleri*, cap. 1. If corporal penance be changed in *penam pecuniariam*, for that pain suit lies in the spiritual court: for see Mich. 8 Hen. 3. Rot. 6. in *Thesaur.* A prohibition lies *pro eo quod rector de Chesterton exigit de Hugone de Logis de certâ portione pro decimis molendinarum*; so as it appears, it was a doubt before the said statute, if suit lay in the spiritual court *de modo decimandi*. And by the statute of 27 Hen. 8. cap. 20. it is provided and enacted, that every of the subjects of this realm, according to the ecclesiastical laws of the church, and after the laudable usages and customs of the parish, &c. shall yield and pay his tithes, offerings, and other duties: and that for subtraction of any of the said tithes, offerings, or other duties, the parson, &c. may by due process of the King's ecclesiastical laws, convent the person offending before a competent judge, having authority to hear and determine the right of tithes, and also to compel him to yield the duties, i. e. as well *modus decimandi*, by laudable usage or custom of the parish, as tithes in kind: and with that in effect agrees the statute of 32 H. 8. cap. 7. By the statute of 2 E. 6. c. 13. it is enacted, "that every of the King's subjects shall from henceforth, truly and justly,

justly, without fraud or guile, divide, &c. and pay all manner of their predial tithes in their proper kind, as they rise and happen, in such manner and form as they have been of right yielded and paid within forty years next before the making of this act, or of right and custom ought to have been paid." And after, in the same act, there is this clause and proviso, "Provided always, and be it enacted, that no person shall be sued, or otherwise compelled to yield, give, or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any compositions real." And afterwards, there is another branch in the said act: "And be it further enacted, that if any person do subtract or withdraw any manner of tithes, obventions, profits, commodities, or other duties before mentioned (which extends to customs of tithing, i. e. *modus decimandi*, mentioned before in the act, &c.) that then the party so subtracting, &c. may be convented and sued in the King's ecclesiastical court, &c." And upon the said branch, which is in the negative, that no person shall be sued for any tithes of lands which are not chargeable with the payment of such tithes by any law, statute, privilege, prescription, or real composition. And always when an act of parliament commands or prohibits any court, be it temporal or spiritual, to do any thing temporal or spiritual if the statute be not obeyed, a prohibition lies: as upon the statute *de articulis super cartas*, cap. 4. *Quod communia placita non teneantur in Scaccario*: a prohibition lies to the court of Exchequer, if the barons hold a common plea there, as appears in the Register, 187. b. So upon the statute of Westm. 2. *quod inquisitiones quæ magnæ sunt examinationis non capiuntur in patriâ*; a prohibition lies to the justices of Nisi Prius. So upon the statute of *Articuli super Cartas*, cap. 7. *Quod Constabularius Castr' Dover, non teneat placitum forinsecum quod non tangit custodiam castrî*, Register, 185. So upon the same statute, cap. 3. *Quod Senescallus et Mariscalcus non teneant placita de libero tenemento, de debito, conventionione, &c.* a prohibition lies, 185. And yet by none of these statutes, is any prohibition or superædæas given by express words of the statute. So upon the statutes 13 R. 2. c. 3. 15 R. 2. c. 2. 2 H. 4. c. 11. by which it is provided, that admirals do not meddle with any thing done within the realm, but only with things done upon the seas, &c. a prohibition lies to the court of Admiralty. So upon the statute of Westm. 2. cap. 43. against Hospitallers and Templars, if they do against the same statute, Register, 39. a. So upon the statute *de prohibitionibus regis, ne laici ad citationem episcopi conveniant ad recognitionem faciend' vel sacrament' prestanda nisi in casibus matrimonialibus et testamentariis*, a prohibition lies, Register, 36. b. And so upon the statute of 2 H. 5. cap. 3. at what time the libel is grantable by the law, that it be granted and delivered to the party without difficulty, if the ecclesiastical judge, when the cause which depends before him is mere ecclesiastical, deny the libel, a prohibition lies, because that he does is against the statute; and yet no prohibition by any express words is given by the statute. And upon the same statute the case was in 4 E. 3. 37. Pierce Peckham took letters of administration of the goods of Rose Brown of the bishop of London, and afterwards T. T. sued to Thomas, archbishop of Canterbury, that because the said Rose Brown had goods within his diocese, he prayed letters of administration to be committed to him, upon which, the bishop granted him letters of administration, and afterwards T. T. libelled in the spiritual court of the archbishop in the Arches against Pierce Peckham, to whom the bishop of London had committed letters of administration to repeal the same: and Pierce Peckham, according to the said statute, prayed a copy of the libel exhibited against him, and could not have it, and thereupon he sued a prohibition, and upon that an attachment: and there Catesby, Serjeant, moved the court, that a prohibition did not lie, for two causes: 1. That the statute gives that the libel shall be delivered, but does not say that the plea in the spiritual court shall surcease by prohibition. 2. The statute is not intended of matter mere spiritual, as that case is, to try the prerogative and the liberty of the archbishop of Canterbury and the bishop of London, in committing of administrations. And there DANBY, C. J., if you will not deliver the libel

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libel according to the statute, you do wrong, which wrong is a temporal matter, and punishable at the common law; and therefore in this case the party shall have a special prohibition out of this court, reciting the matter, and the statute aforesaid, commanding them to surcease, until he has the copy of the libel delivered unto him: which case is a stronger case than the case at bar, for that statute is in the affirmative, and the said act of 2 E. 6. cap. 13. is in the negative, *scil.* that no suit shall be for any tithes of any land in kind where there is a *modus decimandi*, for that is the effect of the said act, as to that point. And always after the said act, in every term in the whole reigns of King Edward 6. Queen Mary, and Queen Elizabeth, until this day, prohibitions have been granted in *causâ modi decimandi*, and judgments given upon many of them, and all the same without question made to the contrary. And accordingly all the judges resolved in 7 E. 6. Dyer, 79. *Et contemporanea expositio est optima & fortissima in lege, & a communi observantia non est recedendum, & minime mutanda sunt quæ certam habuerunt interpretationem.*

And as to the first objection, that the plea of *modus decimandi* is but accessory to the right of tithes; it was resolved, that the same was of no force, for three causes.

1. In this case, admitting that there is a *modus decimandi*, then by the custom, and by the act of 2 E. 6. and the other acts, the tithes in kind are extinct and discharged; for one and the same land cannot be subject to two manner of tithes, but the *modus decimandi* is all the tithe with which the land is chargeable: as if a horse or other thing valuable be given in satisfaction of the duty, the duty is extinct and gone: and it shall be intended, that the *modus decimandi* began at the first by real composition, by which the lands were discharged of the tithes, and a yearly sum in satisfaction of them assigned to the parson, &c. So as in this case there is neither principal nor accessory, but an identity of the same thing.

2. The statute of 2 E. 6. being a prohibition in itself, and that in the negative, if the ecclesiastical judge do against it, a prohibition lies, as it appears clearly before.

3. Although that the rule be general, yet it appears by the Register itself, that a *modus decimandi* is out of it; for there is a prohibition in *causâ modi decimandi* when lands are given in satisfaction of the tithes.

As to the second objection, it was answered and resolved, that *that* was from, or out of the question; for *status questionis non est deliberationis sed judicialis*, not what was fit and convenient, but what the law is: and yet it was said, it shall be more inconvenient to have an ecclesiastical judge, who is not sworn to do justice, to give sentence in a case between a man of the clergy and a layman, than for twelve men sworn to give their verdict upon hearing of witnesses *virâ voce*, before an indifferent judge, who is sworn to do right and justice to both parties: but convenient or inconvenient is not the question: also they have in the spiritual court such infinite exceptions to witnesses, that it is at the will of the judge with which party he shall give his sentence.

As to the third objection, it was answered and resolved, first, that *satisfactio pecuniaria* of itself is temporal: but forasmuch as the parson hath not remedy *pro modo decimandi* at the common law, the parson by force of the act cited before might sue *pro modo decimandi* in the ecclesiastical court: but that does not prove, that if he sue for tithes in kind, which are utterly extinct, and the land discharged of them, that upon the plea *de modo decimandi* a prohibition should not lie, for that without all question it appears by all *that* which before has been said, that a prohibition does lie. See also 12 H. 7. 24. b. where the original cause is the spiritual, and they proceed upon a temporal, a prohibition lies. See 39 E. 3. 22 E. 4. Consultation, that right of tithes which is merely ecclesiastical, yet if the question arise of the limits of a parish, a prohibition lies: and this case of the limits of a parish was granted by the Lord Chancellor, and not denied by the other side.

As to the fourth objection, that an averment is taken of the refusal of the plea *de modo decimandi*; it was answered and resolved, that the same is of no force for divers causes.

1. It

1. It is only to enforce the contempt.

2. If the spiritual court ought to have the trial *de modo decimandi*, then the refusal of acceptance of such a plea should give cause of appeal, and not of prohibition : as if an excommunication, divorce, heresy, simony, &c. be pleaded there, and the plea refused, the same gives no cause of prohibition : as, if they deny any plea, a mere spiritual appeal, and no prohibition lies.

3. From the beginning of the law, no issue was ever taken upon the refusal of the plea *in causâ modi decimandi*, nor any consultation ever granted to them, because they did not refuse, but allowed the plea.

4. The refusal is no part of the matter issuable or material in the plea ; for the same is no part of the suggestion which only is the substance of the plea ; and therefore the *modus decimandi* is proved by two witnesses, according to the statute of 2 E. 6. cap. 13. and not the refusal ; which proves, that the *modus decimandi* is only the matter of the suggestion, and not the refusal.

5. All the said five manners of discharge of tithes mentioned in the said branch of the act of 2 E. 6. being contained within a suggestion, ought to be proved by two witnesses, and so have been always from the time of the making of the said act ; and therefore the statute of 2 E. 6. clearly intended, that prohibitions should be granted in such causes.

6. Although that they would allow *bond fide de modo decimandi*, without refusal, yet if the parson sues there for tithes in kind, when the *modus* is proved, the same being expressly prohibited by the act of 2 E. 6. a prohibition lies, although the *modus* be spiritual, as appears by the said book of 4 E. 4. 37. and other the cases aforesaid.

And, afterwards, in the third day of debate of this case before his gracious Majesty, Dr. Bennet and Dr. Martin had reserved divers consultations granted *in causâ modi decimandi*, thinking that those would make a great impression in the opinion of the King : and thereupon they said, that consultations were the judgments of courts had upon deliberation, whereas prohibitions were only granted upon surmises : and they shewed four precedents :

One, where three jointly sued a prohibition in the case of *modi decimandi*, and the consultation says, *pro eo quod suggestio materiaque in eadem contenta minus sufficiens in lege existit, &c.*

2. Another *in causâ modi decimandi*, to be paid to the parson or vicar.

3. Where the parson sued for tithes in kind, and the defendant alleged *modus decimandi* to be paid to the vicar.

The fourth, where the parson libelled for tithe-wool, and the defendant alleged a custom, to reap corn, and to make it into sheaves, and to set forth the tenth sheaf at his charges, and likewise of hay, to sever it from the nine cocks at his charge, in full satisfaction of tithes of the corn, hay, and wool.

To which I answered, and humbly desired the King's Majesty to observe that these have been reserved for the last, and centre point of their proof : and by them your Majesty shall observe these things :

1. That the King's courts do them justice, when with their consciences and oaths they can.

2. That all the said cases are clear in the judgment of those who are learned in the laws, that consultation ought by the law to be granted.

For as unto the first precedent, the case upon their own shewing appears to be, three persons joined in one prohibition for three several parcels of land, each of which had a several manner of tithing ; and for that cause they could not join, when their interests were several ; and therefore a consultation was granted.

As to the second precedent, the manner of tithing was alleged to be paid to the parson or vicar, which was altogether uncertain.

As to the third precedent, the *modus* never came in debate, but whether the tithes did belong to the parson or vicar ? Which being betwixt two spiritual persons, the ecclesiastical court shall have jurisdiction : and therewith agrees 38 E. 3. 6. cited before by Bacon : and also there the prior was of the order of the Cisterrians ; for if the tithes originally belonged to the parson, any recompense for them shall not bar the parson.

As to the last precedent, the same was upon the matter of a custom of *modus decimandi* for wool : for to pay the tithe of corn or hay in kind, in satisfaction of

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of corn, hay, and wool, cannot be a satisfaction for the wool, for the other two were due of common right; and all this appears in the consultations themselves, which they shew, but understand not. To which the bishop of London said, that the words of the consultation were, *quod suggestio præd' materieque in eadem contenta minus sufficiens in lege existit, &c.* so as *materia* cannot be referred to form, and therefore it ought to extend to the *modus decimandi*.

To which I answered, that when the matter is insufficiently or uncertainly alleged, the matter itself fails; for matter ought to be alleged in a good sentence: and although the matter be in truth sufficient, yet if it were insufficiently alleged, the plea wants matter. And the Lord Treasurer said openly to them, that he admired that they would allege such things which made more against them than any thing which had been said. And when the King relied upon the said prohibition in the Register, when land is given in discharge of tithes, the Lord Chancellor said, that *that* was not like to this case; for there, by the gift of the land in discharge of tithes, the tithes were actually discharged: but in the case *de modo decimandi*, an annual sum is paid for the tithes, and the land remains charged with the tithes, but ought to be discharged by plea *de modo decimandi*: all which was utterly denied by me; for the land was as absolutely discharged of the tithes in *casu de modo decimandi*, when an annual sum ought to be paid, as where land is given: for all the records and precedents of prohibitions in such cases are, that such a sum had been always, &c. paid in *plenam contentationem, satisfactionem & exonerationem omnium & singularum decimarum, &c.* And although that the sum be not paid, yet the parson cannot sue for tithes in kind, but for the money: for, as it has been said before, the custom and the said acts of parliament (where there is a lawful manner of tithing) have discharged the lands from tithes in kind, and prohibited, that no suit shall be for them. And although that now (as it has been said) the parsons, &c. may sue in the spiritual court *pro modo decimandi*, yet without question, at the first, the annual payment of money was as temporal, as annual profits of lands were: all which the King heard with much patience. And the Lord Chancellor answered not to that which I answered him in, &c.

And after that his most excellent Majesty, with all his council, had for three days together heard the allegations on both sides, he said that he would maintain the law of England, and that his judges should have as great respect from all his subjects as their predecessors had had: and for the matter, he said, that for any thing that had been said on the part of the clergy, that he was not satisfied: and advised us his judges to confer amongst ourselves, and that nothing be encroached upon the ecclesiastical jurisdiction, and that they keep themselves within their lawful jurisdiction, without unjust vexation and molestation done to his subjects, and without delay or hindering of justice. And this was the end of these three days consultations.

And note, that Dr. Bennet in his discourse inveighed much against the opinion in 8 E. 4. 14. and in my Reports in Wright's case, that the ecclesiastical judge would not allow a *modus decimandi*; and said, that *that* was the mystery of iniquity, and that they would allow it. And the King asked, for what cause it was so said in the said books? To which I answered, that it appeared in Linwood, who was Dean of the Arches, and of so profound knowledge in the canon and civil law, and who wrote in the reign of King Henry 6. a little before the said case in 8 E. 4. in his title *de decimis, cap. quoniam propter, &c. fol. 139. b. Quod decimæ solvantur, &c. absque ulla diminutione*: and in the gloss it is said, *quod consuetudo de non decimando, aut de non bene decimando non valet*. And that being written by a great canonist of England, was the cause of the said saying in 8 E. 4. that they would not allow the said plea *de modo decimandi*; for always the *modus decimandi* is less in value than the tithes in specie, and then the same is against their canon; *quod decimæ solvantur absque diminutione, et quod consuetudo de non plene decimando non valet*. And it seemed to the King, that that book was a good cause for them in the time of King Edward 4. to say, as they had said; but I said, that I did not rely upon that, but upon the grounds aforesaid, (*scil.*) the common law, statute laws, and the continual and infinite judgments and judicial proceedings; and

that if any canon or constitution be against the same, such canon and constitution, &c. is void by the statute of 25 H. 8. c. 19. which see and note: for all canons, constitutions, &c. against the prerogative of the King, the common laws, statutes, or customs of the realm, are void.

Lastly, the King said, that the high commission ought not to meddle with any thing but *that* which is enormous and exorbitant, and cannot permit the ordinary process of the ecclesiastical law; and which the same law cannot punish. And that was the cause of the institution of the same commission, and therefore, although every offence, *ex vi termini*, is enormous, yet in the statute it is to be intended of such an offence, as is *extra omnem normam*, as heresy, schism, incest, and the like great offences; for the King said, that it was not reason that the high commission should have consance of common offences, but to leave them to ordinaries, *scil.* because that the party cannot have an appeal in case the high commission shall determine of it. And the King thought that two high commissions, for either province one, should be sufficient for all England, and no more.

H. 7 Ja. A. D. 1609. B. R. *Brickendine v. Denwood*. [Noy. 134.]

IT was found upon a special verdict, that the parson of the parish makes a collector of tithes, who had licenced a parishioner to carry away his corn, without setting forth tithes. By the court clearly, that licence is void. *Vide* 5 E. 3. 63. Plow. 104. That a collector of rents cannot make an acquittance and discharge them. And a consultation was awarded.

Where a parson has made a collector of tithes, such collector cannot licence one to carry away his corn, without setting out his tithes.

E. 7 Ja. A. D. 1609. B. R. *Anon.* [2 Br. & G. 247.]

UPON a motion made by *Wincolt*, of the Middle Temple, to dissolve a prohibition granted to the spiritual court, upon a libel for tithes there, the court took this rule, that when a consultation is lawfully granted, there a new prohibition shall not be granted upon the same libel, and yet they qualified that with this difference; that is, when a consultation is granted upon any fault of the prohibition in form by misprision of the clerk, or by mis-pleading of any statute, in that, or such like, there a new prohibition may be granted upon the same libel; but if a consultation be granted upon the right of the thing in question, there a new prohibition shall not be granted upon the same libel. See the statute of 5 Ed. 3.

When a consultation has been lawfully granted, no new prohibition shall issue upon the same libel, unless it be upon default in form, by misprision of the clerk, or by mispleading any statute, or such like.

E. 7 Ja. A. D. 1609. Scacc. *Anon.* [Lane, 39.]

IF a copyholder of the King's manor pretend prescription for a *modus decimandi* against the parson, the right of tithes shall be tried in the exchequer, and a prohibition was granted to the ecclesiastical court in this case.

the exchequer and the spiritual court prohibited.

H. 8 Ja. A. D. 1610. B. R.
Anon. [1 Bulstr. 108.] 4 Gw. 1574.

NOTA, upon the statute of 2 Edw. 6. cap. 13. the parson libels for tithes, and upon this the case appears to be in this manner. The parishioner who was to pay his tithes, sets them out according to the statute, but they being so set out, he would not suffer the parson to come and take them away, thinking by these means and this way to avoid the statute, and upon this the parson libels in the spiritual court for these tithes. The defendant there surmises, that he did not hinder him from the having of his tithes, but says that he did hinder him in coming for his tithes one way, (which was the usual way,) but that he might have come for them another way, and upon this a pro-

One set out his tithes, but would not suffer the parson to come and take them away; to a libel in the spiritual court he pleaded, that he only hindered the parson from coming one

way (which was the usual way); a prohibition was granted upon suggestion that there was no question about the payment of tithes, but of the way to come for them; afterwards a consultation was granted by the whole court.

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a prohibition was prayed, and granted, supposing that here was no question at all, as touching the payment of tithes, but as touching the way to come for them, and upon this whole matter the parson prayed a consultation. The whole court clear of opinion, that such a setting out of tithes as the same appeared to be here in this case, without suffering the parson to come and take away his tithes, is a fraudulent, and no good and sufficient setting forth of tithes, according to the statute and as the statute doth require, which ought to be a fruitful and effectual setting forth of his tithes, for in so doing he ought to set forth his tithes, and also to suffer the parson to come, have, and to take away his tithes, otherwise, unless he do also perform this, the setting out of his tithes here is to no purpose for to excuse him. And to the surmise here made for the way, the whole court clear of opinion, that this is in no wise at all material: And so without any further motion or arguments, by the rule of the court a consultation was granted, *quod nota*.

E. 8 Ja. A. D. 1610. C. B. Dr. Newman's case. [Godb. 175.]

It was said by Coke, C. J. that it had of late time been adjudged twice, that if privileged trees be often lopped for fuel, yet the tops and lops are not titheable, for the body being discharged, so shall the branches,

IN this case it was said by COKE, Ch. J. that it had of late time been twice adjudged, that if timber trees be oftentimes topped and lopped for fuel, yet the tops and lops are not titheable; for the body of the trees being by law discharged of tithes, so shall be the branches: and therefore he that cuts them, may convert them to his own use if he please.

may convert them to his own use if he please. trees be often lopped for fuel, yet the tops and lops are not titheable, for the body being discharged, so shall the branches,

T. 8 Ja. A. D. 1610. C. B. Anon. [Godb. 180.]

A vicar sued in the spiritual court for tithes with which the vicarage had been endowed in the time of Henry III. the court refused a prohibition upon allegation of a modus in discharge of those tithes. Qu.

A VICAR was endowed in the time of King Henry III. of divers tithes, and afterwards he libelled for those tithes in the spiritual court. The defendant alleged a *modus decimandi*, and prayed a prohibition, and day was given to the party to shew cause why the same should not be granted; and at the day the deed of endowment was produced, and shewn in court. By which it did appear, that the vicar was endowed of hay, viz. of the tenth part of it; and so of the remainder of the tithes for which he libelled; whereupon the court refused to award a prohibition. *Quere causam*. For as I conceive, a *modus decimandi* may accrue after the endowment. (1)

(1) I conceive a modus might have accrued before the endowment.

T. 8 Ja. A. D. 1610. Dom. Proc. Case of Convocations. [12 Co. 72.]

It was resolved by two Chief Justices, and divers other Justices at a committee before the Lords in parliament: 1. That a convocation cannot assemble at their own, or at the Archbishop's convocation, without the assent of the king, i. e. by writ.

NOTE, it was resolved by the Chief Justices and divers other Justices, at a committee before the lords in the same parliament, on divers points concerning the authority of a convocation:

1. That a convocation cannot assemble at their own or the archbishop's convocation, without the assent of the king, i. e. by writ.

2. That after their assembly they cannot confer together to constitute any canon without licence *del Roy*.

3. When they upon conference conclude any canons, yet they cannot execute any of their canons without royal assent.

4. They cannot execute any after royal assent, but with these four limitations:

1. That they be not against the prerogative of the king.

2. Nor against the common law.

3. Nor against any statute law.

4. Nor against any custom of the realm.

2. That after

their assembly they cannot confer together to make any canons with the licence of the king.

3. When they upon conference conclude any canons, yet they cannot execute any of them without royal assent.

4. They cannot execute any after the royal assent, but with these four limitations.—1. That they be not against the prerogative of the king; 2. Nor against the common law; 3. Nor against any statute law; 4. Nor against any custom of the realm. 2 Hen. 6. 13. A convocation may make constitutions, by which those of the spirituality shall be bound, for this, that they all, either by representation or in person, are present, but not the temporality.

And

And all this appears by the statute 25 Hen. 8. cap. 19. and this was but an affirmation of what was before the said statute, for that it appears by 19 Edw. 3. title *Quare non admittit*, 7. where it is held, that if a canon law be against the law of the land, the bishop ought to obey the commandment of the king, according to the law of the land, 10 Hen. 7. 17. there is a canon that no spiritual person shall be put to answer before a secular judge; but this does not bind, because it is against the common law; and it appears by the statute of Merton, cap. 9. that they in case of bastardy were enforced to certify against the law of the holy church, that *nati ante matrimonium fuerint bastardi, quia ecclesia habet tales pro legitimis, et rogaverunt omnes Episcopi Magnates quod consentirent, quod qui nati fuerint ante matrimonium essent legitimi*; which proves that the canon law in this point being repugnant to the law of the land, was not of any force; and for this they implored the aid of the parliament, *et omnes Comites et Barones una voce responderunt, quod nolumus leges Angliæ mutari, quæ hæc usque usitata sunt et approbata*.

.. 2 Hen. 6. 13. A convocation may make constitutions, by which those of the spirituality shall be bound, for this, that they all, or by representation, or in person, are present, but not the temporality.

21 Edw. 4. 47. The convocation is spiritual, and all their constitutions are spiritual. *Vide* the records in the Tower of 18 H. 8. 8 Edw. 1. 25 Edw. 1. 11 Edw. 2. and 15 Edw. 2.

Prohibitio Regis ne clerici in congregatione sua, &c. attentet contra jus seu coronam. Et alia, ne quod statuat in concilio suo in præjudicium Regis seu legis, &c. By which it appears, that they can do nothing against the law of the land, for every part of the law, be it common law or statute law, cannot be abrogated nor altered without an act of parliament, (to which every one shall be party) except for spiritual causes, or which concern spiritual persons; nor then if it be against the prerogative of the king or the common law.

M. 8 Ja. A. D. 1610. C. B.

Roberts's case. [12 Co. 65.] Cr. Ja. 269. 1 Gw. 230.

IN this term, in the case of one Roberts, a prohibition had been granted in a case of subtraction of tithes, upon surmise that the plaintiff being defendant in the spiritual court, had but one witness in that court to prove his demise; to which that court said, that *singularis testis* is not allowable; and upon consideration and sight of a prohibition granted upon the same cause in Hil. 3 El. in *Banco Regis*, it was resolved by COKE, Ch. J. *et totam curiam in Communi Banco*, that consultation should be granted, and that for divers causes.

1. It appears by the Register, fol. 5. that it is put for a rule, *quod non est consonum rationi, quod cognitio accessorii in curiâ Christianitatis impediatur, ubi cognitio causæ principalis ad forum ecclesiasticum noscitur pertinere*: and with this agrees 1 Rich. 3. 4.

2. If such a surmise shall be allowed, then in every case for mere delay such a surmise may be made: for he who was plaintiff in the spiritual court cannot deny, that where it is surmised that he had one witness, that he has two or more, for then he affirms matter against himself: and when the spiritual court has jurisdiction of the principal cause, they determine the accessory. But it was objected, that if A. claiming a lease by B. of a rectory, libel for subtraction of tithes, and the defendant plead a former lease made by B. and C. and the defendant have but one witness in the case to prove the former lease, if no prohibition shall be granted, the defendant shall be charged; and if C. sue him

1. A suggestion that the defendant in the spiritual court had but one witness there to prove a deed, is not a sufficient ground for a prohibition, for where the spiritual court has jurisdiction of the principal matter, they shall determine the accessory; but if a question of common law arise upon the construction of a statute, or the like, and the spiritual court will judge of it, upon against the rule

of the law; there, upon special surmise, and proof to the court that such surmise is true, prohibition lies. 2. The judges of the spiritual court cannot write to the judges of the common-law courts to certify, as these judges do to the spiritual court, by authority of the king's writ, where issue is taken upon any matter triable by the ecclesiastical law, as bastardy, ability of a clerk, &c. 3. A man had a rectory impropriate, consisting of glebe and tithes, and by deed granted the rectory and all lands and tithes; no livery being made, it was in question, whether tithes which may pass without livery passed by this grant: held, that by livery of the charter, the tithes did not pass as in gross, for the intention of the parties was to pass the entire rectory by feoffment, and not to pass the tithes by the same, and so to dismember the rectory by fractions, and that by construction of law against the intention of the parties.

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upon the statute 2 Edw. 6. at the common law, the testimony of that one only will there be sufficient, and so he shall be twice charged. To which it was answered, that first the fault was the defendant's, that he would not set forth his tithes, and then he shall be charged whosoever takes them. But in such a case, those of the ecclesiastical court will, upon one good witness, and any concurrent vehement presumption, as possession, or the like, allow of such a proof. And the testimony of one witness in our law is no conclusive evidence, but ought to be left to the conscience of the jury, and so the validity or invalidity of proof in matters of *fact* shall be left to them; but if a question of the common law arise from the party upon the construction of a statute, or the like, and those of the ecclesiastical court will take upon them to judge of it against the rule of law, there, upon special surmise of it, and upon the shewing of the answer or other pleadings of the parties, by which it appears to the court, that such surmise is on good ground, a prohibition lies; for matter in law, arising upon estates or interests (given) by the common law and construction of statutes, ought to be determined according to the rules of common law; *et non debet trahi ad aliud examen*.

And COKE, C. J. cited a notable judgment, Pasch. 35 El. in *Bank le Roy*. (1) Futter brought a prohibition against Clemens and Whiskard, and Futter counted that he himself was owner of the rectory of Langham, in the county of Norfolk, and libelled against Clemens, one of the defendants, before the official of the bishop of Norwich, for subtraction of tithes, scil. of wheat, &c. pendent which suit, the said Whiskard, intervening *pro interesse suo*, made these allegations against the said Futter.

1. That the said rectory was inappropriate to the monastery of Wenling, and by the dissolution of the said monastery, came to the hands of Henry VIII. and did convey it by mesne descent to Queen Elizabeth, who by her letters patent of concealment granted it to Mins and Hall, who enfeoffed Borome, who did let it to Whiskard for four years, and proved his allegations by witnesses, upon which in fine, sentence was given against Futter, and 8l. 10s. given to Clemens for costs, and 13l. 6s. to Whiskard; and Futter did appeal to the Court of the Arches, and there Futter claimed the said rectory by reason that Hall was seized of it, and by his deed gave and granted the said rectory, and lands and tithes to it appertaining, to Sir Edward Clere, before the feoffment all supposed to be made by Borome; and that Sir Edw. Clere by his deed did enfeoff Futter; and although that he offered to prove the delivery of the deed of the said feoffment made to Sir Edward Clere by one sole witness, the ecclesiastical court would not allow it without producing another witness: and Futter further said, that although he had further alleged there, that these were matters determinable at the common law, notwithstanding they gave sentence: the defendant for to have a consultation pleaded, that Futter in the said Court of the Arches, proved the delivery of the deed aforesaid, by Sir Edward Clere and Mouse, but could not prove livery and seisin according to the deed. And for this cause sentence was given, without (for) that the judges of the Arches would not admit the said proof, unless he proved the deed by other witnesses, upon which Futter demurred in law; and it was objected by the counsel for Futter:

1. That Whiskard, who is a mere stranger to the suit, and who comes in *pro interesse suo* in the said rectory, pleads matter merely determinable at the common law, scil. letters patent, feoffment, and lease for years; and on the other part, Futter claims an estate in the said rectory, by conveyance at the common law. And now the question in the ecclesiastical court being only who has the best estate in the said rectory by the common law, this ought to be tried by the common law, and not in the ecclesiastical court; for this is the birth-right of the subject to have his inheritance and freehold tried and determined by the common law; for the civil law differs much in deciding of inheritances.

2. It was objected, that all matters in law ought to be determined by the judges of the law; and in this case matters of law arising, scil. if a man have a rectory inappropriate, which consists in glebe and tithes, and by his deed

(1) Ante, 124; cited in *Wright v. Wright*.

deed give and grant the said rectory, and all lands and tithes any way belonging or appertaining to it, to another and his heirs, and no livery be made in this case, if the tithes shall pass or no, for that tithes may pass without any livery; this question is not fit to be determined by the ecclesiastical judges, but by the judges of the common law, *quod quisque norit, in hoc se exerceat*.

3. It was objected, that Whiskard was a mere stranger to the suit, and all his allegation is temporal, and for that it is a stronger case to maintain a prohibition, forasmuch as betwixt him and Futter nothing is in question, but to whom the inheritance of the rectory belongs; but Clemens, who is sued for subtraction of tithes, hath greater colour in his defence, being lawfully sued in the ecclesiastical court, than for Whiskard, who is no party to the suit for any ecclesiastical cause, but all his allegation, as has been said, is temporal.

4. It was objected, that Futter had but one witness to prove the delivery of the deed, and in the ecclesiastical law, *unus testis, est nullus testis*, for all which causes it was prayed that the prohibition may stand, and that no consultation may be granted.

To which it was answered and resolved by Sir Christopher Wray, Ch. J., and *per totam curiam* :

1. That to the first objection, for that the original belongs to the ecclesiastical court, the determination of all that which depends upon it belongs to the judges of the same court, although that the matter be triable by the common law; but where the original matter belongs to the common law, and is there commenced, and issue be taken upon matter triable by the ecclesiastical law, there the judges of our law shall write to the judges of the ecclesiastical court to try it, and to certify: and the reason of this diversity is, that our judges have authority to write and command them by the king's writ to certify them; but they cannot write to the judges of our law to try any thing, and to certify them, for they have no such authority to command by writ, but to obey the writs of the king: as in any action ancestral, if bastardy be pleaded in the demandant, and upon this issue be joined, this shall be tried by the bishop, and his certificate shall bind: so in a *Quare impedit*, if issue be taken, whether a clerk, who was presented, were able or not able, this shall be tried by examination of the clerk, and certified by the bishop: but although that such issues be, in their nature, triable by the ecclesiastical law, yet if the case were such, that the ecclesiastical court could not try it, then (to the end that justice shall not be wanting) such ecclesiastical matter shall be tried by the common law, as 4 Edw. 3. 26. if the presentee be dead, if he were able or not able, shall be tried *per pais*; for the bishop cannot try it: but against this was objected the stat. *De Articulis Cleri*, c. 13. by which it is provided, *quod de idoneitate personarum personarum ad beneficium ecclesiasticum, pertineat examinatio ad iudicem ecclesiasticum*; upon which it was concluded that the trial *De idoneitate personarum*, in all cases belongs to court-christian. To which it was answered and resolved, that true it is, that the trial of ability belongs to them; but the statute explains in what manner it shall be made, for the statute says, *pertinet examinatio ad iudicem ecclesiasticum*, so that this trial ought to be by examination of the party, and this cannot be when the presentee is dead: and although he be not party to the writ, yet he may be examined; and with this agrees 39 Edw. 3. 2. the Earl of Arundel's cause, and 4 Edw. 3. 25. 16 Eliz. Dyer, 327. So if bastardy be alleged in one who is not party to the writ, there, for this, that the certificate binds for ever, it shall be against law and reason, that he should not be party to the certificate; for this cause in such case it shall be tried *per pais*; and if any difficulty arise upon it, the judges of our law used to consult with the judges ecclesiastical; and with this accords 4 Edw. 3. 37. The same law of profession, 42 Edw. 3. 8. So if bastardy be alleged in one who is dead. Vide 17 Edw. 3. 5. where bastardy is alleged in the tenant, and one who is a stranger to the writ, who are sisters. Vide 32 Ed. 3. Trial, 59. where a tenant alleged bastardy in himself, and the demandant doth aver him *mulier*. Vide 29 Ass. pl. 14. 6 Eliz. Dyer, 226. 228. If the issue be *quod vocavit per resignationem*, part of which is temporal, and part spiritual, this shall be tried *per pais*. Vide 9 Hen. 7. Profession and the time of it, &c. But admission and

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institution, although that it be alleged in a stranger to the writ, yet this shall be tried by the ordinary; as it appears 7 Edw. 6. 78. 6. in Dyer; for admission, institution, resignation, *et similia*, are judicial acts, and remain in their courts and register, upon which they ground their certificate; otherwise it is of bastardy, idoneity, &c. By which it appears, that in divers cases the judges of the common law write to the ecclesiastical judges, commanding them to certify some thing put in issue; and the judges of our law prohibit the judges ecclesiastical to hold plea of some things which are determinable at common law; but the court ecclesiastical has not power to write to our judges, or to command them, or to prohibit them when they hold plea of things determinable by the ecclesiastical judges: but this is erroneous, and shall be reversed by error. And of the other side, if in the ecclesiastical court the suit be for a legacy, and the defendant plead a release, if in the admitting or rejecting of proofs concerning this release, which is matter determinable at common law, they do wrong to the plaintiff or defendant, they have no remedy but by way of appeal.

2. To the second it was answered and resolved, that if upon consultation with men learned in the law, they give sentence according to law, this is well done; and no prohibition ought to be granted, but if they take upon them to draw the interest of any man *ad aliud examen*; and to judge against the rule of law, concerning the inheritance or interest of any, there prohibition lies; and in the case at the bar, they well resolved the law, for by the said livery of the charter the tithes do not pass as gross, for this, that the intention of the parties was to pass the entire rectory by feoffment, and not to pass the tithes by the same, and so to dismember the rectory by fractions, and that by construction of law, against the intention of the parties.

3. As to the third, it was answered and resolved, that by the ecclesiastical law, a stranger may come in *pro interesse suo*, and when they have jurisdiction of the original cause of the suit, we ought not to draw in question their order and proceeding; but if they proceed *inverso ordine*, or not observing form, this ought to be redressed by appeal: and although that the matter depending upon the original cause be determinable by the common law, yet it shall be determined, as it has been said, in the ecclesiastical court.

4. As to the fourth objection, it was answered and resolved, that such a surmise, that he has but one witness, is not sufficient to have a prohibition, for this, that the ecclesiastical court has jurisdiction of the principal, and if such a surmise shall be sufficient, all suits in the ecclesiastical court shall be either delayed, or quite taken away, for such a surmise may be made in every case; and the plaintiff in the ecclesiastical court cannot have any good answer to it to have a consultation, which agrees with the resolution in the principal case, &c.

M. 8 Ja. A. D. 1610. B. R.

Hunston v. Cocket. [Cr. Ja. 252.] 1 Gw. 235.

An appropriation made
24 Hen. 8.
by license of the
bishop shall be
intended to be
good, and to
have all requisite
circumstances, though
there were not
any endowment
of the vicarage,
for appropriations
shall not
now be called in
question.

DEBT upon the statute of 2 Edw. 6. for not setting out tithes. The jury find a special verdict, that a prior was seized of the advowson of this parsonage, and 24 Hen. 8. the church being then void, the bishop gave him license to hold it *in proprios usus*; and that there was not any endowment of the vicarage. And they find the statute of 4 Hen. 4. of appropriations, and the statute of 27 Hen. 8. which gives priories and religious houses to the King; and that the King presented the plaintiff by lapse, who was admitted, instituted, and inducted; and that the defendant did not set out his tithes, *et si*, &c. The points intended were, whether the appropriation were good, there being no endowment of the vicarage; and whether this statute, being in the affirmative, (that vicarages should be endowed,) makes all appropriations void, unless there be a vicarage endowed; and whether an appropriation by the bishop's license, without the King's license, be good. But WILLIAMS said, it has been resolved, that whether appropriations be good or not, cannot now be called in question, but they shall be intended to be good, and to have all requisite

requisite circumstances; and the statute gives them to the King, and does not except any man's right, unless theirs only who had right at that time, which no parson now has. But this case was, without argument, adjudged for the defendant; for the plaintiff claims *per presentationem regis ratione lapidis*: whereas it appears, if the King had any title to present, it was *jure coronæ*, and so the presentment merely void; and it is an admission, institution, and induction, without any presentment, which is merely void, as it was adjudged between *Green and Baker, quod vide*. Wherefore for this cause, it appearing that the plaintiff had not any title, it was adjudged for the defendant.

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HUNSTON
v.
COCKET.

M. 8 Ja. A. D. 1610. C. B. *Parker's case*. [2 Br. & G. 7.]

THREE were cited to appear in the court at Chester for tenths, and treble damages were demanded. And also in the libel it is suggested, that the land is barren, and very unfruitful, and prohibition was awarded against those jointly; and yet it was agreed, that they ought to count upon the prohibition severally.

Where to a libel against three a joint prohibition issued, it was held that they must declare severally.

M. 8 Ja. A. D. 1610. C. B. *Case of Prohibition*. [12 Co. 76.]

NOTE, it was resolved in the same term, that if a man be excommunicated by the ordinary, where he ought not to be, as after a general pardon, &c. and the defendant being negligent do not sue a prohibition, but remain excommunicate forty days, and upon certificate in chancery, he be taken by the King's writ *de excommunicato capiendo*; that no prohibition lies in this case, for that he is taken by the King's writ, and no precedent or authority can be found where a prohibition was granted after the party was taken by the King's writ; for prohibition lies to prohibit ecclesiastical proceedings, not any thing which is done by the King's writ by force of the common law; and if a prohibition be granted, it will not deliver the party. Then it was moved, what remedy hath the party who is so wrongly excommunicated? To which it was answered, that he has three remedies, &c.

No prohibition lies after the King's writ *de excommunicato capiendo*.

1. He may have a writ out of chancery to absolve him; for as it is held in 14 Hen. 4. fol. 14. In all cases where a man is excommunicated by the bishop against our law, he shall have a writ out of the chancery directed to the bishop, commanding him to assail him; and with this agrees 7 Edw. 4. 14.

2. When a man is excommunicated against the law of this realm, so that he cannot have a writ *de cautione admittendæ*, for then he ought *parere mandatis ecclesiæ in forma juris, id est, ecclesiastici*, where in truth it is *excommunicatio contra jus et formam juris, id est, communis juris*: but if he shew his cause to the bishop, and request him to assail him, for this, that he was excommunicated after the offence was pardoned, or this, that the cause does not appear to be of ecclesiastical cognizance, and he refuse to assail him, so that he is now disabled to sue any writ of the King, so long as he remains excommunicated, he may have an action *sur le case* against the ordinary, who hath done him this wrong, to disable him in this case; and with this agrees the Dr. & Stud. lib. 2. cap. 32. fol. 119.

3. If the party be excommunicated for none of the causes mentioned in the act of 5 Eliz. cap. 23. then he may have this for plea in the king's bench by the same act, and avoid the penalties inflicted by the same act.

Note, it was resolved by the court, &c. that where one is cited before the dean of the arches in cause of defamation, for calling the plaintiff whore, out of the proper diocese, *scil.* the diocese of London, against the statute 23 H. 8. and the plaintiff has sentence, and the defendant is excommunicated, and so continues eighty days; and upon certificate into the chancery, a writ of *excommunicato capiendo* is granted, and after the defendant is taken and imprisoned by force of it, that he shall not have a prohibition upon the statute 23 Hen. 8. for no writ in the register extends to it, *et sententiam, si quam fulminaveritis, sine dilatione revocetis*, and after sentence is appealed, a prohibition lies, as appears by the register; but no writ nor precedent can be shewn in this case; but

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there is a writ in the register called a writ *de cautione admittendi*, when the defendant is taken by the King's writ *de excommunicato capiendo, de parendo mandatis ecclesie*, and to assail and deliver the defendant: but note a diversity, where it appears to the court, that the matter of the libel is not within their jurisdiction, as of lay fee, or of lay contract, &c. there lies a prohibition with clause to deliver the party, for there he cannot find caution *de parendo mandatis ecclesie*, for this, that *mandata ecclesie* are *contra legem et extra jurisdictionem suam*: but in the case at the bar, although it appear by the libel, that the defendant was of one such parish in London, yet inasmuch as the statute 23 Hen. 8. has many exceptions, *scil.* that the ordinary request the archbishop, &c. to examine the case, &c. so that the said defamation being the matter of the libel, is of ecclesiastical cognizance, and the statute has many exceptions, so that it does not appear to us judicially without information, that the citation is against the form of the statute; and this information comes too late in this case after the defendant has persisted so long in his contumacy, and is taken by the King's writ and imprisoned.

M. 8 Ja. A. D. 1610. C. B.

Ford v. Ponnoy. [Noy, 196.] 2 Br. & G. 9.

A husband, proprietor of tithes in right of his wife, sued alone for the treble value against a parishioner who set forth his tithes, but afterwards took them away; held that the action lay for the fraud, but that the wife ought to have been joined.

BARON *et feme* lessees of a parsonage, &c. The parishioner sets forth the tithes fraudulently, and presently takes them away again, as it appears upon the evidence. And the husband (1) only brought the action, upon 2 Edw. 6. for the treble damages. And it was resolved, that debt lies for treble damages, upon such a fraudulent setting forth of tithes, although that the clause of treble damages speak nothing of fraud.

2. But it was resolved, that the husband and wife ought to have joined in the action, because it is not for a thing in possession. And if the husband die the wife shall have the damages, and not the executor of the husband.

(1) The husband was entitled in right of his wife. Br. & G.

M. 8 Ja. A. D. 1610. B. R. *Anon.* [2 Br. & G. 11.]

A parol agreement that one may retain his tithes for three or four years is good; but a grant of the tithes of another, though but for a year, is not good, without deed.

UPON a motion of a prohibition. If a parson contract with me by word, for keeping back my own tithes for three or four years; this is a good bargain by way of retainer; and if he sue me for my tithes in the ecclesiastical court, I shall have a prohibition upon this composition. But if he grant to me the tithes of another, though it be but for a year, this is not good, unless it be by deed.

M. 8 Ja. A. D. 1610. C. B. *Anon.* [2 Br. & G. 17.]

An agreement that one shall retain his tithes, made after the corn sown, and for the same year, is good; but not if made before the corn is sown, or for more years than one; and all the court agreed that such an agreement for the tithes of another was void.

IF a parson agree and contract with me, that I shall keep back my own tithes, if that be made after that I have sown my corn, and for the same year only, this shall be good. And if the parson sue in the spiritual court for the tithes, I shall have a prohibition; but if it be for more years than one, or before the corn be sown, this shall not be good. By *Coke* and *Foster* against *Warburton*; and *Coke* said it was adjudged in the king's bench, in parson *Boothe's* case, that a contract made by a parishioner for keeping back his tithes for so many years as he shall be parson, was not good; and so was *Wellowes'* case here also: but it was agreed by them all, that such a contract or agreement for the tithes of any other was void, but only the party himself which was party to the agreement, and that ought to be made by way of keeping them back. See 20 Hen. 6. and 21 Hen. 7. 21. b.

E. 9 Ja. A. D. 1611. Scacc. *Anon.* [Lane, 100.]

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IS. was parson of D. as appropriate, and A. is vicar, and the King is patron of the said vicarage, and debate was between the parson and the vicar; this suit ought to be in the exchequer for these tithes, and by the court it may be commenced accordingly by English bill in the exchequer, or by action in the office of pleas, for it is apparent that the King is supreme ordinary.

A suit for tithes between parson and vicar, where the King is patron, shall be in the exchequer, by English bill, or by

action in the office of pleas, for it is apparent that the King is supreme ordinary.

Tr. 9 Ja. A. D. 1611. C. B.

Dorwood v. Brikinden. [2 Br. & G. 26.]

UPON the statute of 5 Edw. 3. a man libelled in the spiritual court for wood cut, and a consultation was granted; yet the defendant in the court-christian might have a new prohibition, if it appeared the first consultation was not duly granted. So if a man libel for tithes for divers years, and prohibition be granted for part of the years, and after that a consultation be awarded, yet the plaintiff may have a new prohibition for the residue of the time, notwithstanding the statute of 50 Edw. 3. and that it be upon one self same libel.

One may have a second prohibition after consultation, if it were not duly granted; so if a libel be for tithes of divers years, and a

consultation granted for part of the years, yet he may have a prohibition for the rest.

Tr. 9 Ja. A. D. 1611. B. R. *Vaughan's case.* [1 Bulstr. 125.]

ONE Vaughan did libel in the spiritual court of Hereford, for tithe hay, a prohibition was prayed, for that they did offer there for to try the validity of assignment of leases, this being there made the question, the court demanded whether the party had put in his surmise there, of this, and if they refused for to allow this, the court would prohibit them. WILLIAMS, J. and the whole court, they are not there to meddle with the determining of any contracts, nor yet with the validity of assignments of leases, these matters belong not unto them, but to the common law, and therefore, by the rule of the court, prohibition was granted.

The spiritual court cannot determine upon contracts, or the validity of assignments of leases.

Tr. 9 Ja. A. D. 1611. B. R.

Pothill v. May. [1 Bulstr. 171.] 4 Gw. 1571.

IN a prohibition, the case was, the defendant being parson of D. did libel in the spiritual court for tithes of *siva caduā*, and for the herbage for depasturing his geldings, the plaintiff there shewed, that they were his hackney geldings which he kept for his pleasure, and for himself and his servants to ride upon, being his saddle horses; and this plea being there refused, for this cause he prayed a prohibition; the whole court were clearly of opinion, that here was good cause for a prohibition, for that these horses are not titheable, nor any tithe herbage is to be paid for them; otherwise it were, if they had been cart horses, which he had to till his ground, or for cattle bought, and fatted to sell again for gain, for these he ought to be answerable to the parson for the herbage of them, but not for the herbage for his geldings, by him kept, and used only for his pleasure, but if it were for working horses, for the cart or plough, or for fat cattle, bought and fatted to sell again, of such cattle allowance is to be made for their herbage, because that a profit comes in by them, but otherwise it is of saddle horses; the whole court agreed in this, and therefore in this case, by rule of the court, a prohibition is granted.

No tithe is due for agistment of saddle horses kept for pleasure, but for working horses for the cart or plough, or cattle bought and fatted to sell, it shall be paid.

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M. 9. Ja. A. D. 1611. C. B. *Willott v. Spencer*. [1 Br. & G. 98.]

In an action on 2 E. 6. it is sufficient for the plaintiff to state himself in the declaration to be proprietor without other title: the principal matter is the damage for not setting out tithes, which alone is traversable.

THE plaintiff brought an action of debt for tithes of wood upon the statute of 2 E. 6. and *Foster* argued that judgment ought not to be given for the plaintiff, because the plaintiff did not shew in his plaint that he was parson; for he ought to bring his action according to that name that he claimed the tithes by, and this ought to be expressed in the *queritur*; and therefore if a man bring his action to recover any things as heir, executor, or sheriff, he ought to name himself so in the *queritur*, 30 H. 6. and 9 H. 4.; but *Touss* said the same exception was taken between *Merrick* and *Peters*, and disallowed. *FLEMING*, J. said, that if it had been by writ, he must have shewn it, but need not, it being by plaint; if the truth appear in that, and if a man bring his action as assignee, he need not shew it in his plaint, if the truth appear in the declaration; but it is otherwise in an original, and a plaint in the king's bench is as an original, but not in all things; and if the plaint be uncertain, the defendant in that court shall plead in abatement of the plaint, as to an original in the common pleas; and at last two precedents were shewn,—one between *Champion* and *Hill*, and the other between *Merrick* and *Wright*, that were allowed without naming of the plaintiff rector in the *queritur*; and judgment was given for the plaintiff by the whole court.

M. 9. Ja. A. D. 1611. C. B.

Baxter v. Hope. [2 Br. & G. 30.] Co. Ent. 459.

A custom was alleged in a town, that every inhabitant who maintained a family and dairy for manuring his land and maintenance of his family, had used, from time whereof, &c. to pay tithes of corn and hay growing upon his farm, in kind, and by reason thereof had been used to be discharged of tithes of the aftercrop of the same land, and to pay tithes of milk and calves in kind, and by reason thereof had been discharged of tithe of young and barren beasts. And held good upon solemn argument by all the judges.

IN prohibition the plaintiff suggests, that within such a town was such a custom, that every inhabitant who maintained a family and dairy, for manuring his land and maintenance of his family, has used of time out of memory, &c. to pay tithes of corn growing upon his farm, in kind, and by reason thereof has used to be discharged of after crop of the said land; and also that they have used to pay tithe milk and tithe calves in kind; and by reason thereof have been discharged of tithe of young and barren beasts: and the plaintiff suggested further, that he occupied a farm and maintained a family and dairy, for the manurance of that, and maintenance of his family, and has paid his tithe corn, and milk, and calves, in kind; and for that ought to be discharged of tithes for the after-crop, and for young and barren beasts, and for the tenths of which suit was begun in court-christian, and upon demurrer joined upon prohibition, the custom was debated whether it were good or no; and it was moved first by *Houghton*, Serjt. for the defendant, that the custom was not good, insomuch that by that the plaintiff was not to pay more than by the law he ought; for he ought to pay tithe corn and milk and calves in kind; and this is no more than the law compels him to do; and this cannot be a consideration to discharge him of other things; for all things which renew, ought to pay tithes of common right, as after pasture, and barren cattle, and corn, and milk, and all other things which renew: if there be no good custom to the contrary, which is grounded upon consideration; and then to consider how much consideration shall be valuable in other cases, and what not: and to that it appears in 9 Ed. 4. 18. and 19. in trespass upon the statute of 5 Rich. 2. The defendant pleads accord that the plaintiff entered into his land again, and agreed that that was not bar, insomuch as agreement without satisfaction is not bar, and entry into lands is no more than he might do without the agreement, and for that it is not good for default of consideration. So in 12 H. 7. 15. a. in trespass for goods taken, the defendant pleads arbitrement, that is, for that, that the defendant has taken the goods of the plaintiff, and that he should deliver them to the plaintiff in full satisfaction; and agreed that this is no good award, insomuch that this cannot be satisfaction for that, that the goods were the proper goods of the plaintiff: and although that he have his goods again, yet he is not satisfied for the taking. But if the award had been, that the defendant should redeliver his goods, and carry them to such a place certain, at his own costs and charges, then it had been good. See

45 Ed. 3. accordingly. So in an action upon the case, upon an assumpsit made in consideration that the plaintiff has paid due debt, is not good, for this is no consideration; and so in the principal case the prescription is not good, inasmuch that he has not suggested more or other consideration, which by the law he ought to do. But he agreed that if he had suggested that the plaintiff had ploughed and manured the land, and disposed of the tithes of the corn for the benefit of the parson, in other manner than the law compelled him, then the first prescription had been good; and so he concluded and prayed judgment for the defendant. *Hutton*, Serjt. for the plaintiff in the prohibition seems (affirms) the contrary, and that the suggestion, and prescription, and custom, contained in that are good. And to the objection, that it is no consideration that the custom may be founded, he intended that this is a ground upon immunity subsequent to the consideration, as of things which are not titheable, as in the general case of things which are for the maintenance of the family; for ploughing and manuring of the land shall not pay tithes, as in a suit for tithes for herbage, suggestion that they were depastured by labouring cattle, which ploughed and manured the land, of which the parson had tithes; or small wood which is cut or employed for the fencing of a farm, or fuel spent in the farm, shall not pay tithes: insomuch that, without that, the farm cannot be manured, nor the family sustained; and so by consequence the parson shall not have any tithe corn, insomuch that no corn will grow without manuring; and also the parson by those has the more tithe corn, and so he has consideration in that, for the better the farm is fenced and manured, the more tithe the parson shall have: so the farmer may be discharged of tithes for rakings, insomuch that he mows and cocks the tithes for the parson at his own cost, and this is sufficient consideration. And also he insisted upon the statute of 2 E. 6. which provides that tithes shall be paid in the same manner as they were paid for forty years before; and he cited one *Jessop's* (1) case, to be adjudged in prohibition; Pas. 36 Eliz. upon suit in court-christian, for flocks and locks of wool: and the custom was alleged that the owner had wound the tithe for the parson, and, in consideration of that, ought to be discharged of tithes of locks and flocks, if they be not made by covin to defraud the parson; and these were demanded by the name of wool dispersed: and 18 El. it was adjudged that tithes shall not be paid for brick, and in prohibition the suggestion was grounded upon the general immunity, and insomuch that it was made of land, for which no tithes are to be paid, insomuch that it does not renew; that for this cause tithes ought not to be paid for the brick which is made of that; and so of mines, and so loppings and toppings and bark of trees shall pay no tithes, but are within the statute of 40 El. 5. of wood to be fallen, as it is resolved in *Soby* and *Molyns's* case, in the commentaries; (2) and he agreed that for herbage the tenth gate, or profit of that ought to be paid, if there be not a custom to the contrary; but in the principal case he intended that that was paid in the corn, and in that the parson has recompense and consideration as before; and so he concludes, and prays judgment for the plaintiff. *Dodridge*, serjt. of the king, argued that the custom is not good, as it is here suggested, for the consideration is of some things which ought to pay tithes in kind, and so upon the matter is no consideration at all, for he intended that tithes should be due by divine right, as due by manuring and tillage of the occupier, in whose soever hands the land comes, if it be not in the hands of the parson himself. 30 H. 8. 43. *Dyer* 20. And for that a parson shall have tithes against his own feoffment. 43 Ed. 3. 13. a. 1 *Coke*, *Albany's* case, 111. a. 32 H. 8. B. Tithes the 17. accordingly, and unity of possession shall not extinguish them: and also he intended there are two manners of persons which are discharged of payment of tithes; one spiritual, the other temporal: the spiritual in respect of their order, and the temporal in respect of custom and prescription; and also by grant, as it is agreed in the archbishop of *Canterbury's* case, 2 *Coke*; (3) but this was in the case of a spiritual man, before the statute of 32 Hen. 8. who was capable of them in peruanity, and that he might prescribe in not tithing; but a layman cannot be discharged, but for satisfaction

(1) *Ante*, 110.(2) *Ante*, 60.(3) *Ante*, 113.

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tion and consideration, for he cannot prescribe in not tithing; and for that in the case here the thing to be considered is, if it be sufficient satisfaction and consideration; and to that he intended that the payment of a duty, that is tithe corn and tithe hay, cannot be satisfaction and consideration for any duty; and this was the reason of *Pigot* and *Heron's* (1) case, that the lord of a manor, in consideration of twenty nobles yearly paid to the parson, prescribes to have the tithes of a hamlet; and in consideration of that, the lord himself and his tenants were discharged of payment of tithes; but there the consideration and satisfaction were the cause which made the custom good. See 2 *Coke*, 41. a. And then he proceeded and examined the manner of the satisfaction in the principal case, which is, that the plaintiff shall pay tithe corn and hay, and nothing for milk and calves, but by reason thereof shall be discharged, as if he should say, that because he pays tithe corn, therefore he shall pay no tithe milk: and he intended that the nature of satisfaction is to give content to the party; as if the prescription had been, that the plaintiff should pay so much money, and in consideration of that, or that he shall make the tithe of cocks, or rake it or mow it at his own charge: this is a good prescription, and there are divers precedents of that, but no precedent is of this form, as the case here is; for money shall be intended the greater value, and more beneficial for the parson than his tithes in kind; and money is the value of every thing, and may give contentment to the party which receives it; and he cited books of 9 E. 4. 19. and 12 H. 7. 15. and 2 H. 5. 2. a. to the same intent, which were cited before by *Houghton*, that is, which agree in arbitrement; and the plaintiff entered into his own land, or that the defendant delivered to the plaintiff his own goods, which the defendant had taken from him, it is not good, for it cannot give contentment to the party, otherwise it is, if it be that the defendant shall carry them to another place, and there shall deliver them; for it cannot be satisfaction and contentment to the party; and for that, that here the plaintiff has not made more than the law compels him, and that it was his own duty; and for that the prescription wants consideration, it shall not be good, and also by reason thereof it can be no good discharge, for this cannot be satisfaction; but he said it was adjudged Pas. 20 Jac. between *Hall* and *Aubery*, that money was a good consideration and satisfaction for tithes; and so he concluded and prayed judgment for the defendant. Note, that this cause was adjudged Hilary, 8 Jac. upon solemn argument by all the judges, with one voice, that the prescription was good.

(1) *Ante*, 135.

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Hil. 10 Ja. A. D. 1612. C. B. *Anon.* [1 Br. & G. 33.]

If a tree under 20 years growth be topped, and suffered to grow, and afterwards be lopped

IF a man top a tree under the growth of twenty-one [twenty] years, and suffer the body to grow, and afterwards when the boughs are grown out again, he do lop and top it again, he shall pay no tithes, although the tree were not privileged at the first cutting, by the opinion of the whole court.

and topped again, no tithes shall be paid, although it were not privileged at the first cutting.

H. 10 Ja. A. D. 1612. B. R.

Arnold v. Bidgood. [Cro. Ja. 318.] 2 Bulstr. 65. 1 Gw. 249.

1. If a unity of possession by a greater monastery had only been interrupted by a lease

granted before the dissolution, which lease was an absolute nullity, *ab initio*, the court thought that a claim of discharge by reason of it, would be good, but otherwise where a lease was made by the stat.

2. A grant of all his right in tithes passes a lease of tithes which the grantor had in right of his wife, as executrix to her former husband.

DEBT upon the statute 2 E. 6. c. 13. for not setting out tithes. The case was, a man being possessed of a lease of tithes in right of his wife as executrix to her former husband, grants *totum jus, titulum et interesse suum de et in decimis prædictis*. After verdict for the plaintiff (who claimed under the said

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said grant), it was moved in arrest of judgment, that the declaration was not good, because the plaintiff had not set forth any good title to enable himself to the tithes: and the books of 10 E. 4. 1. and 19 H. 6. 40. were cited to that purpose: but the whole court unanimously resolved, that the grant was good, and the lease he had in the tithes in right of his *feme* did thereby pass; for he granted *totum jus, titulum et interesse suum de et in decimis prædictis*; and by DODDERIDGE the word *suum* imports a propriety in possession, and is all one as if he had specially named the same in the grant; nor could it be more certainly named or expressed. There was then an objection made out of the proviso in the statute for dissolutions, that all leases made by an abbot within a year before the dissolution, should be void; and this lease was pretended to be so, and therefore void. But it was thereto answered, that here the issue was only whether he were discharged of tithes or not. And the jury gave their verdict directly, that at the time of the dissolution there was not any discharge of tithes; and this lease being but an inducement only to the title of the plaintiff, the issue therefore is well enough: but if in this case there had been any mispleading or mis-trial, the court held clearly it was aided by the statutes of 32 H. 8. & 18 El. c. 14. and cannot be quashed after verdict; whereupon judgment was given, and entered for the plaintiff.

[It was objected that the abbot of Milton was seised *simul* and *semel* of the farm and tithes, and so the same discharged, and by the dissolution came to the crown discharged; to this was answered that this was not so, for the abbot had before made a lease, and so not in his hands. The court said also it has been objected that there was a discharge of tithes, by a supposed unity of possession, in the hands of the abbot, before the dissolution, and at the time of the dissolution; and for this the point was, that the abbot, a year before the dissolution, did make the lease for years; and the whole court agreed clearly in this, that this should be no discharge of the tithes, notwithstanding that the lease was made void by the statute: and the words are from henceforth—"And no "unity of possession, being in the abbot, no discharge shall be of the tithes;" and this by the whole court; otherwise it would have been, if there had been an absolute nullity of the lease, *ab initio*, but it is not so here. *Bulstrode.*]

E. 10 Ja. A. D. 1612. C. P. *Anon.* [1 Br. & G. 32.]

IF two fulling-mills be under one roof, and a rate tithe paid for the mills, and after you alter these mills, and make one a corn mill, your rate is gone, and you must pay tithes in kind; or if you have but one pair of stones in your mill, and pay a rate for them, then if you put on another pair of stones, new tithes must be paid in kind.

If two fulling mills be subject to a rate tithe and one be altered into a corn mill, tithe in kind

must be paid; so if two pair of stones be put in the place of one pair.

E. 10 Ja. A. D. 1612. C. B. *Anon.* [1 Br. & G. 31.]

THE court much doubted, whether one that had a park, and used to pay one shoulder of deer for all manner of tithes, and the park is disparked, should pay tithes in kind or not.

For wool and lamb, no action lies upon the statute for not setting out tithes, for they are no predial tithes: and no action lies upon this statute for small tithes.

manner of tithes, should pay in kind for it when disparked. No action lies upon 2 E 6. for not setting out tithes of lamb and wool, for they are not predial; and no action lies upon this statute for small tithes.

The court much doubted whether one that had a park, and was used to pay one shoulder of a deer for all

setting out tithes

Tr. 10 Ja. A. D. 1612. C. B. *Brown's Case.* [Godb. 194.]

IT was holden by the whole court in this case, that if a man have a *modus decimandi* for hay in Black-acre, and he sow the said acre seven years together with corn, that the same does not destroy the *modus decimandi*, but the same

If a modus be payable to a vicar for the tithe hay of a close which is

sown with corn, and tithes in kind during that time paid to the parson, yet the modus shall revive when again hay.

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same shall continue when it is again made into hay. And when it is sown with corn, the parson shall have tithe in kind; and when the same is hay, the vicar shall have the tithe hay, if he be endowed of hay.

Tr. 10 Ja. A. D. 1612. B. R. *Anon.* [3 Bulstr. 271.]

The spiritual court shall be prohibited, if they will determine upon the validity of letters patent.

NOTA by DODDERIDGE, J. If one be a patentee of the King of a rectory, he may well sue for tithes in the spiritual court. Sir Thomas Vavasour was such a patentee. But if they will go about to try, and determine the validity of the grant, (viz.) of the King's letters patent, as whether *dominus Rex concessit*, or *non concessit*, they having no power so to do, in such a case we will prohibit them.

The whole court agreed with him herein.

M. 10 Ja. A. D. 1612. B. R.

Moyle v. Ewer. [Cro. Ja. 361.] 2 Bulstr. 184. 1 Gw. 276.

1. If a man buy standing corn of a man who afterwards and before severance becomes parson, yet upon severance tithes shall be set out.
2. Objections to an action on 2 E. 6. 1st. That the offence was alleged by way of recital. 2d. That the word "owner" was omitted. 3d. That it was not shewn how proprietor. 4th. That it was not shewn by whom the corn was sown. 5th. That the time of the asportation of the corn was not stated, over-ruled.

DEBT upon the statute of 2 Ed. 6. and demands £165. For that whereas by the statute made 2 Ed. 6. it is provided, &c. (reciting the clause in the statute concerning the setting forth of tithes, &c.) And whereas the plaintiff, 30 September, 6 Jac. was proprietor of the rectory of Caverfield, and of all tithes within the said parish; and whereas the defendant, 1 September, 5 Jac. was possessed for divers years to come of 300 acres of land within the said parish, whereof 130 acres were sown with wheat, 120 acres were sown with barley, 40 acres with pease, and 10 with oats; and whereas all tithes were usually paid in specie for those lands for forty years before the said statute; and whereas the defendant the said 30 Sept. 6 Jac. *sic inde possessionatus existens* all the grain *adunc crescent*. upon the said lands, did mow and cut down, and all the grain *inde provenient*. *apud* Caverfield, did take and carry away, without setting forth tithes, and without agreement with the plaintiff, *adunc proprietarius* of the said rectory: *et dicit in facto*, that the tithe of the corn in the year of 6 Jac. so taken and carried away, was then worth £55. And the treble value was £165, *per quod actio accrevit* to the plaintiff to demand the £165 aforesaid: notwithstanding the defendant had not paid unto him the said £165. *Et ideo producit sectam*: the defendant *protestando* that it is not of such value; for the plea says, that the plaintiff himself sowed that corn, being possessed of the said land for divers years yet to come; and 5 June, 6 Ja. sold the corn to the defendant; wherefore he took it; and traversed that he was possessed from the time, &c. And it was thereupon demurred, and adjudged for the plaintiff, that he should recover £165, as he had declared: and now a writ of error was brought, and the errors assigned were, that the declaration was not good. First, because all the matter of the declaration, and the offence is by way of recital; and the offence is not alleged by matter in fact, that he carried away the corn, and that the tithes were not set forth; *sed non allocatur*; for it is sufficiently alleged, as well as if it had been by express charge, and the action is brought for non-payment of the treble value, and the other is but to shew the cause how it became due. Secondly, because the plaintiff misrecites the statute; for whereas the words of the statute are, "that he ought to agree with the parson, vicar, or other owner, proprietor or farmer of the said tithes, &c." The words of the declaration are, *cum rectore, vicario, aut alio proprietario seu firmario* (omitting the word owner), *sed non allocatur*; for owner and proprietor are all one and synonymous, and of the same sense, and the omission of that word not material. Thirdly, for that he says that he was proprietor, but he does not shew how, nor any title—*sed non allocatur*—for it is but a conveyance to the action. Fourthly, because it is not shewn by whom the corn was sown—*sed non allocatur*—for *non refert* by whom it was sown, the defendant being owner at the time of the reaping; and although the declaration be, that 1 Sept. 5 Ja. he was possessed of lands sown with corn, and that 30 Sept. 6 Ja. he, thereof being so possessed, mowed and cut down,

down, which being a year and month after, cannot be well intended, yet being possible, the declaration is good enough. Fifthly, for that there is not any time alleged of the caption or asportation: but the court conceived, the declaration being, that he 30 Sept. 6 Ja. *sic inde possessionatus* of the said land, *messuit granum prædictum*, it is to be intended that he reaped it the same day: and the declaration being, *ac totum granum inde provenient'*, *cepit et asportavit*, although he does not say, *ad tunc ibidem*, yet it is coupled with the former time by the word *ac*, and has reference to, the former time: and they said that if any one will buy corn standing of the proprietor of a rectory, if he have not special words to discharge it, he ought to pay tithes; and the carrying away such corn without setting out the tithes, is an offence within the statute; wherefore the judgment was affirmed, that he should recover the treble value, as he had declared.

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MOYLE & SWEET.

M. 10 Ja. A. D. 1612. C. B.

Priddle v. Napper. [11 Co. 8.] 2 Br. & G. 25. 1 Gw. 236.

IN an attachment upon a prohibition in the common pleas by John Priddle, *qui tam*, &c. against Thomas Napper, gent. proprietor of the rectory of Tintenhul, in the county of Somerset: the plaintiff declares, that whereas one Robert Shirburne, *alias* Whitlocke, late prior of the priory of St. Peter and Paul the apostles, of Montacute, in the county of Somerset, *ordinis Cluniacensis*, was seised of twenty-two acres of land, called Perin's-hill, *alias* Guilbert's-hill, in Tintenhul, in the said county, and of the rectory of Tintenhul, *eidem prioratus pertinet et spectant'*, *ac parcel' eidem priorat' existen'* in his demesne as of fee in the right of the priory, and that the said prior and all his predecessors, priors of the said priory before the dissolution of the said priory, and at the time of the said dissolution of the said priory, were rectors of Tintenhul aforesaid, and had and held the rectory aforesaid *simul et semel* with the said twenty-two acres of land, *in manibus suis propriis in jure prioratus sui prædicti, ratione cujus idem nuper prior et omnes prædict' alii priores ejusdem nuper prioratus per totum tempus prædictum ante prædictum tempus dissolutionis prioratus illius, usque ad tempus dissolutionis, &c. habuerunt et tenuerunt, ac idem nuper prior tempore dissolutionis, &c. habuit et tenuit prædictas viginti et duas acras terræ exonerat', acquietat', et immunes de omnibus et omnim' decimis, &c.* and that 20 Martii, anno 30. the said prior and convent, by their deed enrolled in Chancery, gave, granted, and surrendered the said priory, the said rectory, land, and all the possessions thereof to King Hen. 8. his heirs and successors; and that by force thereof, and of the statute of 31 Hen. 8. of dissolutions, King Hen. 8. was seised of the said rectory, and of the said land in his demesne as of fee, as in the right of his crown; and shewed the clause of the statute of 31 H. 8. of discharge of payment of tithes; by force whereof, King H. 8. was seised of the said twenty-two acres of land, &c. discharged of payment of tithes, and conveyed the inheritance of the said twenty-two acres to Sir Thomas Freke; and others;

1. Though there were unity of possession of a rectory and land therein at the time of the dissolution of a greater monastery, yet if the land only had been holden from time whereof, &c. it is no good ground of discharge by unity; but the owner of such land may prescribe under the stat. 31 H. 8. that the land was held by the abbot, &c. discharged at such time of dissolution; and since, by virtue of 31 H. 8. but if the abbey were founded within time of memory, then he cannot prescribe at all.

2. Upon great consideration it was resolved, and adjudged that a perpetual unity *a tempore cujus, &c.* till the dissolution should be *primò facie* a discharge of the land of payment of tithes, by force of the stat. 31 H. 8. c. 13. for divers reasons, for the statute does not say discharged of tithes, but discharged of payment of tithes; and for other reasons, the chief of which was the infinite impossibility and impossible infiniteness, so that such immunities and discharges as religious houses had before time of memory, cannot be known. And such unity as is within the 31 H. 8. ought to have four qualities:—

1. It ought to be *justa*, rightful, and not by wrong. 2. It ought to be *equalis*, viz. fee in one, and fee in the other; for if the abbots, &c. have held by lease, *a tempore cujus, &c.* that is not a unity within the statute. 3. It ought to be *perpetua*, *a tempore cujus, &c.* 4. It ought to be *libera*, free from payment of any tithes; but if their farmers at will, for years, &c. have paid tithes to them before the dissolution, then the intendment and presumption of law upon the perpetual unity fail.

3. Where issue is joined upon a plea of perpetual unity, then the prescription of unity ought to be traversed, and not the conclusion *ratione cujus*; as in logic, the syllogism cannot be denied, but the *major* or *minor* proposition; so in law, the *major*, where there is a perpetual unity of a rectory and land therein until the dissolution, &c. there the land is discharged of tithes; here has been a perpetual unity, &c.—*ergo* the land is discharged of tithes: this conclusion cannot be denied.

4. It was said by Popham, Ch. J. in the argument of this case, that if no tithes were paid after the statute, it should be intended that no tithes were paid before the statute.

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others; who, anno 38 Eliz. demised the same to the said John Priddle for ninety-nine years, if three of his sons, or any of them, should so long live; and averred their lives; and that the defendant *proprietary rectoris prædicti*, &c. before the bishop of Bath and Wells sued the plaintiff for tithes of corn growing in the twenty-two acres of land, &c. *Et præd' Thomas Napper pro consultatione habenda*, alleged a grant by letters patent of Queen Elizabeth, anno regni sui secundo, of the said rectory to Rive and Evelyn, and to their heirs; and by meane conveyance, conveyed the said rectory to the said Thomas Napper in fee, and that he libelled for the said tithes, as he lawfully might; *absque hoc quod prædictus prior et omnes prædecessores sui priores præd' nuper prioratus a tempore cujus contr' memoria hominum non extitit ante tempus dissolutionis, &c. necnon usque ad tempus dissolutionis, &c. habuerunt et tenuerunt prædict' viginti et duas acras terræ exonerat', acquietat' et immunes de omnibus et omnimodis decimis quibuscunque super prædictas viginti et duas acras terræ quovismodo provenient', &c. prout, &c. et hoc, &c. unde petit iudicium, et breve dicti domini regis de consultatione sibi in hac parte concedi, &c.* Upon which issue was joined, and the jury, before the justices of nisi prius, gave a special verdict; that the prior and his predecessors, *a tempore cujus, &c.* until the time of the dissolution, were seised of the said twenty-two acres of land in their demesne as of fee, as in the right of the said priory; and that one Thomas, late prior of the said priory, was seised of the advowson of the said church of Tintenhul in fee, in the right of his priory: and he being so seised, King Hen. 8. the 8th day of May, in the twentieth year of his reign, by his letters patent (the exemplification of the enrolment of which, under the great seal, they set forth) *De gratiâ sud speciali ac certâ scientiâ et mero motu suis licentiam dedit præfat' Tho. tunc priori nuper prioratus, et ejusd' loci conventui et successoribus suis, quod ipsi et successores sui dictam ecclesiam parochialem de Tinten' præd', impropriare, consolidare, incorporare, annectere, et unire, et eam sic appropriat', consolidat', incorporat', et unitam, in proprios suos usus tenere possint; with proviso to endow a vicarage, and that a competent annual sum should be distributed to the poor, with the usual non obstante: and that John, bishop of Bath and Wells, ordinary of the said place, 4th Sept. 1529, by indentures tripartite, viz. one part sealed with the seal of the said bishop, the other part sealed with the seal of the prior and convent of Bath (which confirmed the said indenture), and the third part sealed with the seal of the dean and chapter of Wells (which also confirmed the said indenture), *ecclesiam parochialem de Tintenhul dictæ nostræ diocesis et sui patronatus (ut asserunt) dictis priori et conventui et successoribus suis et domui sive prioratus sui prædicti cum consensu pariter et assensu metuentissimis in Christo principis et domini Henrici octavi Dei gratiâ, &c. autoritate nostrâ ordinariâ annectimus, appropriamus et unimus per præsentem, ita quod cedente vel decedente rectore ejusdem ecclesiæ parochialis qui nunc est, seu aliter ipsi ecclesiæ quovismodo vacari contigerit, liceat ipsi priori, conventui suisque successoribus per se vel per alium seu alios ipsorum nomine possessionem dictæ ecclesiæ parochialis autoritate propriâ intrare, &c. et in proprios usus convertere et in perpetuum retinere: with endowment of a vicarage, and provision for an annual sum to the poor: and afterwards the then parson of the said rectory died, after whose death the said Thomas, prior of the said priory, into the said rectory entered, and was as well of the said rectory as of the said twenty-two acres of land seised in his demesne as of fee, in right of the said priory: and afterwards the said prior Thomas died, and prior Robert succeeded him: and that the said prior Thomas, and prior Robert, ever after the said appropriation, held the said rectory, with the said twenty-two acres of land in their own hands, *simul et semel*, in the right of the priory, and found the surrender of the said priory; and that the said King H. 8. 24 die Julii, anno 36 Hen. 8. by indenture under the seal of the Court of Augmentation, demised the said rectory to William Petre, doctor of law, for twenty-one years, who assigned it over to Edward Napper, and that no tithes were paid until the second year of Queen Mary, and then the said Edward Napper had a sentence in the Court of Audience against one Thomas Guil, then farmer of the said twenty-two acres; and that after the said sentence, until the eighth year of Queen Elizabeth, tithes were paid of the said**

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twenty-two acres, and conveyed the said rectory from King Hen. 8. by mesne descents to Queen Elizabeth, and by the said letters patent, and by divers mesne conveyances to Napper: *Et utrum super totâ materid, &c. præd' Robertus super prior et omnes prædecessores sui priores ejusdem prioratûs a tempore cujus contrar', &c. ante tempus dissolutionis, &c. necnon usque ad tempus dissolutionis, &c. habuerunt et tenuerunt prædict' 22 acras terr' exonerat', acquietat', et immunes de omnibus et omnimodis decimis quibuscunque, &c. Juratores penitus ignorant, et petunt adiuvamentum curiæ in præmissis, et si, &c.* And this case was oftentimes argued at the bar by the serjeants, and now this term it was argued at the bench. And in this case these points were resolved:

1. That the information upon which the prohibition was granted, was sufficient in matter: for although every parish church be supposed to be presentative, and the incumbent ought to come in by admission, institution and induction; yet the plaintiff in this case may prescribe, that the prior and his predecessors, *a tempore cujus, &c.* have been rectors of the said church; for that amounts that it was inappropriate, &c. and the beginning of a thing done before time of memory, cannot be known, viz. whether it came by union or impropriation. And therewith agrees 21 Ed. 4. 65. a. where in trespass for certain cart-loads of oats taken at Bodman against the prior of Bodman, the defendant said, that the corn was growing in a certain place in B. in the parish of B. of which parish he is *persona impersonata, i. e. incumbent*; and he was driven to shew how he came to the same parsonage, wherefore he alleged title by the prescription, and how the corn was severed from the nine parts, and that he took it, and that was allowed for a good title to the rectory: wherefore, as to this point, the information was resolved to be good; but the addition of the impropriation, &c. had made it without question. It was also held that the conclusion of the prescription of the unity, viz. *ratione cujus*, the prior held the said land discharged of tithes, was not formal; for in truth, by the unity (as it shall appear after) the land was not discharged of tithes, but of payment of tithes; and so are the words of the statute of 31 Hen. 8. (as also shall be after shewed:) but yet it seems, that forasmuch as the prescription itself is well alleged in substance, so as the foundation of the prohibition is good, that the misprision of the conclusion, and consequence thereupon, shall not be a cause to grant a consultation.

2. That the defendant's plea, *pro consultatione habenda*, (for he is in a manner an actor) was insufficient, because he has traversed a thing not traversable, for the prescription of the unity ought to have been traversed; and not the conclusion, viz. *ratione cujus*, and that for divers reasons; one as in logic, the conclusion of a syllogism cannot be denied, but the *major* or *minor* proposition; so it holds in law, which is the perfection of reason: and therefore in a *Præcipe*, if one plead, that the manor of Dale is ancient demesne, and the land in demand is parcel of the manor, and so ancient demesne; the demandant cannot say, that the land in demand is not ancient demesne, for that is the conclusion upon the two precedent propositions. The first, that the manor is ancient demesne; the second that the land in demand is parcel of the manor, for *sequitur conclusio super præmissis*, and therefore it cannot be denied; and therewith agree 41 Edw. 3. 22. a. 48 Edw. 3. 11. a. b. and many other books: so in the case at bar, the *major*, where there is a perpetual unity of a rectory and land therein, until the dissolution, there the land is discharged of tithes; but here has been a perpetual unity of the rectory of T. and the twenty-two acres, *ergo*, the twenty-two acres are discharged of tithes, this conclusion cannot be denied: 2. It is not only a conclusion, but a conclusion of law, and matter in law shall not be put in issue to be tried by the country, for the rule is, *Quod quisque norit in hoc se exerceat*, and therefore *sicut ad questionem facti non respondent iudices, ita ad questionem juris non respondent juratores*: and if the jury take upon them to know the law, and find the special matter, and mistake the law, the judges of the law shall give judgment on the special matter according to law, without having regard to the conclusion of the jury, who ought not to take upon them the judgment of the law, and therewith agree Pl. Com. Amy Townsend's case, fol. 112. b. 114. b. Vide 5 Hen. 7. Carew's case, 12, 13, 14, 15. 9 Hen. 6. 38. a. 13 Hen. 7. 22, &c.

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and the Lord Berkley's case, Plow. Com. 230. b. One pleads a gift to King Henry VII. and to the heirs male of his body, *virtute cuius* he was seised in fee; the other confessed the gift, *virtute cuius* he was seised in tail, and no traverse to the *virtute cuius*, for the conclusion is the conclusion of the law. 3. The issue is not well joined, 1. Because the matter of the discharge is, by reason of the unity, which is by force of the statute of 31 Hen. 8. and not by the common law, and the issue is joined upon a discharge by the common law, viz. prescription in the prior and his predecessors to hold the said twenty-two acres of land discharged of tithes, which is a discharge by the common law : 2. every issue ought to consist upon an affirmative and a negative, and here is not any affirmative, for that which comes after the *ratione cuius* is not affirmative, or positive alleged, but as a consequence upon the precedent matter, vide 8 Hen. 6. 6. a. 36 Hen. 6. 15. a. b. 9 Edw. 4. 36. 6 Hen. 7. 5. b. and therefore agrees the resolution of the judges in the Bishop of Canterbury's case, (1) in the Second Part of my Reports, fol. 48. so that here is not any issue joined, of any matter alleged in fact in the information.

4. Upon the verdict divers points were moved at the bar : 1. If the said impropriation (as it was found) were good, or not. 2. If it were not good by the common law, if the statute of 35 Eliz. *Reginæ*, cap. 3. have supplied the imperfection of it or not. 3. When the jury find matter sufficient to bar the parson of the tithes, which was not parcel of their charge, nor within the issue, if without regard to that matter a consultation shall be granted. 4. If by the said impropriation and unity, so short a time before the dissolution, which could not be above nine or ten years, it should be such a discharge of tithes as is intended within the statute of 31 Hen. 8.

As to the first it was objected, that the said impropriation was void for two reasons : 1. Because the king has made a license of impropriation of the church of T. *per verba de præsentis tempore*, where it appears, that at the time of the license made, there was an incumbent then of the same church ; so that no appropriation could be made *in præsentis*, but *in futuro*, by special words, to take effect after the death of the present incumbent, for as no appropriation can be made of a church which is full of an incumbent, but in a special manner to take effect after the death of the incumbent, so the king's license (without which the appropriation cannot be made) ought to be special also, or otherwise the king is deceived in his grant, and by consequence the appropriation is void ; and that no appropriation can be made without the king's license, vide Sir William Ethingham's case in 17 Edw. 3. 39. a. and Plow. Com. in Grendon's case, fol. 495. b. (2) And that in such case the appropriation ought to be made in such special manner, appears in Grendon's case ; and in 6 E. Dy. 244. pl. 60. The second reason was, that the appropriation in the case at bar was made to take effect in possession, and not in such special manner after the death of the incumbent, as it appears before it ought by the law.

But it was resolved, that that appropriation was sufficient in law, for it is true, that the license is general, and therefore it shall be taken in such sense, that it may take effect, and that is, to be appropriated after the death of the incumbent : and when the letters patent may be taken to two intents good, in many cases they shall be taken to such intent as is most beneficial for the king ; but if the letters patent may be taken to one intent good, and to another intent void ; then for the king's honour, and for the benefit of the subject, they shall be taken in such manner, that the king's grant shall take effect ; for it was not the king's intention to make a void grant, and therewith agree 21 Edw. 4. 44. b. and Roger, Earl of Rutland's case, in the Eighth Part of my Reports, fol. 56. a. which is proper to be perused ; and in the Lord Stafford's case, in the same Part, fol. 77. a. and the case of Sir John Molins, in the Sixth Part of my Reports, 6. a. and the Lord Chandos' case, in the same Part, fol. 55. b. and the Earl of Cumberland's case, in the Eighth Part of my Reports, fol. 167. a. And so it was resolved in the principal case, that the license shall be taken to this intent, to make the appropriation to take effect after the death of the present incumbent ; and *eo potius*, because the letters patent were *ex certâ scientiâ et mero motu*, and therewith agrees a record in the

(1) *Ans.*, 113.(2) *Ante*, 67.

book of Entries, tit. *Quare impedit, division, appropriation*, where the license of appropriation was general, and the appropriation after the death of the incumbent in these words, *Volens et concedens ut cedente vel decedente ipsius ecclesie nunc Rectore, quod predictus Abbas et Conventus ejusdem ecclesie corporalem possessionem apprehenderent, ac fructus, proventus et obventiones perciperent et libere haberent.* And vide in eodem libro, tit. *Droit*, l. 1. As to the second reason, that is mistaken, for it appears by the instrument of appropriation found within the record, that it was by express words to take effect after the death of the then incumbent, *Ita quod cedente vel decedente Rectore dictae ecclesie qui nunc est, &c.* Another reason was added, that inasmuch as always the king's license of appropriation is made to the body spiritual, to which the church shall be appropriated, and not to the bishop, &c. and therefore it shall be presumed, that they would obtain it in such form that it should avail them. Also the license of appropriation is always general, and so are all the precedents; for although the rector be alive at the time of the making of the license, he may die or resign, &c. before the appropriation.

As to the second point, admitting the said appropriation had been void, it was objected, that the said act of 35 Eliz. has made it good, for thereby it is enacted and declared, "That all manors, lands, tenements, and hereditaments, which at any time heretofore were the possessions of any abbey, monastery, priory, &c. which after the said 4th day of February, in the 27th year of Henry VIII. were granted or conveyed, or mentioned to be granted or conveyed, in, or by any letters patent whatsoever, made by the said late King Henry VIII. to any person, &c. were and shall be reputed, taken, and adjudged to have been lawfully and perfectly in the actual and real possession of the said late king, and of his heirs and successors, at such time as the same were granted by the said late king." And where it was answered by the plaintiff's counsel, that the said act of 35 Eliz. extended only to letters patent made by King Henry VIII. and the letters patent in the case at bar were made by Queen Elizabeth, and so out of the said act of 35 Eliz. it was resolved, that in truth the said act of 35 Eliz. did not extend to this case, but not for the cause alleged by the plaintiff's counsel; for although it be true that Queen Elizabeth granted the inheritance of the said rectory, yet it appears by the special verdict, that King Henry VIII. by his letters patent indented, had demised the said rectory to William Petre, Doctor of Law, for twenty-one years, and the act of 35 Eliz. enacts, "that all manors, lands, tenements, and hereditaments, mentioned to be granted or conveyed in or by any letters patent whatsoever, made by King Henry VIII. to any person or persons, bodies politic or corporate, shall be reputed, taken, and adjudged to have been lawfully and perfectly in the actual and real possession of the said late king, and his heirs and successors;" in which purview four things were observed: 1st. The favourable penning thereof, scil. mentioned to be granted, although in effect nothing passed by the grant. 2d. The generality of the quality of the words, first, concerning the letters patent, scil. in or by any letters patent whatsoever, be they under the great seal, the exchequer seal, the court of augmentation seal, the duchy seal, &c. Secondly, concerning the estate of interest which is mentioned to pass by the letters patent, which is left at large, and not restrained to any in certain, and therefore if the letters patent purport a grant for life, or for years, the statute has as great operation, as to the purview of the act, as if the letters patent had purported a grant of an estate tail, or a fee. 3. The generality of the purview, for it extends not only to make the grant good, but to vest the manors, lands, tenements, and hereditaments of the late abbots, &c. in the actual and real possession of King Henry VIII. 4. And not only in King Henry VIII. but to him, his heirs and successors, so that the lands shall be as well vested in the king, his heirs, and successors, when the king grants the land for life or years, as where he grants it in fee-tail or fee-simple, and so the purview extends to three other cases. 1. Where any such lands, tenements, or hereditaments, came to the hands or possession of the said late King Henry VIII. 2. Or which were put in charge to, or for his highness in his court of exchequer, or any other courts of his Majesty's revenue. 3. Or by

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any auditor, or other officer of the said late king;" and in every of these cases the purview hath so great operation, as in cases of letters patent, as to vest such lands, tenements, or hereditaments in the king; his heirs and successors: but yet it was resolved, that the said act of 35 Eliz. cap. 3. did not extend to this case; for the purview has a qualification or restraint which has not been mentioned before at the bar; and that is, that in the said four cases, such lands, tenements, hereditaments, "shall be reputed, taken, and adjudged, in the actual and real possession of the said late king, his heirs and successors, at such time as the same did so come to his Majesty's hands or possession, or were so put in charge or granted, or conveyed by the said late King Henry VIII. as aforesaid; (then comes the qualification or restraint) "notwithstanding: 1. Any defect, want, or insufficiency, of or in any surrender, grant, or conveyance of the said manors, lands, tenements, or hereditaments, or any part thereof, to the said late King Henry VIII. 2. Or any other matter or cause whatsoever, by which his highness was or might have been entitled to the same:" so that the scope and purpose of the act was, to vest in King Henry VIII. all the lands, tenements, and hereditaments, which the abbots, &c. had, notwithstanding the defects aforesaid; but if the said appropriation were void, and were not given to the king by the statute of monasteries, then the Prior of Montacute, in the case at bar, had nothing in the said rectory, but the advowson only, and *jus presentandi*: but yet the said act of 35 Eliz. is of great use and effect, for inasmuch as the statute of 31 Hen. 8. gave not the king any monasteries, priories, &c. but only which had been surrendered, granted to the king, &c. or were dissolved; or which should be surrendered, granted, &c. or dissolved, this act, in the said four cases, has supplied the defect or want of a surrender, grant, or conveyance; also of an insufficient surrender, grant, or conveyance, so that be there any conveyance to the king or not; and if any be, although it be insufficient, the said lands, tenements, and hereditaments, are actually vested in the king, his heirs, and successors. 2. If the abbot, prior, &c. had been disseised, or in any other case, where an office, *scire facias*, seisure, &c. was requisite to vest the possession in the king; there the latter words, viz. "or any other matter or cause whatsoever, by which his highness was or might have been entitled to the same," supply all such means by which the king might have been lawfully entitled, and put in actual possession. Vide 33 Hen. 8. Brook, tit. Chose in Action, 14. the question there made, where an abbot, &c. was disseised, well explained and resolved. But although there be a defect in the appropriation, yet (if the rectory be in reputation appropriate, and so has been used) it is given to the king by the statute of 27 Hen. 8. c. 38. or 31 Hen. 8. c. 13. and therefore in 19 Eliz. in the Dean of Paul's case, it was adjudged in the king's bench, that a chauntry or college in reputation, and not in law, was given to King Edward VI. by the statute of 1 Edw. 6. within the words "all and all manner of chauntries, colleges," &c. 27 Junii, anno 29 Eliz. in *Cancellaria*, upon an aid prayer of the king, by the course of the common law, the case was between the Lord St. John, plaintiff, and the Dean and Chapter of Gloucester, defendant, for the parsonage impropriate of Penmark, in the county of Glamorgan, because the patron (who, before the appropriation, had granted the advowson to the body ecclesiastical, to which the appropriation was made) in anno 18 R. 2. was but tenant in tail, and yet it always continued as a church appropriate, it was resolved by Sir Tho. Bromley, Lord Chancellor of England, Gilbert Gerrard, Master of the Rolls, Shute and Windham, Justices, (whom the Lord Chancellor in that case associated unto him) that this rectory in reputation was given to the king by the statute of monasteries. Another case was, T. Eliz. in *Camerâ Scacc' inter* T. Grimes and H. Smith, for the parsonage of Bulbenham, in the county of Leicester, which, anno 22 Edw. 4. was appropriated to the Abbot of Sulby, and no vicar endowed there, &c. according to the purview of the acts of 4 H. 4. 12. 15 Rich. 2. 6. But there had continued a vicar in reputation, and the rectory continued also as appropriated; and it was resolved that the rectory was given to the king by the statute of monasteries. H. 4 Jac. Reg. in *Cancellar' inter* Bedel and Bear, for the church of Kimbolton, which was appropriated anno 40 Ed.

3. and the defect was, that Humphrey de Bohun, Earl of Hereford (who granted the advowson of the said church to the body ecclesiastical, to which the appropriation was made) was but tenant in tail; and resolved clearly that it was given to King Henry VIII. by the statute of monasteries. *Nota*, reader, in the statute of monasteries there is a saving of rights, &c. but the founders, donors, &c. are excepted out of the saving; so they are bound by the body of the act.

As to the third point upon the verdict, it was resolved, that forasmuch as the special matter found by the jury was not parcel of their charge, nor pertinent to the issue, (admitting that the special matter had been sufficient to have barred the plaintiff of the tithes,) it should not be regarded; for the party grieved thereby cannot have attain, nor the witnesses be punished for perjury by the statute of 5 Eliz. because neither the saying of the jury, nor the testimony of the witnesses was material to the issue; so that inasmuch as the issue is joined upon prescription in the prior and his predecessors, to hold the said twenty-two acres discharged of tithes, *à tempore cujus*, they cannot give in evidence an unity of the rectory and land for ten years only; that if any colour should be, that the same should be a discharge, it is not a discharge by prescription *à tempore cujus*, &c. by the common law, but by the statute of 31 Hen. 8. So that for the insufficiency and impertinency of the points and parts of this prolix record, the other justices did not speak to the fourth point of the verdict: but the Chief Justice (for the better direction of this and such other cases) did declare that the point had been resolved before, and the causes and reasons of the resolution thereof. It was a long time, in all the courts of Westminster, a great question upon the said branch of the statute of 31 Hen. 8. and the cause of the doubt thereof stood upon two considerations: 1. Upon consideration of the nature and quality of tithes before the said act. 2. Upon the words and purview of the said branch of 31 Hen. 8. And, as to the first, *quota pars*, i. *decima pars*, which we call tithes, is an ecclesiastical inheritance collateral to the estate of the land, and of their proper nature, due only to an ecclesiastical person by the ecclesiastical law, and therefore no unity of possession can either extinguish or suspend them; but they, notwithstanding any unity, remain *in esse*, so that they may be demised or granted to any spiritual man, notwithstanding any such suspension. Tithes are more collateral to land than a warren, which the owner of the land has in it; for by feoffment of the land, without excepting the warren, the warren is extinct, as it is held in 35 H. 6. 56. a. But if a prior who has a parsonage impropriate, enfeof another of part of the glebe, yet he shall have tithes against his own feoffment, as it is held in 42 Edw. 3. 13. a. and they are not like a leet; and yet if the lord of the leet purchase land within it, his leet is not suspended, nor (if he make a feoffment of the said land) is his leet in it extinct, as it is held in 7 Edw. 2. tit. Avowry, 211. and 8 Edw. 2. ibid. 212. But he has an inheritance by the common law in the leet, which is descendible, and which he may grant over to whom he pleases: but such inheritance a layman cannot have in tithes by the common law, neither shall they pass by such words as temporal inheritances shall pass, and therefore M. 31 & 32 El. in a prohibition betwixt John Parkins and Thomas Hinde, parson of Babington, in the county of Somerset, (1) the case was, that the said parson, by deed indented, leased his glebe, *cum, proficuis et commoditat ib' eidem spectantib' for ninety-five years, rendering rent pro omnibus exactionib' et demandis quibuscunque dicta rectorie pro clauso predicto spectantib'*, and the question was, if the lessee should have the said close discharged of tithes during the term; and it was resolved *per totam curiam*, that the tithes shall not pass by such general words; and as they are tithes not severed, they are merely ecclesiastical, for the subtraction of which, no remedy lies by the common law. If a parson purchase land within his rectory, and lease this rectory, the lessee shall have tithes of the land purchased; and therewith agrees 30 Hen. 8. Dy. 43. pl. 21. Vide 32 Hen. 8. Brook, tit. Dismes, 17. Then, inasmuch as if tithes be considered of themselves, before the severance of them, they are merely ecclesiastical, and so collateral to the estate of the land, that no unity can extinguish or suspend them; but notwithstanding any unity, they remain *in esse*; now the words of the act are to be considered, which are, "that as well the king,

(1) *Ante*, 98.

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"his heirs and successors, as all and every such person and persons, their heirs and assigne, which have or hereafter shall have any monasteries, parsonages appropriate, or other hereditaments, &c. shall have, hold, retain, keep, and enjoy, as well the said parsonages appropriated, &c. meases, lands, tenements and other hereditaments, &c. discharged and acquitted of payment of tithes, as freely, and in as large and ample a manner as the said late abbots, priors, &c. had held, occupied, possessed, used, retained, or enjoyed the same, at the days of their dissolution:" and upon these words, forasmuch as the unity does not discharge nor suspend the tithes, but that they were *in esse* at the time of the dissolution: and forasmuch also as these words (discharge and acquit) imply actual immunity and freedom; and that the king and his patentees shall not have them discharged and acquitted absolutely, but *sub modo*, that is to say, "In as large and ample manner, &c. as the said late abbots," &c. And the late abbots held not the said lands in case of unity discharged, but charged with the payment of them: for these reasons, in short, it was doubted, whether the said act should extend to the case of a perpetual unity; and it was also urged, that if the said act of 31 Hen. 8. in the case of perpetual unity should, in respect thereof, discharge the land of tithes, it would do a wrong; and as it is said in *Plowd. Com.* in the *Earl of Leicester's case*, 398. b. The parliament is a court of the greatest honour and justice, of which none ought to imagine a dishonourable thing, and the Doctor and Student, fol. 165. cap. 55. It cannot be thought, that a statute that is made by authority of the whole realm, as well of the king, and of the lords spiritual and temporal, as of all the commons, will do a thing against the truth, &c. And Fortescue, cap. 18. *Prudentiâ etiam et sapientiâ necessariâ statuta hujus regni referta putandum est, dum non unius aut centum solum consultorum virorum, sed plusquam trecentorum electorum hominum, quali numero olim Senatus Romanorum regebatur, ipsa sunt edita.*

But at length, upon great consideration, it was resolved and adjudged, that a perpetual unity, *a tempore cujus*, &c. till the dissolution, should be *primâ facie* a discharge of the land of payment of tithes, by force of the said branch of 31 Hen. 8. cap. 13. for divers reasons: 1. The statute doth not say discharged of tithes, but discharged of payment of tithes, and divers other reasons, the chief of which was, for the infinite impossibility and impossible infiniteness, so that such immunities and discharges which religious houses had before time of memory, cannot be known. And it was expressly resolved, that the general allegation of unity at the time of the dissolution, &c. without an averment that it was perpetual, was not sufficient: and although it had been a perpetual unity, yet if the farmers of the land of the rectory had paid tithes before the dissolution, then the intendment and presumption of law, upon the perpetual unity, failed: and all this you may see in the Archbishop of Canterbury's case, in the Second Part of my Reports, and divers judgments and resolutions there cited, fol. 48, and 49. (1) So that such unity, which is within the said branch of the act of 31 Hen. 8. ought to have four qualities: 1. *Talis unitas*, ought to be *justa*, rightful and not by wrong. 2. It ought to be *aqualis*, scilicet in the one and the other: for if the abbot, priors, &c. have held by lease, *a tempore cujus*, &c. that is not an unity within the statute. 3. It ought to be *perpetua à tempore cujus*, &c. 4. It ought to be *libera*, free of payment of any tithes: but if their farmers at will, for years, &c. have paid tithes to them (as has been said) the unity perpetual will not serve. But it was asked, what if the appropriation were made in the times of Edward IV., Henry VI., Henry IV., Richard II., Edward III., &c. and yet in law within time of memory, and unity had continued from the time of the appropriation until the dissolution, and tithes were never paid, neither by the abbots, &c. or their farmers: should not the statute extend to those causes? And it was answered, no, upon the point of unity; for if he will take the aid of the act of 32 Hen. 8. the unity, as has been said, ought to be perpetual. But in such case he may allege the said branch of the act of 31 Hen. 8. concerning the discharge of payment of tithes, &c. and that the abbots, &c. *a tempore cujus*, &c. until the dissolution,

(1) *Ante*, 113.

have held the land discharged of tithes (as he may well prescribe by the common law) and give such evidence that he may approve it: and so if in truth, the land be discharged, he has sufficient remedy to relieve himself. Vide the Bishop of Winchester's case, in the Second Part of my Reports, fol. 44. b. 45. a. (1) But if the abbey or priory, &c. were founded within time of memory, then he cannot prescribe *omnino*, and forasmuch as in the principal case, the appropriation was made in 20 Hen. 8. so that it appeared to the court, that before that, the twenty-two acres were charged with tithes; for of common right all lands ought to pay tithes; for that reason the Chief Justice concluded, that the said twenty-two acres were, as this case is, chargeable with tithes; but if the parties are not satisfied with it, they may begin again; for inasmuch as the information, as it is resolved, is good, and the plea, *Pro consultatione habenda*, altogether insufficient, and the verdict impertinent to the issue, they would not grant a consultation; and thereunto the whole court agreed. See Fitz. 38. in Dr. Bentley's case.

[It was adjudged, Pasch. 40 Eliz. Rot. 454. between *Chyld* and *Knightley*, that the unity of the possession ought to be of time, that the memory of man does not run to the contrary. And in the argument of this case it was said by Popham, Ch. J. that if no tithes were paid after the statute, that then it should be intended that no tithes were paid before the statute. *Br. & Goldsb.*]

(1) *Ante*, 119.

M. 10 Ja. A. D. 1612. B. R.

Reynoulds v. Green. [2 Bulstr. 27.] 4 Gw. 1573.

NOTE, that in a trial at bar in an action of trespass, the question arising between the parson and the vicar, as touching tithe wood, and to whom the same belonged; as to this, by the opinion of the whole court clearly, the parson, *de mero jure*, ought to have the tithe-wood, if the vicar be not endowed of the same, or claim to have it by prescription; but without such a dotation or prescription, the same belongs to the parson. Another question was propounded for the vicar, who entitled himself to the tithe-wood, by these words (*alteragium*) and *minuta decima*, whether these words will carry the tithe-wood to him, or not; as to this, the exposition and true definition of this word (*alteragium*) is to be considered, and to whom this is due. (*Alteragium*,) as was observed, is that which is due to be served at the altar. — WILLIAMS, J. *Alteragium* is that only and properly which is offered at the altar, and *minuta decima* are the small tithes; also the word (*alteragium*) will not carry tithe-wood; and this is the question here, whether the vicar, by this word (*alteragium*) have title to the tithe-wood. — CROOK, J. This word *alteragium* does not carry the tithe-wood, which is a great tithe; but *minuta decima*, are petit small tithes. *Minuta decima* et *alteragia*, the vicar, as was urged, is to have by his composition, and that by these words he is to have the tithe-wood. — FLEMING, Ch. J. There is a usage here laid in the vicar to have the tithe-wood, by reason of these words, *alteragia et minuta decima*, which the vicar can in no wise have, but by prescription, or by such a usage; and so the same may pass by these words, *alteragia et minuta decima*, and the usage had accordingly: also sheaves of corn have passed by usage to the vicar, by the words *alteragia et minuta decima*, and so it was adjudged in the court of exchequer. The judges all agreed in this, that by these words, *alteragia et minuta decima*, by usage, tithe-wood may well pass, and so has the opinion of all the civilians been. FLEMING, Ch. J. and the rest of the judges agreed in this, that by usage, the word *alteragia* shall be accounted *inter minutas decimas*. — WILLIAMS, J. By the word *alteragia*, tithe-wood does not pass, but if the vicar have used to have the same, time out of mind, this is good, and it shall pass under the words *minuta decima*. — FLEMING, Ch. J. Though the law be against it, that tithe-wood does not pass by these words, yet by usage it has been allowed good, to carry tithe-wood, by these words, being but of a small value: and by such usage tithe-wood may pass, though the law be against it.

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Though tithe wood will not pass by an endowment, under the word *alteragium*, (which in law only extends to small tithes,) yet, by usage, it may well pass under the words *alteragia et minuta decima*, and under these words sheaves of corn have also passed.

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H. 11 Ja. A. D. 1613. C. B. *Gerey's Case*. [Moo. 873.]

Definitive sentence was given in the spiritual court for tithes, and also for the treble value; prohibition went as to the treble value.

DEFINITIVE sentence was given in the spiritual court for tithes, and also for the treble value according to the statute; and now prohibition was prayed, because the spiritual court should not meddle with the treble damage. And the court doubted whether a general or a special prohibition should be issued, and if the spiritual court, after definitive sentence, could divide it afterwards, when execution thereof; but at last it was resolved, that the prohibition should be, that they should not proceed to execution of the sentence as to the treble value.

H. 11 Ja. A. D. 1613. C. B. *Gippe's Case*. [Godb. 245.]

Where a *modus* is suggested, it must be proved within six months, or a consultation will be granted.

A MAN libelled for tithes in the spiritual court; the defendant alleged a *modus decimandi*, and thereupon had a prohibition; and afterwards the plaintiff in the prohibition did not prove his suggestion within six months; and therefore the court granted a consultation, because the law has appointed a certain time, within which time the suggestion is to be proved, otherwise the parson should be delayed and prejudiced in his tithes; and so it was adjudged in parson *Bug's* case, Mich. 8 Ja. in this court.

E. 11 Ja. A. D. 1613. C. B.

Urrey v. Boyer. [MS. Hargr. No. 385. 1 Calth. Rep. f. 138.]

2 Br. & G. 820. 1 Gw. 250.

The court was divided on the point, whether the discharge from tithes possessed by the Hospitallers, was continued after the dissolution of that order; all however thought that if it were, it was by 32 H. 8. and not 31 H. 8.

BOYER libelled in the spiritual court against Urrey for tithes of corn. Urrey suggested that the lands of which the tithes were demanded were in the hands of Sir Richard Weston, prior of St. John's of Jerusalem, in England, and of his brethren, and that they were discharged of tithes in their hands; he then shewed that all the lands were given to the King by the statute 32 Hen. 8. c. 24. and further pleaded that the statute gives to the King all immunities, privileges, jurisdictions, &c. which the prior or any of his predecessors had; and set forth farther, that the King by his letters patent granted these the lands aforesaid to the now plaintiff in prohibition, with a clause therein that he should have *tanta, talia, tot immunitates, privilegia, &c.* as any other had before him, &c. and so he prayed a prohibition; and upon this suggestion of the prohibition Boyer demurred. And COKE, Ch. J. argued that the suggestion was insufficient, and that these lands ought to be charged with tithes, and could not be discharged thereof; and NICHOLLS, Justice, agreed with him. But WARBURTON and WINCH held, that the lands ought to be discharged of tithes; and their reason principally was, for that the statute of 32 Hen. 8. c. 24. revives all privileges, jurisdictions, immunities, &c. which the Hospitallers had, and they insisted much upon the book of 10th of El. Dy. (1) But I heard neither their argument nor that of NICHOLLS, and therefore have not reported them; but I have only reported COKE's argument, which I did hear, who held that the statute 31 Hen. 8. c. 13. did not extend to the possessions of the Hospitallers, in as much as they were dissolved by an act of parliament after; and the statute of 32 Hen. 8. c. 24. which revives the immunities and privileges of the dissolved monasteries does not extend to them, inasmuch as the privilege of being discharged of tithes is a privilege inseparable from the persons of the Hospitallers; it is an ecclesiastical and not a temporal privilege; it is a privilege and not a discharge only; and it is not *in esse*, and the statute 38 Hen. 8. c. [24.] only extends to privileges which can be severed, and which are temporal, and which are *in esse*; and to prove that these privileges of the prior of St. John's of Jerusalem to be discharged were inseparable from the person of the prior, he said that there were four orders that were discharged of tithes by a general council and by a decree of the pope, viz. the Cistercians, the Templars, the Hospitallers, and the Præmonstratenses; (2)

(1) *Ante*, 59.(2) *Hierosolomitani*, C.

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and all other orders were to pay tithes as other persons; and all the aforesaid orders also pay tithes *de terris de novo acquisitis*, and were not discharged (as to those.) And the words of the council are, that the said orders and their successors shall be discharged of tithes for their lands so long as they remain in their proper hands. So that it appears by the words of the council, that if the lands be transferred to the hands of others, the privilege is gone, and they become charged with tithes again; now as the *medium dispositivum*, to wit, the bull or council which discharges them of tithes is ecclesiastical; the persons who are discharged are ecclesiastical; the thing itself, whereof the discharge is made, is ecclesiastical: it seems to me that there is great reason that this privilege cannot be transferred to those who are not ecclesiastical, and have none of those causes for which they should be discharged. It is besides a thing that was never seen, that incidents inseparable were either given to the King, or contained within the general words of an act of parliament; and proves, though the statute respecting the Templars, made in [17] Edw. 2. wills that the Hospitallers, to whom the possessions of the Templars were transferred, shall hold by the same tenure and the same services which the Templars held by; yet the immunity of the tenure in frankalmoigne could not be transferred from the Templars to the prior of the hospital of St. John of Jerusalem and his brethren, as was adjudged in 35 Hen. 6. 56, 57; and yet in that act the words were special, and the persons to whom the transfer was, were of the same quality with the persons from whom the possessions were taken. In 3 Edw. 3. 11. an appropriation is not transferred from the Templars to the Hospitallers, notwithstanding the statute of Templars wills that the prior of the Hospitallers shall have all the possessions which belonged to the Templars; for the appropriation is inseparably annexed in privity to the Templars, and cannot be transferred by the general words of an act of parliament. The statute of 33 H. 8. c. 20. gives all manner of conditions to the King; and yet by force of these general words, a condition inseparably annexed to the person of the party attainted, is not given to the king, as was adjudged in *Inglefield's case*, 1 Anders. 293. So by that statute, a right of action shall not be given to the King, notwithstanding that the statute gives all rights generally; for it is a thing consisting in privity, and therefore shall not be given by the general words of an act of parliament, as may be seen in the *Marquis of Winchester's case*, 3 Co. 2. So in the case at bar, as the immunity of being discharged of tithes is, so long as the land remains in the hands of the Hospitallers, and therefore inseparable from their persons; for that reason it shall not be transferred by the general words of the act of 32 Hen. 8. c. 20. Besides, it was never seen that the general words of an act of parliament ever extend to tithes; for tithes being a spiritual thing, and due *jure divino*, quoad a competent maintenance, and not *jure humano*, the common law does not take any notice of them; and an act of parliament, which is but a temporal conveyance, will not meddle with them. And for this reason it is that there is never any saving in an act of parliament of tithes, though there be a saving of all seigniories, rights, rents, and all other things; for tithes being a thing collateral to the land, and not a temporal inheritance, are not included within the general words of an act of parliament. And for this reason the statute of 3 Hen. 5. c. 1. which grants that men shall enjoy their liberties and franchises, does not extend to this that they shall enjoy the liberty of being discharged of tithes. And so, though the statute of 27 Hen. 8. c. 28. grant that the King shall have all colleges, &c. and hereditaments whatsoever, in as ample and large a manner as the abbots, &c. had them, yet the King by these general words shall not be discharged of tithes, for all the possessions which came to the King by this statute remain charged with tithes at this day.

And here COKE said, that though tithes are due *jure divino*, quoad a competent maintenance, yet unquestionably as to a tenth part, and neither more nor less, that is due *jure humano*, and by the constitution of man. And he said that tithes are not assets, nor are they extinguished by a feoffment of the land; a common person is not capable of them at common law; and that so it appeared by what had been said, that the statute of 32 Hen. 8. does not extend to an immunity which is inseparably annexed to the person.

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It is now to be inquired, whether that statute extends to a privilege which is ecclesiastical and spiritual, and not temporal. And as to that, he said, the statute extends only to the reviving of temporal and not of spiritual franchises. For if it should extend to the spiritual liberties, then a great inconvenience would ensue, because by these means all the possessions of the Templars would be exempt from all temporal jurisdiction as they were when they were in the hands of the Hospitallers, as may be seen in 1 Edw. 3. 9. & 31 Edw. 3. Trial, 99. where it is holden that profession alleged in a plaintiff, professed of the order of Templars, cannot be tried by the bishop, because the order is exempted by the pope; and they would have all ecclesiastical privileges which the Templars had, which would bring a great inconvenience to the commonwealth, a greater indeed than a man would imagine; for the Templars had many great immunities bestowed upon them by the pope and councils, which privileges they might as well claim as to be discharged of tithes; and therefore, because the law forbids those who have now their possessions to claim those privileges, it will also forbid them to claim the ecclesiastical privilege of being discharged of tithes. And as to the third privilege, which is a privilege of discharge, and not in being, he said, that the statute of 32 Hen. 8. c. 20. does not extend to it; for the statute says, that the privileges, &c. shall be actually and really in the King, his heirs, and successors; and a privilege of discharge, which is not *in esse*, cannot be actually and really in the King. Besides, the statute says, that all franchises, &c. of what nature soever they may be, lawfully had, used, and exercised, &c.; but a franchise of discharge cannot be used or exercised, because it is not *in esse*, and therefore the statute does not extend to it. In 7 Hen. 6. 8. where the abbot, in a writ of cosinage brought against him, pleaded to the jurisdiction of the court, that the lands lay within Westminster, which is a privileged place; the plea was disallowed, the privilege and immunity extending to the person only, and not to the lands or goods, according to 11 Hen. 4. 35. And although the prior of St. John's, &c. were discharged of taxes and subsidies in respect of his person, yet all those who have their lands shall not be therefore discharged, because the discharge was solely in respect of the person, and not in respect of the lands. In 38 & 39 Eliz. in the case of the lord Darcy it was adjudged, that where the King granted to the dean and chapter of Paul's, and their successors, that they should be discharged of purveyance in their manor of D. and the manor was afterwards surrendered into the King's hands, by the 35 Hen. 8. c. . the King's patentee should not be discharged of purveyance, though the patent ran that he should have *tot, talia, et tanta privilegia, franchises, libertates, &c. quot, qualia, quanta aliquis habuit*; for this discharge of purveyance is a personal thing, and not *in esse*. 1 Hen. 7. 25. a grant was made to the abbot of Abington, that he should be discharged of episcopal jurisdiction; in that case it would be absurd to say, that he who should have the possessions of this abbey, should have the privilege of discharge. 20 E. 3. *Escommencement*, the abbot of E. had the privilege of being exempt from any ordinary jurisdiction; in this case the statute of 32 Hen. 8. would not revive this privilege, because it was a privilege of discharge, and a personal privilege. In 44 & 45 Eliz. in a *quo warranto* brought against the lord Hunsdon and another, it was adjudged, that a privilege of being discharged from the government of the mayor and aldermen of London, was not revived by the statute of 32 Hen. 8. so that the defendants claiming under a dissolved monastery, could (not) claim all franchises. F. N. B. 227. Reg. 259. we see that all ecclesiastical persons were discharged of toll, murage, pontage, &c.; yet the persons who have the possessions of those ecclesiastical persons shall not be discharged of them, for it is a personal privilege, and a privilege not *in esse*. The statute of 14 Edw. 3. c. 2 & 1. *pro clero*, grants that ecclesiastical persons shall be discharged of receiving sojourners of Scotland, &c.; this privilege of discharge does not extend to those who have their possessions, nor is it revived by the statute of 32 Hen. 8. Whence we see that the statute of 32 Hen. 8. c. 20. does not revive privileges which go in discharge, and are not *in esse*.

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And it now remains to see whether the statute of 31 H. 8. c. 13. can in any way extend to this. As to this, he said, that when a thing is out of the body or purview of an act, it shall never come within the branch of it. For how can it be that there can be sap in the branch, when there is none in the root? How can it be that this dissolved hospital should be within the branch of the 31 H. 8. which gives immunity from tithes, when it is not within the body of the act? And this dissolved priory of St. John of Jerusalem is not within the body of the act, because it was given to the King by an act of parliament passed in 32 H. 8. c. 24. and not by this act. Besides, this statute of 31 H. 8. is very precise in its penning; for it says, that all houses of religion, &c. which have been dissolved since the 4th of February, &c. so that the house or priory that would have the privilege of the discharge of tithes within this act, must have come to the King since the 4th of February. And it is for this reason, that this statute does not extend to those priories and religious houses which were dissolved by the statutes of 4 H. 5. c. and 27 H. 8. c. (28). The statute too says, that the said possessions shall be discharged of the payment of tithes; so that the lands, which are to be discharged of tithes within the statute, ought to be those possessions which came to the King by the statute; for the word "said" runs from the branch to the body of the act, so that nothing shall be within the branch which is not contained within the body, and therefore because these lands do not come to the King by the 31 H. 8. they shall not have the immunity of being discharged of tithes. And it is for this reason that neither the lands that come to the King by the statute of 32 H. 8. c. 13. nor those which come to him by the statute of 1 E. 6. c. 14. of chantries, are discharged of tithes by the branch of the statute of 31 H. 8. c. (13.) For how can it be intended that the statute should provide for the lands (of those houses) that might be dissolved thereafter, unless you will say that the makers of the act of 31 H. 8. had the spirit of prophecy? And so it was resolved in the *Bishop of Canterbury's case*, 38 Eliz. 2 Rep. 46, 47. (1) And in the case of one *Greene and Buffkyn*, (2 Rep.) 49 (b.) (2) and Hil. 44 Eliz. Rot. 994. in an action on the statute of 2 E. 6. it was the opinion of all the judges except GAWDY, that the branch in the statute of 31 H. 8. which gives immunity from tithes, shall not extend to possessions given by the statute of 32 H. 8. And so it was ruled in the case of *Quarles v. Spurlin*, who were the same parties between whom the action on the statute of 2 E. 6. was depending. Mich. 1 Jac. Rot. 45. in a prohibition. As to the case in the 10th of Eliz. Dy. 277. (3) which had been so strongly urged, he said, first, that it was a case ruled upon sudden opinions given before the lord chancellor, and not done upon solemn argument. 2dly. He said, that the case was in truth upon the order of Cisterians, as he had seen by the papers in chancery, though Lord DYER state it to be of the order of Templars; and by the recital of the act of 2 H. 4. c. 4. it appears that Lord DYER understands it so, because the statute of 2 H. 4. intends only that the farmers of the Cistercian order pay tithes, and does not speak of the order of Templars; and the Cistercian order are discharged of tithes, because their lands came to the King by the 31 H. 8. But admitting the case to be as it is stated in the book, yet inasmuch as there have been four judgments adjudged directly upon the point against the book, it is good to see the latter judgments, as Plowden saith. (4) And here COKE said, that such possessions as are discharged of tithes by the branch of the statute of 31 H. 8. must have been in the hands of religious and ecclesiastical persons at the time of the dissolution. For if they were in the hands of religious persons only, and not of ecclesiastical likewise, then such possessions will not be discharged of tithes by 31 H. 8. because the act always speaks in the copulative, religious and ecclesiastical, and not otherwise. But here he said, that the Templars were holy persons who might be discharged of tithes, if there were no other impediment in the case. For they were both religious and ecclesiastical, for an order cannot be religious without being ecclesiastical; though an order may be ecclesiastical, and yet not religious; as a bishop, dean and chapter, archdeacon,

(1) *Ante*, 113.(2) *Ante*, 111.(3) *Ante*, 59.(4) *Vide Whiton v. Weston*, *infra*.

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they are ecclesiastical, but not religious, because they are not regular, and have not professed themselves, nor vowed three things, viz. obedience, voluntary poverty, and perpetual chastity, which things are requisite to such orders as are said to be religious, as may be seen in 2 Rep. 48. But the Templars are religious, because they are professed persons, as may be seen 35 E. 1. Tryall, 99. 2 R. 3. 4. and also 9 E. 3. 25 and 26. 12 R. 2. Nonability, 4. 8 E. 3. 53. where it is admitted that the prior of the hospital alone shall sue and be sued without naming the brothers, they being dead persons in law. They were also ecclesiastical persons, for they might sing mass, as may be seen in the statute of Templars, 17 E. 2. which no one could do who was not an ecclesiastical person. So that it appears that they were both religious and ecclesiastical, and of course entitled to the aid of the statute of 31 H. 8. if there were no other impediment in the case. And here COKE said, that the prohibition is insufficient of itself, inasmuch as the suggestion is, that "the prior of the hospital of St. John of Jerusalem and his brethren were seised;" whereas it ought to be that "the prior of the hospital of St. John of Jerusalem was seised," for the brothers are persons dead in law, who cannot be said to be seised. And therefore we see in 1 E. 3. 7. that the prior of St. John's of Jerusalem in England avowed without making any mention of his brethren. So in 1 E. 3. 9. it is said that the Templars and Hospitalers are professed persons, and their profession shall be tried by the common law and not by the ordinary, because they are out of his jurisdiction. And in 7 E. 3. 25. 1 R. 2. Nonability, 4. 8 E. 3. 53. the brothers are never mentioned in any suit by or against the prior of the hospital. And here COKE took occasion to speak of the first institution of the Templars and of their dissolution. The first institution of the Templars, he said, was to conduct Christians to the Holy Land safe from robbers and pagans, as may be seen in Matthew Paris, fo. 67. and as Pole says in 9 E. 3. 25. the lands upon their foundation were given to the Templars in defence of the Christians against the Saracens; and as *says, their institution was ad defensionem Christianorum terre sancte adversus Paganos et Saracenos.* So that they were a kind of soldiers and *militie dediti*, and did not fight with their pen, as other orders did, but with their swords; and they were *gladio cincti*, and always upon the mention of the gospel drew their swords in sign that they were ready to maintain the gospel with their swords; *et fuerant induti vestimento nigro modo Laicorum gerente signum crucis ante et post*; and as the learned Camden tells us, fo. 340. they had in all Christendom 9,000 manors for their maintenance, as the Hospitalers had 19,000; and they were always entombed in their complete armour, as the monks were always interred in their clothes. But the Templars, though a religious order, were persons of great impiety; for the Emperor Frederick having an intention of going on a pilgrimage to the place where John the Baptist preached, they treacherously wrote to the Sultan, and gave him notice of it, in order that he might surprize the Emperor, and by those means obtain a great ransom. But the Sultan, as soon as it was disclosed to him, informed the Emperor of it. And the French King, in requital as some say, prevailed with the Pope to dissolve the order; for in a counsel holden in 1312 at Vienne, the Pope said, *quanquam de jure non possumus, tamen plenitudine potestatis nostre ordinem illum Templariorum reprobramus.* And in consequence of this decree made by the Pope at that council, the whole order was dissolved in England by the statute of 17 E. 2. But the true cause of their dissolution is to be traced to other motives of the French King. All the Templars were gentlemen of the best quality; and the order of Hospitalers was erected a long time before the dissolution of the Templars, contrary to the opinion of Rastal in his title of Templars in his statutes, where he says that they commenced at the time when the Templars were dissolved. And COKE farther said, that long before the dissolution of the Templars, there were inns in which the apprentices of the law resided; for it may be seen in an old record among the *communis placita* in the hustings of London, that John Tracy *bene nummatus homo* devised *totum illud hospitium in Holborn in quo apprentiti ad legem habitare solebant*, whence it is manifest that they were resident in Holborn before the dissolution of the Templars.

Tr. 11 Ja. A. D. 1613. B. R.

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Kipping v. Swayn. [1 Br. & G. 123.] Cro. Ja. 324. 2 Bulstr. 119.
1 Gw. 258.

THE plaintiff brought an action of debt against Swayn, upon the statute of 2 E. 6. for not setting forth of tithes, and declares, whereas the plaintiff being proprietor of the rectory of B. in the county of, &c. for the term of seven years, and that the defendant was occupier of lands within the said pariah for six months, by a devise made the tenth of March, *an. decimo Jacobi*, and that the defendant, 27th August, the year aforesaid, did cut his corn there growing; and that the 10th of September then next following, the defendant being (*Subdit. dicti Dom. Regis.*) carried away the said corn, not setting out the tenth according to the statute; and upon a *nil debet* pleaded, it was found for the plaintiff; and it was moved in arrest of judgment, first, because of the plaintiff's own shewing, he had no cause of action against the defendant, for the interest of the defendant in the land was determined, before the tithes were carried away; but the court were of opinion, that it was no exception, for although his interest in the land was gone, yet he remained owner of the corn; for if corn be cut, although a stranger take it away before severance, yet an action will lie against him upon this statute; for otherwise the intent of the statute may easily be defeated. Another exception was taken, because the plaintiff said, he was (*Subdit. dicti Domini Regis*), which is a fault incurable; for the statute refers *subdit.* to his politic capacity, but *dicti* goes to his natural and sole capacity; and so the force of the statute shall be determined by his death; and for this cause an indictment upon the 8 H. 6. *contra pacem dicti Domini*, had been several times reversed; and of this opinion were three judges, but HAUGHTON doubted of it, and so it was adjourned.

A tenant cuts corn, and before carriage his term expires, yet he must set out his tithes, for he remained owner of the corn, &c. and if corn be cut down, although a stranger take it away before severance from the nine parts, an action on 2 E. 6. lies; for otherwise the intent of the statute might easily be defeated.

M. 11 Ja. A. D. 1613. B. R.

Wheeler v. Heydon. [Moo. 834.] Cro. Ja. 328. 2 Bulstr. 83.
1 Br. & G. 125. 1 Gw. 258.

IN an action of debt on 2 E. 6. the plaintiff declared upon a lease for five years made to him by the parson, if he should so long live and continue parson there. The jury found the lease for five years, if the parson should so long live, omitting the words, "if he should continue parson there." And the question was, if this were a material variance or not; and HAUGHTON, J. thought it was; but DODDING, CROKE, and COKE, *contra*. [The addition in the declaration is no variance in substance. The declaration is also good enough for a second reason; for the lease is not the ground of the action, nor is the declaration founded upon the lease, but upon the carrying away of the tithes; and for remedy of his wrong was the action brought; and the allegation of the lease is but an inducement to the action. CROKE.]

In an action on 2 E. 6. a variance between a lease stated in the declaration, and a lease proved, is immaterial, as it is but an inducement to the action which is founded on the wrong.

M. 11 Ja. A. D. 1613. C. B. *Norton v. Lyster.* Godb. 203.

IT was said by the court in this case, that before the stat. 2 E. 6. all prohibitions to the spiritual court were *quia secutus est de laico feodo*: for when a man had a *modus decimandi*, the corn and other things were lay things.

secuti sunt de laico feodo, for when a man had a *modus*, the corn and other things were lay things.

Before 2 E. 6. all prohibitions to the spiritual court were *quia*

1613.

M. 11 Ja. A. D. 1613. Dean and Chapter of *Windsor v. Webb*.
[Godb. 211.]

The word "forfeiture" in the statute 2 E. 6. does not give the treble value to the King, but to the parson himself.

The double value may be sued for in the spiritual court, but if they proceed for the treble, prohibition lies.

IN this case it was holden by the court, that if a man give lands unto a dean and canons, and to their successors, and they be dissolved, or unto any other corporations; that the donor shall have back the lands again, for the same is a condition in law annexed to the gift; and in such case no writ of escheat lies, yet the land is in him in the nature of an escheat. And the principal case was, that a prescription was shewn of a discharge of tithes in an abbot, prior, and convent, and that the corporation was afterwards dissolved, because all the monks died, and the abbot also. And it was holden by the court, that he who is now owner of it, and holds the lands, shall pay tithes; for a layman cannot prescribe in *non decimando*; and the prescription continues no longer than the lands continued in the abbot and convent's hands. And in this case it was said by COKE, that there are only three manners of escheats: 1. *Abjurat Regnum*. 2. *Quia suspensus per collum*. 3. *Quia utlagatus*. But because they sued for the treble value in the spiritual court, a prohibition was awarded; but the parson may sue for the double value in the spiritual court, and no prohibition will lie, for that is given by the express words of the statute of 2 E. 6. and so it was adjudged in *Manwood's* case in the Exchequer. And the word "forfeiture" in the statute does not give the treble value to the King, but to the parson himself. Also it was holden by COKE and WARBURTON, Justices, that if a rent be granted to one and his successors, and the corporation be dissolved, that the rent shall revert to the donor: and there is no difference as to the matter, betwixt things which lie in prender and things which lie in render. — NICHOLS, J. contrary, that the rent extinguishes in the land itself. And in the principal case, because they sued in the spiritual court for the treble value, a prohibition was granted.

M. 11 Ja. A. D. 1613. C. B. *Jacks v. Cavendish*. [Godb. 234.]

A prescription to take back thirty sheaves of the tithe corn after they were set out, alleged, but not determined.

A PARSON sued for the subtraction of predial tithes, upon the statute of 2 E. 6. in the spiritual court. The defendant made his suggestion, that for such a farm upon which the tithes did arise, there was this custom; that when the tithes of the lands were set forth, that the owners of the said lands had used time out of mind to take back thirty sheaves of the tithe corn: and shewed that he was the owner of the said farm; and that according to the said custom, after the tithes were set forth, he did take back thirty sheaves thereof, and thereupon prayed a prohibition. And in this case it was said by the court, that it ought to be averred, that the farm was a great farm, for otherwise it should be the impoverishing of the church, and would take away a great part of the profit of the parson. And it was further said by the court, that if there were but thirty tithe sheaves in all, the owner should not have them, for then the custom should be unreasonable: and day was given to the other side, to shew cause why the prohibition should not be awarded.

M. 11 Ja. A. D. 1613. C. B. *Baldwyn v. Girrie*. [Godb. 245.]

1. The stat. 2 E. 6. does not give any damages for mere subtraction of tithes; but if the tithe be first set out, and then subtracted, then because the parson had once an interest, he shall recover treble damages. If the jury give £20. damages, then the court shall treble them and make them £60.

2. Sentence was given in the spiritual court that one should recover the single damages, and further that he should recover the double value; resolved that a special prohibition should go, for although the sentence be not expressly that he should recover treble damages, yet in effect it was so.

A PARSON libelled in the spiritual court for tithes, and the subtraction of them, and grounded his libel upon the statute of 2 E. 6. The defendant alleged that he was to be discharged from the payment of tithes, by reason of privilege within the statute of 31 H. 8. of dissolutions: and the plaintiff here had a prohibition. And afterwards they were at issue here, whether he ought to be discharged by privilege or not; and after issue joined, the plaintiff in

in the prohibition was nonsuit: And thereupon the parson had a consultation, and proceeded in the spiritual court, and there obtained a sentence; and the sentence there was, that he should recover the single damages, and the same were set in certain; and *ulterius* that *recuperet duplicem valorem*, which was also by the said sentence set in certain. And it was resolved in that case by the whole court, that a prohibition should be granted grounded upon the sentence, because the spiritual court in their sentence exceeded the damages which were to be given by the statute in that court: and it was said, that although the sentence there given be not expressly that he recover treble damages, yet because it did amount to so much, if the words of the sentence be joined together, it was directed that a special prohibition, in which the statute and the whole matter were to be mentioned, should be awarded. And in this case it was agreed by the whole court, that the statute of 2 E. 6. for subtraction of tithes merely, does not give any damages: but if the tithes be first set forth, and then subtracted, there because the parson had once an interest in them, he shall recover treble damages. And the principal case was resembled by WARBURTON, J. to the case of *Waste*; that if the jury give damages £20. there the court shall treble the damages and make the same £60. and so it was done in the principal case.

1613.
BALDWIN
vs
GIRRIE.

M. 11 Ja. A. D. 1613. B. R. *Dolley v. Davies*. [2 Bulstr. 141.]

IN a prohibition moved for by *Yelverton*, the case appeared to be this: the defendant being parson of a parish in Bristol, libelled in the spiritual court against the plaintiff, being an innkeeper of the Bear in Bristol, to have tithes of the profits by him made, of his kitchen, stable, and wine cellar, and lays in his libel there, that he made great gain in selling of his beer, (having bought it for £500. and sold the same for £1,000.) and so libels for the third part of the profits of the same, and sets forth in his libel, that this tithe is due to him, *per communem legem Angliæ*, and sets forth in his libel, that *negociando et traficando*, he bargains to sell beer in his inn for £1,000. which he bought for £500. and gained in his sale £300. and better, of which gain he ought to have tithe. *Yelverton* moved for a prohibition, setting all this matter forth in his suggestion; and further shewed, that the defendant had yearly of the plaintiff £40. at the least. — DODDERIDGE, J. The defendant would have tithe, as I think, also of the kitchen-stuff. — *Clench*, clerk of the papers, informed the court, that there was a parson who libelled for tithes, of the gains of £10. for £100. put out, and a prohibition was granted: in this principal case, by the rule of the court, a prohibition was granted.

A parson libelled against an innkeeper for tithes of the profits of his kitchen and cellar; prohibition granted; so in a libel for tithe of the interest of money.

M. 11 Ja. A. D. 1613. B. R.

Draiton and Another v. Smith. [2 Bulstr. 157.]

IN a prohibition, the case appeared to be this, *Smith* libelled against them in the spiritual court, for tithe hay growing in their orchards: upon this suit they prayed a prohibition, grounded upon this suggestion, that they have time out of mind used to pay for a *modus* forty shillings to the vicar, and this to be in lieu of all tithes here due to the vicar and parson, and upon this suggestion, a prohibition was prayed. COKE, C. J. — If the parson sue in the spiritual court for tithes and the other plead a *modus* to the vicar, this *modus* now can never come in question by this suit between the parson and him, for tithes due to the parson, but this is to be questioned, and determined in the spiritual court, to whom the tithes belong, whether to the parson, or to the vicar; and this has been divers times adjudged in this court, and in the court of C. B. in *Bushe's* case, (1) and it has always been clearly held, that if the right of tithes come in question, between the parson and the vicar, to which of them the same belong, this is a suit properly belonging to the spiritual court to hear and determine, and in such a case they are not there to be ousted of their jurisdiction,

Where the right to tithes is in question between parson and vicar, the common law courts will not interfere, it being properly triable in the spiritual court.

(1) *Ante*, 90.

1613.
DEATON AND
ANOTHER
v.
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and this being now a question between the parson and the vicar, to which of them this tithe belonged, for which the *modus* is alleged to be paid; therefore no prohibition is to be granted in this case, though there be a *modus* suggested to be paid to the vicar, for all tithes here due to the vicar, and parson, the parson suing for the tithes there, as due to himself, and not to the vicar, and so the question is as touching the right of tithes between the parson and the vicar; which is a suit proper for the spiritual court; and this is to be observed for a sure rule, in such a case, never to have a prohibition granted; the reason of this is, because the *modus* suggested to be paid, cannot come in question upon this suggestion of this payment to the vicar, but only the right of tithes, to whom they belong, whether to the parson or to the vicar, and divers judgments have been accordingly given in the like case, and so by the rule of the whole court, a prohibition was denied.

M. 11 Ja. A. D. 1613. C. B.
Dr. Graunt's Case. [11 Co. 15.] 1 Gw. 259.

A customary payment of two shillings in the pound of the rent of houses within the precinct of St. Martin le Grand by way of tithes, is good, and may be recovered in the spiritual court.

THE case was, that Gabriel Graunt, doctor in divinity, parson of the parish of St. Leonard in Foster Lane, *infra præcinctum Sancti Martini le Grand*, libelled in the spiritual court before Dr. Master, official of the dean and chapter of Westminster, against Edward Taylor, farmer, of a great and ancient house, called the Dean's house, within the precinct of St. Martin's le Grand, late parcel of the possessions of the abbot of Westminster, and alleged, that every parishioner, or inhabitant having, or occupying a mansion-house, shops, warehouses, cellars, or stables, within the said parish of St. Leonard, within St. Martin's le Grand, yearly, every quarter of the year, at the feasts of Easter, the nativity of St. John the Baptist, St. Michael the Archangel, and the birth of Christ, *a tempore cujus*, &c. or at least from the foundation, donation, and erection of the said rectory of St. Leonard, by equal portions, to the parsons of the said rectory for the time being, *Nomine et loco decimar' suar', juxta ratam cujuslibet viginti solidat' redditus per an. ex quilibet hujusmodi domo, shopa, sollar', cellar', sive stabulo sic tent' sive occupat' in prædictâ parochiâ, duos solidos legalis moneta Angliæ*, &c. and that the said Edward Taylor and his family did dwell in the said house three years, and had and possessed it for the same time, *sub annuali redditu sexdecim librarum seu saltem 12 librarum*, &c. and so demanded two shillings in the pound, &c. The said Edward Taylor exhibited an information and suggestion to the court, that the late abbot of Westminster, and all his predecessors, until the dissolution of the said monastery, which was *anno* 30 Hen. 8. had held the said house discharged of tithes, and alleged the statute of 31 Hen. 8. concerning the discharge of payment of tithes, and conveyed to himself a lease for years, and thereupon had a prohibition; to which the said Dr. Graunt appeared, and Taylor declared against him to the effect aforesaid, and Dr. Graunt traversed the said prescription of discharge of tithes; whereupon issue was joined, and tried before me in London for Dr. Graunt: and now it was moved by Taylor's counsel, that upon the said libel, no consultation ought to be granted; for *de communi jure*, no tithes ought to be paid for houses of habitation, nor for any rent reserved upon any lease made of them; for tithes ought to be paid of things which grow and renew from year to year, by the act of God. Vide Register, 54. b. F. N. B. 53. E. Br. Tit. Dismes, 16. and not for dwelling in houses, or of rents issuing out of lands reserved and created only and merely by the act of the party: and therefore in the city of London, the parsons have two shillings and eight pence in the pound, &c. in name of tithes; but that is by decree made *anno* 1535, which is enacted and confirmed by authority of parliament, *anno* 37 Hen. 8. cap. 12. But St. Martin's le Grand is not included within the said decree, and act, for it is within London, and not of it; and therefore remains at the common law. And in 30 Ed. 3. fol. 1. a. and 38 Ed. 3. fol. 13. a. by Finchden it is said, that the profits of the churches in London, are the oblations and obventions.

But it was resolved *per totam curiam*: 1. That a consultation should be granted,

granted, for it may have a lawful beginning; for it may be, that for all the tithes of the land, upon which the houses are built, this *modus decimandi* has been a *tempore cujus*, &c. paid, and although it be after built, that shall not take away the right of the parson in such case. And because it may have a lawful beginning, and that it has been used a *tempore cujus*, &c. it was therefore resolved, that a consultation should be granted.

It was likewise resolved: 2. That for these monies he might sue in the ecclesiastical court, because they are in the nature of tithes, viz. *modus decimandi*; and every ancient city and borough has for the most part such custom, *de modo decimandi*, for their houses, for the maintenance of their parson. And as to the opinions in 30 Edw. 3. and 38 Edw. 3. it is said, that *obventio dicitur ab obveniando*, and includes oblations, rents, or other revenues, which may well agree with the resolution before; and afterwards a consultation was granted.

[Note, The "may be," &c. in the first resolution, *supra*, seems a weak reason to support that resolution.]

1613.
ORANTY'S CASE.

E. 12 Ja. A. D. 1614. B. R. *Boocher v. Rogers*. [1 Ro. Rep. 3.]

BOOCHER had obtained a prohibition against Rogers, and suggested, that he, being a layman, was seised of the manor of D.; and that he, and all those, whose estate he had, from time whereof, &c. had been accustomed to take the tithes within the said manor, by reason that he, and all those whose estate he had, had used to maintain a chaplain in the church of D. *Bridgeman* prayed a consultation:—1. Because he had not alleged that the church of D. was within the same parish as the manor, therefore no consideration was shewn to the parson, who was the plaintiff. 2. Because he had not carried the maintenance of the chaplain, so far as his title to the tithes, that is, from time whereof, &c. 3. The defendant had not proved that part of his suggestion, on which chiefly depended the goodness of his prescription, viz. the maintenance of the chaplain within the six months: and he submitted, that, on these grounds, a consultation ought to be granted, which, as to the last point, was conceded by the court. But *Coke* said it ought also to have been granted on the other objections. The other points, however, were not noticed by the other judges.

1614.

A layman prescribed to have all the tithes within his manor of D. he maintaining a chaplain in the church of D. *Coke* held such a prescription bad, both because it was not alleged that the church of D. and the manor of D. were in the same parish, and so no consideration to the parson; and out of mind.

because the maintenance of the chaplain was not alleged to have been three

E. 12 Ja. A. D. 1614. B. R.

Parker v. Kemp. [1 Ro. Rep. 12. 2 Bulstr. 227.]

TO a suit in the spiritual court for tithes of apples, the defendant pleaded an award; and then prayed a prohibition here by *G. Croake*, for that it was a matter to be tried at common law, but was refused by the court. *Coke*. — If he had pleaded 10s. in satisfaction, ought a prohibition to be granted? I think not. So in a suit for a legacy, a prohibition shall not be granted upon a payment pleaded; so if an acquittance be pleaded yet no prohibition, as 1 R. 3. is. The reason of these cases is, that where the spiritual court has cognisance of the original and principal matter, there a matter subsequent, and depending thereon, triable at common law, shall not oust the court of jurisdiction. In *Morley and Eaton*, it was adjudged here, that upon a suggestion of having but one witness, which is insufficient in the spiritual court, a prohibition should not be granted, for the other could not deny it, without admitting against himself that there were two witnesses to the thing in question; which was agreed by *DODDERIDGE*. For if such suggestion should be allowed, and prohibition granted, we should oust the spiritual court of every thing. *HAUGHTON*. — If a suit were in the spiritual court for a legacy upon a lease, then a prohibition should be granted, which was agreed to by *Coke*; who said

1. A prohibition shall not be granted upon a suggestion of having but one witness, which is not sufficient in the spiritual court, for the other cannot deny this; for if he do, he admits against himself that there are two witnesses of the thing in question; but if the spiritual court adjudge otherwise upon the matter than also, the common

law would, prohibition shall be granted. 2. An award pleaded is not sufficient cause for a prohibition; but if they decide upon it in the spiritual court contrary to the common law, prohibition will lie.

1614.

PARKER

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also, that if the spiritual court adjudged otherwise upon such an acquittance, or award than according to the common law, then a prohibition should be granted, which was agreed by DODDERIDGE; and therefore he advised them, if the award should be disallowed, to move this court again. — COKE. By the spiritual law, a gift of goods is not valid without delivery, but if they decide according to such law, a prohibition shall be granted. When the original begins in court-christian, although that afterwards a matter happen in issue, which is triable by our law, yet this shall be tried there by their law; as if one sue there for a horse devised to him, and the defendant there plead, that the deviser gave this horse to him in his life-time, this is triable by our law, yet the same shall be tried there. In the same manner it is, where the original begins here, the same shall be tried here by our law, as in a *quare impedit*, able or not able; if it were otherwise, they would there try nothing, this is belonging to them: but if they will there draw the matter, *ad aliud examen*, as upon proof of a deed, they judge otherwise than we do; as in case of a lease for years to be made, they hold the same to be *traditione*, or void; and so a grant of goods, to be delivered, or not good. If they will judge in common law matters otherwise than we do, then, in such cases, we will prohibit them. (*Bulstr.*)

E. 12 Ja. A. D. 1614. B. R.

Babington et Ur. v. Matthews. [1 Ro. Rep. 13.] 2 Bulstr. 229.

In an action on 2 Edw. 6. it is sufficient for the plaintiff to state himself in his declaration to be proprietor without other title, the principal matter being the damage for not setting out tithes, which alone is traversable.

BABINGTON brought an action of debt, on the statute of 2 Edw. 6. against (Matthews), for not setting out tithes according to the statute. Exception was taken to the declaration, by *Overbury*, after verdict for the plaintiff, because the plaintiff declared that he was seised of the tithes in right of his wife, for her life, and averred the wife to be living; and that the tithes were not set out, &c.; which was not sufficient, for he ought to have shewn his title to the tithes, and to have set forth the deed of conveyance. 36 Hen. 6. 19. 6. Where a deed forms a necessary part of the case, it ought to be set forth in the declaration. — COKE. There is a difference between setting forth a conveyance and a title: if a man bring an action on the case for a nuisance to a freehold, or to a way, it is sufficient if the declaration allege that he was possessed of the premises for a term of years then to come, and that the defendant stopped up and hindered, &c. and this, notwithstanding the term, is uncertain; for it is only inducement, and so it is in the present case; the principal question is the damage sustained by not setting out the tithes, and this only is traversable. — DODDERIDGE. If the thing demanded must of necessity be by deed, a deed ought to be alleged, as in an avowry for rent; but here the statute gives the action to the proprietor, and it has been expressly ruled, that by force of this word, the declaration would have been good if the plaintiff had alleged himself proprietor, without other title. And judgment was given for Babington by all the court.

E. 12 Ja. A. D. 1614. B. R.

Porter v. Tike. [1 Ro. 22.] 2 Danv. Ab. 611. 2 Inst. 645.

Quere, whether a country may prescribe in *non decimando* if the incumbent have sufficient support beside.

IT was said by COKE, that WRAY, Ch. J. held, that a country might prescribe in *non decimando*, if the incumbent had sufficient for his livelihood, but I think otherwise.

A country may prescribe to be quit of tithes of wood, or any other tithe, so there be sufficient maintenance and sustentation of the incumbent besides; but a town cannot so prescribe.

Tr. 12 & E. 13 J^a. A. D. 1614. B. R.*Mascall v. Price*. [1 Ro. 38. 62. 176. 2 Bulstr. 238.]

1614.

UPON demurrer to a [declaration in] prohibition, *G. Croke* prayed a consultation.

1. The libel in the spiritual court is for the herbage of oxen and steers, and the defendant prescribes that time whereof, &c. every one keeping any dry cattle, which might afterwards be employed in husbandry, should pay no tithes for the herbage of such dry cattle; and does not lay his prescription for dry cattle which might be employed for husbandry within the parish, (1) and therefore bad, for perhaps such cattle might be so employed in other parts of England, and yet not in this parish, and then the parson of this parish has no consideration for the prescription. *Davenport, & contrâ*, I think that for dry cattle no tithes shall be paid, for that they are for the maintenance of husbandry, and it is not reasonable that the parson should have tithes of the produce of their labour, and also for their feed, which is solely to enable them to perform the labour. Hil. 8 Jac. C. B. rot. 1109. *Barter v. Hope*. (2) A man prescribes that in consideration that he had maintained a family within the parish to manure and till his land, and in consideration that he had paid hay and calves to the parson, he had been discharged of all herbage within the parish, and a consultation was prayed after prohibition, and refused. Hil. 4 Jac. in this court, *Bartlett v. Longe*, Co. Ent. 460. A man prescribes, that in consideration that he had fenced his land, and paid tithes of the emblements and of hay, and had a family within the parish, he had been discharged from payment of tithe of any wood employed in his house or about the land aforesaid. COKE, Ch. J. to the same effect, for barren cattle no tithes ought to be paid; and so *Lindwood* held, which was conceded by the court. And *G. Croke*, as to no tithes being payable for them, objected, as before, that the prescription is laid for dry cattle which might be employed in husbandry within the parish. — COKE. It is all one.

2. *G. Croke*, the libel is for the herbage of fattening cattle and milch kine, and butter and cheese; the defendant prescribes, that all who have milch ewes and cows within the parish, have been used to give, on *Lanmas-day*, in every year, nine cheeses to the parson, for butter, cheese, and the herbage of milch kine and fattening cattle; which prescription is unreasonable as to the fattening cattle, for that they are of a different nature from the consideration. *Dr. Lewes v. Gismond*, (3) 37 Eliz. A man prescribed that every one having a milch cow within the parish had used to pay a penny in discharge thereof, and all dry cattle within the parish, and not good, for that one thing cannot be a consideration for the discharge of tithes of another nature; and 38 Eliz. *Sellington v. Fleetwood*, (4) was adjudged accordingly. *Davenport, & contrâ*,

1. No tithe is due for agistment of barren cattle, bred and kept to be employed in husbandry, unless fattened and sold away.

2. No tithe shall be paid for the herbage of milch cows or sheep, for they are *animalia fructuosa*.

3. The court seemed inclined to think that a custom, that every one keeping milch cows should in satisfaction of agistment tithe of fattening cattle, and of the tithes of milk, butter, and cheese, pay nine cheeses (being a collateral thing) was bad. Coke said he did not believe it had ever been decided that a payment in money, which differed from this, should not be a discharge for different things.

4. A custom these to make up the

first crop is a good discharge of the after-crop.

5. The court seemed inclined to think that broom is titheable, unless it be stubbed up to make way for the plough, upon land barren, within the statute 2 E. 6.

6. Though a demurrer to a declaration in prohibition be bad, yet if the declaration itself be not good, a consultation shall go. To demur to prescriptions at first is dangerous; it is best to join issue upon the custom, and try the facts, and afterwards, if necessary, to demur in law. (By Coke.)

7. If land, covered by a *modus*, be leased, and the farmer pay tithe in kind, the *modus* shall not be destroyed against the lessor.

8. A money *modus* for the tithes of a park is not destroyed by disparking.

9. Where the plaintiff in prohibition alleged a custom to pay no tithes for barren cattle reared or employed for the plough, he must also allege that the cattle for which tithes were demanded were so reared or employed.

10. Where one prescribed that no one keeping milch cows ought to pay agistment tithe of fattening cattle, but in satisfaction thereof; and of the tithes of milk, butter, and cheese, to pay nine cheeses, but did not allege that he kept milch cows, a consultation was granted.

11. The parson may sue for a *modus* in the spiritual court, and prohibition will lie if he sue there for tithes in kind, because the *modus* has not been paid.

(1) *Wodden Water*, in the county of Essex. Bulstr.

(2) 2 Bro. & G. 30. ante, 900.

(3) *Grysmen v. Lewes*, Cro. Eliz. 446. ante, 112.

(4) *Sherington v. Fleetwood*, Cro. Eliz. 475, &c. ante, 132.

1614.

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v.

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these cheeses require the labour of the party, and so there is more than tithe in kind, and therefore a good satisfaction. — COKE, Ch. J. For milch cows no tithes shall be paid; and so is *Lindwood*. But I do not believe that it has been adjudged, that money shall not be a discharge of things of another nature, for this differs from the case here.

3. The libel is for the herbage of sheep. The defendant prescribes that it has been used to pay the tenth fleece, and for that, to be discharged of herbage, which is not good, for the tenth fleece is but the due of wool. *Davenport, & contrà*, F. N. B. A man shall not pay tithes for the agistment of such beasts as he has tithes of, and the Register accords. 52. a. To this prescription nothing was said by the court.

4. The libel is for the latter crop of grass. The defendant prescribes that in consideration of payment of tithe of hay of the first cutting, he has been used to be discharged of tithes of the second; this consideration is no more than is due by law, and therefore not good. *Davenport, & contrà*, for he preserves the first cutting for hay, which he might have eat with his beasts, and therefore a good consideration; and so it was held in the case of *Baxter v. Hope, suprà*, that for the after-crop of emblements no tithes shall be paid. of the same opinion.

5. The libel is for tithes of broom. The defendant prescribes that for rooting up the broom, and sowing the land next year with emblements, which is more beneficial to the parson; and also for that the broom is of little value, and is good for covering houses, they have been used to be discharged of tithes of broom, which is in effect a *non decimando*, and therefore bad. — *Davenport, & contrà*. The rooting up is a great charge to the party, and the sowing of the land with emblements is more beneficial to the parson, and therefore the prescription is good. — COKE, Ch. J. I think that land with broom is not within the statute of 2 Edw. 6. for it is not barren land, and therefore if it be converted into arable land it is titheable, for the statute speaks of barren, heath or waste land; yet it appears that if a man stock up wood, and convert the land into tillage, that it is not within the statute, and so it has been ruled, for that it is fructiferous land and not barren, and therefore I think that in the case at bar tithes ought to be paid of broom. The court seemed to incline to the same opinion.

6. It appears that the form of these prescriptions is not good; for in the first, there is no averment that these cattle were employed about husbandry; in the second, it is not averred that he had any milch cows or ewes; and so in all the other prescriptions there is no averment, that he had done what the prescription requires, and therefore not good, which was conceded by the court; and therefore the court advised them to take issue, which they refused upon adjournment.

G. Croke. The plaintiff in the prohibition prescribes to pay no tithes for the herbage of such barren animals as are reared for the plough or employed at the plough; and has not alleged that these cattle, for the herbage of which the defendant has sued in the spiritual court, were so reared or employed, so that he has not brought himself within the prescription. So he has prescribed, that all who have milch kine within the parish ought not to pay any tithes for the herbage of fattening cattle, but in consideration thereof and of tithes of milk, butter, and cheese, he had been used to pay annually nine cheeses on a certain day, and has not alleged that he had any milch kine, and therefore a consultation ought to be granted; which was conceded by the court, and a consultation was granted upon both prescriptions.

G. Croke. In the prohibition there is another prescription, by which he claims to be discharged of payment of tithes of wool, and the herbage of sheep, for that he had been used to pay for them ten stone of wool, and has not alleged that he had paid it. The court said, it is well enough, for the parson might sue for this *modus decimandi*; but the prohibition is well granted here, as he had sued for tithes in kind; and for herbage of sheep no tithes ought to be paid, for they are *fructuosa animalia*. — *Davenport*. The demurrer to this prohibition is not good. The court said, if the demurrer were not good, yet

yet if the declaration in prohibition were bad, a consultation ought to be granted.

Upon evidence at bar, it was said by COKE, Ch. J. to the jury, that if a man prescribe to pay four nobles for the tithes of a park, for time whereof, &c. if it be afterwards disparked, yet the *modus decimandi* will continue: he also said, that if a man prescribe to pay a *modus decimandi* for certain land, and afterwards let it to farm, and the farmer pay tithes in kind, yet this does not destroy the prescription as it regards the lessor.—(*Rolle.*)

In a prohibition to the spiritual court, upon a libel there for tithes; in his declaration, sets forth five several prescriptions for a *modus decimandi*, there pleaded, in discharge, and not allowed of, and for this cause a prohibition prayed; demurrer to this declaration. *G. Croke* prayed a consultation, for that all the prescriptions set forth in the declaration are bad; the question was for the tithe, arising in the parish of Woddam Water, in the county of Essex. The 1st prescription was this, to be discharged of tithe herbage for barren cattle in the parish, and out of the park, kept and employed only for husbandry, and manurance of his land, within the parish, and so for other young cattle kept for this purpose, *cum valerent*; and in the interim, it is laid, that he had no other profit of them, and in regard, that he was to have his tithes out of the profits of the land manured by these cattle, and therefore for tithe herbage of them, in this regard, he prescribes to be discharged; this prescription here, is not good, the same being too general, and trenches to the impoverishing of the parson, if he shall have no allowance for barren cattle. The second prescription is also bad, being this, that if he keep milch kine, or ewes, he prescribed to pay at *Lammas-day*, nine cheeses, this is not good; and for fattening cattle to pay nothing. Upon this there was a case, Mich. 37 Eliz. between *Dr. Lewis* and *Gilborne*, (1) where the prescription for a *modus decimandi* was this, that in regard he paid for milch kine so much, (*sc.*) one penny, he prescribed to be discharged of the tithe of milch kine, and also of all other dry cattle: this was there held to be contrary in itself, for a *modus* for one kind, to be discharged of another kind; and therefore this prescription held not good, and for this cause the same was disallowed. Another case there was, which was a Lincolnshire case, 38 Eliz. B. R. between *Sherington* and *Fleetwood*, (2) where the prescription was to pay so much for milch kine and ewes, and for this to be discharged of tithes, for them, and for all his dry cattle; this was here adjudged to be a bad prescription; and so here, in this principal case, this prescription is not good; and as touching customs, Littleton's rule, in his chapter of *burgage*, is to be observed, being this, (*sc.*) that *consuetudo ex certa causa rationali usitata, privat communem legem*, so that every custom ought to be reasonable; but here the nine cheeses, to be in discharge for the milch kine, and also for all his other dry cattle, this is a bad custom, and unreasonable. The third prescription here is laid for shorn sheep, to pay for this the tenth fleece, and to pay no other tithe for the agistment of any sheep, and for this cause the prescription is not good; for that he here prescribes to pay no more than he ought *de jure* to pay, and so not good; also, it is not here averred, that these sheep or kine were there kept, nor that he had any kine or sheep for which he ought to pay, and therefore the prescription is not good. The fourth prescription, for the latter crops of meadows, out of the park; this is no other but to pay this which he ought to pay, and by this to be discharged of that which he ought to pay, being the vesture, and so not good. The fifth prescription, touching the furzes and broom. The libel is, he took sixty loads of broom, and paid no tithe for it; the prescription in discharge of this was, that the land by this being brought into tillage, and so by this the parson to have tithe corn, which should be of greater value to him; and that the broom was but of small value, and given away to the poor for pulling it up, and therefore he to have no tithe of this broom; but it is not averred, that the broom so taken was for this purpose, and therefore is not good; neither is it averred, that this was converted into tillage. In the libel it is shewn, that this broom was rooted up every year, but doth not shew, that it was so done for this purpose, to convert and turn the same into tillage; neither is it averred that this land was

(1) *Grymman v. Lewis*, Cro. Eliz. 446, ante, 112.(2) *Ante*, 132.

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barren, nor that the same was converted into tillage, and so the prescription is not good, and therefore prayed a consultation. Against this it was urged by *Davenport*, that these several prescriptions are good. As to the 1. touching barren cattle, that were kept to be employed in husbandry, and because with them the land is tilled, and they make the increase, for that tithe corn and hay come of the labour of the beast, and therefore this is a good prescription. Hill. 8 Jac. C. B. Rott. 1109. Coke's Book of Entries, fol. 459. in *Baxter and Hope's* case; (1) that, for the payment of tithe corn and hay, to be discharged from payment of any thing, for all his young cattle, kept and bred up for agriculture, a prohibition upon this was granted; and a consultation could never be obtained, the reason because that husbandry cannot be without cattle; and therefore not to have tithe of them, and upon that record, no consultation was granted. There is also some speech of the discharge of the after-crop, for the rewine grass; as touching this also, there was a case, H. 4 Jac. B. R. Rot. 411. Coke's Book of Entries, fol. 460. *Bartlet* against *Long*, a case touching tithe wood, a *modus decimandi* pleaded in discharge of it; the second prescription for lactage, this is good, as it is set forth, for *principiorum non est ratio*, if the custom be not unreasonable, it is then good; he would have herbage of milch kine, and milch sheep, and for calves also, for this to have nine cheeses paid him on *Lanmas-day*, in consideration of the tithe of milch kine, and milch ewes, and for barren cattle; he to have these nine cheeses, although he make but ten cheeses, or but nine cheeses in all, he is to have nine, so that this tithe is here well satisfied with a collateral thing, and so good. The third prescription for sheep, to have the tenth fleece. F. N. B. and Register, fol. 52. no tithe for agistment of land, in respect of the cattle which feed there. The fourth prescription for the after-grass, in consideration that every one shall preserve *primam tonsuram*. by which the parson shall have the better tithe, and therefore to be discharged of the after-crop, for the tithe of it, and this is called (rewine), this is good, for by this the parson has the greater benefit. The fifth and last prescription is not merely to be discharged of the tithe broom, but if he have barren land, overgrown with broom, and, at his proper costs and charges, he root this up, and convert it into tillage, to pay no tithe of this: the custom is qualified, this to be converted the same year or the next into tillage, and so this is not generally to be discharged of tithe broom; and so the prescription here is good, and prays that the prohibition may stand. — COKE, C. J. These several prescriptions here, are laid to be time out of mind, and upon these the counsel of the other side has demurred; to demur upon such matters is a very desperate kind of practice, and I would never have done so, but to join issue upon the customs, and first to try whether there were such a custom or not, and if it be found so, then afterwards to demur upon the validity of this in law. As to the custom for barren cattle, which are for the plough or the pail, no tithe is to be paid for the herbage of them, and this is clear, and so is *Lindwood*, *animalia fructifera, et sterilia*, these exempted from tithe; that for barren cattle, bred and kept to be employed in husbandry, for their agistment no tithes to be paid, (unless it be averred, that they were by him fattened and sold away.) — COKE. The abbot of Colchester had the parsonage impropriate, yet the vicar had the tithe lambs; and in one year, the vicar had but one lamb, and the abbot would also have this lamb of him, whereupon the vicar did write these two verses unto the abbot, (sc.)

*Velleribus centum gaudes, cum lacte bidentum,
Nec reputas magnum, tuleris nisi pauperis agnum.*

The nine cheeses here, are as well for the one as for the other. As concerning the broom, this is titheable, notwithstanding he convert the land into arable, if the statute of 2 Edw. 6. cap. 13. do not help him. — HOUOTON and COKE. Clearly the broom is titheable. — COKE. It was *Farrington's* case, if wood be stocked up, and the land converted into arable, it was adjudged here, that of this wood tithe should be paid, for this land is *fructifera*, and therefore to pay tithes; but if you would be discharged from payment of tithes for this, you ought then to aver, and prove this to be *sterilis*, underwood,

and that you have stocked up all, to make way for the plough, otherwise tithe to be paid of this, and so of other great woods; and so this case was adjourned unto another time. Afterwards Termin. Mich. 12 Jac. B. R. this matter was then moved again. — COKE. Notwithstanding the demurrer to the declaration be bad, yet if the declaration upon the prohibition be not good, a consultation is then to be granted; and this is warranted by a judgment given, Mich. 35 Eliz. between *Knightley and Spencer*, (1) that if the declaration upon the prohibition be bad, then a consultation to be granted. Here the first custom, not to pay any tithe for barren cattle (to be) employed for the pail or for the plough, or for young cattle, but the *minor* is here omitted, for it is not shewn, that these cattle were such, and so not good, and therefore for this a consultation is clearly to be granted; the whole court agreed herein, for a consultation as to this. The second custom, no tithes to be paid for fat cattle, because to pay nine cheeses on *Lammass-day*, in discharge of tithe of milch kine and fat cattle, but does not shew, that he had any milch cow, or that he paid any cheese at all, and so not good; and therefore a consultation granted for this, by the whole court. — COKE. If he pay money for a *modus decimandi*, he may sue for this, though it be not alleged that it was paid; there is a difference between *fructuosa et sterilia animalia*, not to have tithes in both kinds.

Nota, that afterwards, on another day, by a jury of Essex, the prescription for the *modus* was tried at the bar. — COKE. If this *modus* be not paid for a certain time, yet clearly this does not alter the prescription for this *modus*, but he may pay it when he will. Also if there were a prescription, time out of mind, for a *modus decimandi*, for land when it was a park, this prescription shall have continuance clearly, for the payment of this *modus* only, after that such a park be disparked, and converted to another more profitable use; the whole court agreed with him herein. The jury, upon such directions as the court gave them, went together, and returning, gave a verdict for the plaintiff, in the prohibition, against the directions of the court, and contrary to all their evidence, inasmuch that the court said unto them, that they never heard of so ill a verdict, they having no proof at all for the prescription, for the *modus decimandi*, but for the tithe to be paid in kind; and therefore the court said, that it should be tried again by another jury, and would give the party no costs in this case. — (*Bulstrode*.)

(1) *Ante*, 101.

Tr. 12 Ja. A. D. 1614. B. R. *Prowse v. Dr. Leyfield*.
[MSS. Calthorpe, Vol. 1. p. 401.] 1 Ro. 54. 1 Gw. 264.

THE proprietor of the rectory of Old Clive, a parsonage inappropriate, libelled against Prowse for the tithes of three acres of arable land, and three acres of pasture. Prowse, upon the suggestion which he made, obtained a prohibition, and declared that William, abbot of Clive, was seised of the rectory of Old Clive, and the lands whereof tithes are now demanded, *simul et aemel* from the time of the foundation (of the abbey) to the time of its dissolution; and he being so seised, made a lease of the lands and of the tithes of the corn, and of the small tithes in the 9 H. 8. for six lives, rendering 3*l.* for the lands, 26*s.* 8*d.* for the tithes of corn, and 6*s.* 8*d.* for the small tithes: that afterwards the statute of 27 H. 8. Rastall, Monasteries, 9. was made, whereby all monasteries, &c. not above the value of 200*l.* *per annum*, were given to the king, by virtue whereof the reversion of these lands, the monastery being under the value of 200*l.* *per annum*, came to the king; and shewed that the lease continued till 20th of Eliz. without the payment of any tithes, &c. and then conveyed the rectory to the defendant, and the lands to the now plaintiff in the prohibition, and pleaded the statute of 27 H. 8. (c. 20.) whereby it is enacted, that the king and his assignees shall hold in as ample

1. Possession by an abbot of a smaller monastery of lands and a rectory, *simul et aemel*, from the foundation of the abbey to the dissolution, 27 Hen. 8. is not a sufficient ground of discharge, if it be shewn that the abbey was founded within time of memory; but if there had been a perpetual unity, and no tithes ac-

fully paid, or if they had been suspended, by being leased with the lands, the court (according to Rolle) seemed to think that it would be a good ground of discharge with respect to the smaller monasteries.

2. Where tithes were leased for a rent at the dissolution, it was held that there could be no discharge by unity, for the payment of rent for the tithes was a payment upon the matter of tithes, and a seisin of them.

3. Where the foundation of an abbey was shewn to have been within time of memory, it was ruled there could not be a sufficient unity for a discharge from the payment of tithes.

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and large manner as the abbot; and also pleaded the branch of the statute of 31 H. 8. (c. 13.) which discharges from the payment of tithes; and further stated, that he was ready to pay the rent that was paid to the abbot, &c. and concluded that the defendant *contra modum decimandi prædictum et contra formam statutorum prædictorum* demands tithes, &c. To this declaration the defendant demurred, and prayed a consultation.

Wincoll, of the Middle Temple, argued that the count is insufficient: first, in regard that the plaintiff entitles himself to be discharged of tithes by reason of a unity of possession, and it does not appear that there has been a perpetual unity time whereof, &c. for he says that there has been a unity from the time of the foundation of the abbey till the time of the dissolution, which is not sufficient without shewing that the foundation has been time whereof, &c. It might be, notwithstanding this plea, that the foundation was ten, twenty, or thirty years before the dissolution, which would not be sufficient; for if the time of the commencement of the foundation appeared, that would destroy the custom, according to the case of *Hankins v. Hankins*, where a unity of possession for time whereof, &c. was alleged in an abbot of the rectory and lands whereof the tithes were demanded *simul et semel*, it was shewn for the defendant in prohibition that the foundation of the abbey was within 200 years; and thereupon it was ruled, that it was not a sufficient unity to discharge from payment of tithes; for the unity ought to be time whereof, &c. and where the commencement of a thing appears, it is not time whereof the memory of man runs not to the contrary; for where any beginning appears, either by record or other writing, it is not time whereof, &c. any more than if the beginning had appeared within the memory of man. And for that reason in 3 H. 6. 31. where one prescribed to have a road over land, and there was a unity of possession shewn of the land from which, &c. and of the land over which, &c. in the time of Rich. 2. it was ruled, that the prescription was destroyed, inasmuch as there was a time shewn when the road did not exist. 34 H. 6. 36. 19 H. 6. 75. 33 H. 6. 27. 34. 27 H. 6. Prescription, 48, it is holden, that if a person prescribe to have an annuity as appurtenant to his church, and the defendant shew either a deed by which the annuity was granted, or the time of the foundation of the church, the prescription is destroyed, because its beginning appears. 45 E. 3. 4. the defendant in an action of trespass made title to the plaintiff as a villein regardant of his manor, time whereof, &c. to which the plaintiff replied, that his ancestor, in the time of the defendant's great-grandfather, was an *adrentif*; and it was ruled, that the prescription failed, because there was a time shewn when the plaintiff's ancestor was not a villein. And the New Book of Entries, 457. 2 Co. 47. the archbishop of *Canterbury's* case, (1) P. 40 Eliz. Rot. 437. Tr. 34 Eliz. Rot. 83. and the case of *Ryder and Calmady*, according, that a unity that will discharge one of the payment of tithes within the branch of the statute of 31 H. 8. ought to be a perpetual unity time whereof, &c. and if there be an allegation that it was time whereof, &c. where it is not so, it is a thing traversable, and an issue may be joined upon it. But it seemed to him that the general allegation of lands being discharged from the payment of tithes without shewing how it is discharged, is sufficient, according to 2 Co. 47, 48. inasmuch as it may be discharged many ways, as by composition, prescription, &c. and it would be hard to drive him to shew how it is discharged, when there are so many ways which cannot be well known; but, if he take upon him to shew the special way how it is discharged, then it ought to be shewn certainly, otherwise the plea is insufficient, and a consultation shall be granted. And the said lands may be discharged from the payment of tithes without the aid of the branch of the statute of 31 H. 8. as where they are discharged by prescription, as in the case of a spiritual person, as in the archbishop of *Canterbury's* case, or by composition, as, where there is a *modus decimandi* paid for the tithes in kind.

COKE, Ch. J. CROKE, DODDERIDGE, and HOUGHTON, Justices, thought that the count was insufficient, inasmuch as it did not shew the foundation to be time whereof, &c. and the unity which will discharge one from the payment of tithes, ought to be a perpetual union, and not a temporary union.

Secondly,

Secondly, *Wincoll* moved that the count was insufficient, inasmuch as he claimed to be discharged from the payment of tithes by the statute of 27 H. 8. (c. 20.) and the statute of 31 H. 8. (c. 13.) and neither of those statutes would discharge him. For the statute of 27 H. 8. Monasteries, 9. will not discharge him, because it has not any words of discharge; for it only says that the king's patentees shall have all such actions, suits, entries, and remedies, to all intents and purposes, as the abbots might or ought to have had, &c. which words will not make any discharge according to the resolution in *Green and Balser's* case, (1) where it was ruled that if the branch of the statute of 31 H. 8. had been only in general words, that the king and his assignees shall have the lands in as ample and large manner as the abbots had them, they would not operate any discharge, because such general words would never extend to a privilege of discharge. And the statute of 31 H. 8. c. 13. cannot discharge these lands, for that statute not being a statute by which monasteries were dissolved, but being only a statute by which monasteries dissolved by surrender, &c. since the 4th day of February, in the 27th year of H. 8. were confirmed and settled in the king, his heirs and successors, it does not extend to discharge any lands from the payment of tithes, but those lands only which came to the king after the statute of 27 H. 8.; for, after reciting that the monasteries have come to the king since the 4th day of February, it says, that the said late monasteries and the lands appertaining to the said monasteries, &c. shall be retained and kept according to their estate and title discharged of the payment of tithes: wherefore as the abbey in the case at bar, and the lands appertaining to it, coming to the king by the statute of 27 H. 8. shall not be comprised within the statute of 31 H. 8. which extends only to lands which came to the king after the statute of 27 H. 8. so, for the like reason, lands which have come to the king since the statute of 31 H. 8. shall not be discharged from the payment of tithes, as we may see in 2 Co. 47, the archbishop of *Canterbury's* case, where it is ruled that lands which came to the king by 1 E. 6. (c. 14.) shall not be discharged of tithes within the 31 H. 8. And 1 Ja. Rot. 45. and Hil. 44 Eliz. Rot. 444. *Quarles and Spurling's* case, where it was ruled that lands parcel of the priory of St. John of Jerusalem, which came to the king by the statute of 32 H. 8. (c. 24.) shall not be discharged from the payment of tithes within the 31 H. 8. which extends only to those monasteries, &c. which came by inferior means than an act of parliament after the statute of 31 H. 8. For the same reason those lands which came to the king before the statute of 31 H. 8. shall not be discharged; the statute of 27 H. 8. being as high means as the statute of 31 H. 8. and not inferior to it.

Thirdly, He argued that the conclusion of the count was insufficient, which says, and so *contra modum decimandi*, &c. he ought not to pay tithes; whereas a *modus decimandi* will not discharge him from the payment of tithes, unless it has been time whereof, &c.

Fourthly, It appearing to the judges that the tithes were leased for a rent, they granted a consultation; for now it was manifest that tithes were paid at the time of the dissolution; and if tithes were paid by the farmers of the land, then is the land not discharged from the payment of tithes within the branch of the statute of 31 H. 8. c. 13. and this payment of rent for the tithes was a payment upon the matter of tithes, and a seisin of them.

Note. It appears by the record that there was a demurrer upon the suggestion; but it does not appear that a consultation was granted.—(*Calthorpe.*)

Prowse brought a prohibition against Dr. *Leyfield*, and shewed that the defendant, as parson, had sued in the Court of Audience for tithes of two acres of land, which was parcel of the possessions of a certain abbey which came to the king by the stat. 27 H. 8. and pleaded also the statute 31 H. 8. and averred that the abbey, from the foundation to the dissolution, was discharged of the tithes of such land; to this there was a demurrer.—*Wincoll.* I think the defendant ought to have a consultation, for he says that the abbey held it discharged from the foundation to the dissolution, which is not good; but he might have said that it was discharged at the dissolution for the uncertainty of the commencement of the discharge; and so is 2 Co. *Arch. Cant.* 47. But if he would

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would shew a special discharge, there ought to be a perpetual unity, and it might be that this abbey was founded but a short time before the dissolution; *Hankins v. Hankins*, in prohibition, a perpetual unity was alleged, and the defendant for a consultation shewed the foundation of the abbey, and the plea good; for if a prescription be alleged, if the commencement of it be shewn, the prescription is destroyed, as in 3 H. 6. 31. 34. H. 6. (36.) 33. H. 6. 34. — *Hooper, & contra*. If only a discharge at the time of the dissolution had been alleged, it would have been sufficient, and so this surplussage shall not prejudice him. But by the whole court a consultation was granted. However, *DONDERIDGE* said if he had alleged that the abbey was founded before time of memory, and that from the foundation to the dissolution it was dissolved, it would have been good; which was conceded by *COKE*. [*Rolls*.]

Tr. 12 Ja. A. D. 1614. C. B. *Anon.* [1 Br. & G. 71.]

In debt on
2 E. 6. the num-
ber of loads of
corn need not
be expressed in certain.

EXCEPTION was taken on an action of debt brought upon the statute 2 E. 6. for not setting out tithes, because the certainty of loads of corn was not expressed, but it was held good notwithstanding.

Tr. 12 Ja. A. D. 1614. B. R. *Whitaker & Tiddersdale v. Dr. Leyfield.*
[MSS. Calth. Vol. 1. p. 412. Hob. 10.] 1 Gw. 261.

The parson of
St. Clement's
libelled for 2s.
in every 20s.
rent paid for the
houses. In pro-
hibition, *Coke*
thought such a
custom might be
good, for per-
haps this tithe
rent was paid
for the ground
before the
houses were
built: after-
wards in C. B.
they were or-
dered to declare
upon the prohi-
bition, which
was granted,
and then pro-
ceed to judg-
ment.

DR. LEYFIELD being the parson of St. Clement's parish, and surrogate of Middlesex, libelled before himself for the tithes of certain stables within his parish; and shewed that by prescription he and his predecessors time whereof, &c. had used to have two shillings in every twenty shillings rent paid for the houses, and cited the defendants to answer upon their oath what rent they paid.

Montague, serjt. moved for a prohibition, first, because he had libelled before himself, so that he is both party and judge, which is unreasonable: 2d. because the defendants are to answer upon oath what tithes they pay, which is against the law, for *nemo tenetur prodere seipsum*: 3d. because he demands tithes of houses, whereas no tithes are payable by law for them except in London, where there are statutes as 27 Hen. 8. c. 21. and 37 Hen. 8. c. 12. for the payment of them, and these stables are in Middlesex, out of London, and so out of the statutes and decrees.

The court inclined to grant a prohibition; for as to the first cause, it is a rule in law *nemo debet esse judex in propria causa*; and they said, that if the ecclesiastical judge were a surrogate where by law he ought not, the sentence given is void, and there may be an appeal. As to the second, they said, that the statute of 2 and 3 Edw. 6. cap. 13. gives power to the ordinary of the diocese, where the party liable to pay the tithes inhabits, to call the party before him, and at his discretion to examine him by all lawful and reasonable means, other than by his own corporal oath, concerning the true payment of personal tithes; and the statute of 35 Hen. 8. cap. 19. goes also in confirmation of this. But it seemed to *COKE*, Ch. J. the motion for a prohibition ought to be before the oath is taken; for if the oath be once taken, then he comes too late, because it is then done and past. As to the third cause, *COKE*, Ch. J. seemed to incline that no prohibition ought to be granted: for it appeared to him that the prescription might well stand; because it might be that where these stables now are, there were formerly gardens or orchards, for which tithe-rent was paid; and it would be unreasonable that the parson should be defeated of his tithes by the building of houses upon them: and therefore in *Dr. Grant's* case (1) it was adjudged, where Dr. Grant libelled in the spiritual court for the tithe-rent of houses in St. Martin's out of London, viz. two shillings in every twenty shillings rent that was paid; and a prohibition was granted upon a suggestion that all the houses were in the hands of the prior of Westminster discharged of the payment of tithes at the time of the dissolution, by prescrip-

tion;

(1) *Ante*, 222.

tion; that a consultation should be granted upon the prescription found for the plaintiff (notwithstanding it were moved that a consultation ought not to be granted, because no tithe ought to be paid for houses that are out of London); for *non constat curia* when these houses were built, and it might be that this *modus decimandi* was paid for the land before the houses were built, which *modus* is suable for in the spiritual court, and it is unreasonable that the *modus* should be discharged by the building of a house. And as to the book of 38 E. 3. which says, that no tithes are to be paid in London, but only offerings and obventions; he said that this did not extend, but that a tithe-rent might well be paid in London, because *obventus* includes every manner of profit; and day being given till the next term for the granting of the prohibition, he moved in the court of common pleas for a prohibition, and there it was granted to him. [*Calthorpe.*]

Doctor Leifield, parson of St. Clement's, without Temple-Bar, sued one Tysdale, his parishioner, for tithes of certain stables, and libelled that of common right and by prescription time out of mind, the parson there used to have a *modus decimandi* for the houses, stables and buildings, that is to say, "after the rate of the tenth part of the yearly rent or value of the same. And so he proceeds to demand accordingly, whereupon a prohibition was desired, and the opinion of the court was, that a prohibition was to be granted; for *de communi jure*, no tithes are to be paid for the yearly rent, or value of houses, "for tithes are paid for the revenue and increase of things: and therefore no tithes are paid in any such case in any cities or towns in England, saving in London, and this parish is out of London and the liberties thereof. Now where there is no tithe at all *de communi jure*, there can never be a *modus decimandi*, for that is with an abatement, correction, or alteration of the tithe in *specie*. And yet it seems that this kind of payment had been long used here about London, which certainly was by use; for when the statute gave it in London, the parts adjoining gained the same by that colour, and even in London it must be sued for according to the form prescribed by the statute. But for houses, oblations were paid in all places, and now by the statute were brought to a certainty, that is, a groat for a house.

And in this case, Justice WARBURTON said, that it had been lately adjudged in this court, that a copyholder could not lay a custom to fell and sell timber upon his copyhold.

And in Mich. 12 Jac. the case was moved again by *Harris* for the doctor, who said that by a special custom such a form of tithing would stand in any place, and said that Doctor *Grant* had a consultation in this court upon argument in the very same case, for two shillings in the pound, in St. Martins le Grand, which was not within the statute, for it is a liberty exempted from London, and is no part of London, nor of the liberties of London: and the reason was, because it may be supposed that such form of tithing was used for the land itself, before it was built upon, and then the building cannot take it away: and therefore it is now directed by the court, that they shall declare upon the prohibition, and then proceed to judgment. (*Hobart.*)

Tr. 12 Jac. A. D. 1614. B. R. *Reynolls v. Hayes.* [1 Ro. 55.]

REYNOLLS, parson, libelled in the spiritual court against Hayes, for not setting out tithes, and afterwards the defendant pleaded an award by arbitrators, by which he was to pay so much, &c. and upon suggestion of this award, the defendant had a prohibition here, and now *Were* moved for a consultation, for that he had not proved his suggestion within six months, according to the stat 2 E. 6. c. 13. for the clause for proof of the suggestion is general, and not limited to real compositions, &c. as the preceding clauses are. COKE, of the same opinion, for he thought this ought to be proved as well as a *modus decimandi*, and a suggestion upon the 31 H. 8. of dissolutions which was

assented

spiritual court, for by the setting out, they have become a lay chattel; if the question be whether set out or not, prohibition lies.

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A suggestion of an award by arbitrators is not sufficient ground for a prohibition to the spiritual court.

After tithes have been set out, no suit lies for them in the

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assented to by CROKE and DODDERIDGE. COKE thought a consultation ought to be granted, for that pleading an award is not sufficient cause for a prohibition, which was agreed to by HOUGHTON, and therefore they thought that a consultation should be granted. But DODDERIDGE and CROKE said, that it should be granted for the other cause; for DODDERIDGE said, that if tithes be set out, the parson cannot sue for them in the spiritual court, for that by the setting out they were become a lay chattel, which was conceded by COKE, but he said, if the question were whether tithes were set out or not, no prohibition should be granted, which was assented to by DODDERIDGE. And in the case at bar a consultation was granted. But COKE said, the court *advise vult* as to the double costs. (R. Wherefore it appears that the consultation was not granted for not having proved the suggestion, for the statute says, that if it be granted for such cause, double costs should be granted. But note, that the clerks of the court said, that it had not been usual to prove such a suggestion as this.) Mich. 12 Jac. Were moved for double costs according to 2 E. 6. COKE thought that if the consultation were granted for not proving the suggestion within six months, then costs should be given; but if it were granted for that no prohibition laid as upon the matter, then no costs should be given, and here it is granted for that no prohibition lies, therefore the court *advise vult* as to the costs.

M. 12 Jac. A. D. 1614. B. R. *Stampe v. Clinton*. [1 Ro. 100.] Ob.

1. Timber trees are parcel of the inheritance, and no tithes shall be paid for them, although they become decayed through age, nor for their roots, nor bark, nor for germins that grow from their stocks.  
2. For acorns tithes shall be paid, for they renew annually.

**T**IMBER trees are parcel of the inheritance, and by the court no tithes shall be paid for them. Hil. 2 Jac. Rot. 229. *Brooke v. Rogers*, (1) but it was decided when I was chief justice, (COKE,) that for a tree which once was timber, but has become by age arid and dry, no tithes should be paid, on account of the inheritance which once was in it; as tenant after possibility shall not be punished for waste on account of the inheritance which once was in him, but CROKE in his argument held, that for such a tree tithes ought to be paid. — COKE. If trees be felled, no tithes shall be paid for the root. E. 29 El. B. R. (2) Resolved, that no tithe should be paid for the germins which grow upon an ancient stock, for they are part of the inheritance; for the bark no tithes shall be paid, for it is the clothing of the inheritance, as Doct. and Stud. 173. 45 E. 3. it was adjudged in parliament upon the statute, that prohibition laid for trees as had been used. But for acorns tithes shall be paid, Regist. 49. for that they renew annually. 22 H. 6. 2. trees are parcel of the inheritance.

(1) *Ante*, 158.

(2) *Ante*, 91. Anon. Cro. El. 55.

M. 12 Ja. B. R.

*Hickes v. Froud*. [MS. Calth. Vol. 1. 464. 564.] 1 Gw. 267.

Upon suggestion of a special custom, as to the mode of paying tithes, prohibition shall be granted.

**T**HE parson of North Somerset libelled against Hickes for the tithes of the agistment of cattle. Hickes, upon a suggestion that there is a great waste between the vills of South Somerset and North Somerset, and that the resiants and occupants of each vill have had common by reason of vicinage, and that there is a custom that if any inhabitant of the vill of South Somerset use pasturage ground in the vill of North Somerset, for the trover of those cattle which go on the waste, that then he shall pay tithes to the parson of South Somerset, where he inhabits; and that in consideration thereof, the parson of South Somerset shall pay to the parson of North Somerset 4s. and to the vicar 8s. and so the party who inhabits within his parish shall be discharged of tithes against the parson of North Somerset, had a prohibition granted to him, and issue being joined upon the custom, it was found for the plaintiff. It was moved in arrest of judgment, by Serjeant *Bawtry* of Lincoln's Inn, that the custom was not good, because it was not equal. For it is not reasonable that the parson of South Somerset should have all the tithes of the lands of North Somerset, paying to the parson 4s. *per annum*, and that the parson of North Somerset should not have the same privileges in the lands in South Somerset.

And by law, no parson is to have tithes but of lands in his own parish. *Sed non allocatur*, for though the custom be hard, yet it is found by the verdict, and therefore we cannot give any aid; and here is a recompense, such as it is, given to the parson of North Somerset; and though it be not given by the occupier himself, yet it is given by the parson, which is all one, according to the case of *Heron v. Pigot*, (1) in which it was adjudged, that a custom to pay the tithes to the lord of the manor, who used to pay an annual rent for the maintenance of the parson, was good.

The case was afterwards moved again by Serjeant *Bawtry*, who said that a *modus decimandi* being the consideration in respect of which the tithes due in kind are not to be paid as of right they ought to be, should be precisely alleged, so that it may appear to the court that the parson has a recompense in satisfaction of his tithes; which is not the case here; for the party who claims to be discharged, does not pay any *modus decimandi* to the parson of North Somerset; but it is alleged, that the parson of South Somerset pays to the parson of North Somerset 4s. in discharge, which is not sufficient. For where a party would be discharged by a *modus decimandi*, he ought to pay the *modus* himself, according to the rule, *qui sentit commodum, sentire debet et onus*; and therefore, as in this case, he does not pay it himself, but another pays it for him, it will not be sufficient to discharge him from the payment. *Sed non allocatur*, for by *COKE*, C. J. *CROKE* and *DODDERIDGE*, Justices, the custom is good enough to discharge the occupier of lands in North Somerset from the payment of tithes to the parson of North Somerset, though he pay nothing himself for them to him; for he pays his tithes in specie of these lands to the parson of South Somerset, who pays 4s. to the parson, and 8s. to the vicar of North Somerset; and so the parson of North Somerset has a consideration, and the occupier has a charge, though it be not between the same parties, according to the case of *Pigot v. Heron*, cited in 2 Co. where it was ruled, that a custom to pay tithes to the lord of a manor, who for himself and his free tenants, paid an annuity to the parson in discharge of them, was good, for there the free-tenant is charged with the tithes to the lord of the manor, and therefore it is not reasonable that he should be charged with the tithes to the parson also, when he receives an annual pension from the lord, to whom the payment of the tithes is made, in consideration of the tithes. And in this special case a layman may have a portion of tithes, and sue for the subtraction of them. And by *COKE*, C. J. and *DODDERIDGE*, the custom in the case at bar will not aid any one, but only such person as both depastures his cattle in the waste, and also lands in North Somerset, for if he lands in North Somerset only, or, if he depasture cattle in the waste only, then the custom will not extend to him, because it is, that no tithes shall be paid to the parson of North Somerset, where the person is an inhabitant of South Somerset, and depastures cattle in the wastes, and also lands in North Somerset.

It was then moved by *Houghton*, J. that no prohibition ought to have been granted in the case at bar, because the right to the tithes is to be discussed between two parsons, viz. the parson of North Somerset, and the parson of South Somerset; and it has been often adjudged, that if a parson libel against one of his parishioners for tithes, upon a suggestion that the parishioner ought to pay the tithes or a *modus* to the vicar, a prohibition shall not be granted, because the right comes to be discussed between two ecclesiastical persons. *Quod fuit concessum* by *COKE*, C. J. who said, that it appears by the book of 22 E. 4. that if in an action of trespass the right to tithes come in question, this court shall be ousted of jurisdiction. And in the case of one *Bush*, (2) who was parson of *Pancras*, and of *Lady Gresham*, (3) who had the parsonage inappropriate of *Findonne*, it was ruled, that if the parson libel in the spiritual court against one for tithes, who pleads that he pays 10s. in consideration of all manner of tithes to the vicar of the same parish; no prohibition in such case is to be granted; because the *modus decimandi* does not come in question; but the only point is, to whom the tithes of right belong and that is triable in the spiritual court. But still he said there was a great difference between that case and the case at bar; for in the case at bar the tithes are payable against com-

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(1) *Pigot v. Heron*, ante, 135.(2) *Ante*, 90.(3) *Ante*, 94.

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mon right; because to pay the tithes to the parson of another parish than that in which the lands lie, is against common right, and by intendment it must begin by some grant made by the parson, patron, and ordinary of North Somerset to the parson of South Somerset, or otherwise by some grant made by the parishioners before the council of *Lateran*, and therefore a prohibition might well be granted upon the suggestion of such a custom. But, where the parson and vicar are both in the same vill and parish, there, the tithes are paid of common right, and no prohibition ought to be granted. And in the case of *Pigot v. Heron*, where the question was between the parson and the lord of the manor, to which of them the tithes of right belonged, a prohibition was granted; for that the payment of tithes to the lord of the manor is against common right. And *Coke* took it to be a rule, that wherever a spiritual thing begins by temporal means, there, if there be a suit for it in the spiritual court, a prohibition may be well granted; and therefore if tithes be granted by deed to the parson of another parish than that in which the lands lie, and a suit be instituted for them in the spiritual court, a prohibition may be granted according to the Register Judicial where may be seen a supersedeas upon such a grant made by the prior of *Lewes*. And if an obligation or other specialty be made for marriage money, a prohibition shall be granted, if there be a suit for it in the spiritual court; for the specialty alters the nature of it. It was moved by Serjeant *Bantry*, that the *venire facias* ought to have been awarded to North Somerset and South Somerset, and not North Somerset only, inasmuch as the custom originally alleged, concerned both vills, and not North Somerset only, and to this opinion *Coke*, C. J. and *Doddridge*, J. seemed to incline; but *George Croke* said, that the *venire facias* was well awarded, as the tithes demanded were of lands in North Somerset only, the money alleged to be paid in consideration of tithes in kind was to be paid to this parson, and it was he who libelled for the tithes in kind.

M. 12 Ja. B. R.

*Russell v. Patridge*. [MS. Calth. Vol. 1. 422.] 2 Bulstr. 285. 1 Gw. 270.

Qu. Whether a custom to be discharged of tithes of underwood in the weald of Kent be good, for *Coke*, C. J. and *Dodderidge* seemed to think that some ancient instrument or matter of record should be shewn as the foundation of the *non decimando*, which in such cases they thought was in respect of some composition.

**R**USSELL libelled in the spiritual court against *Patridge*, for the tithes of *silva cedua*. *Patridge* suggested that the place where the underwood of which the tithes are demanded is situated, is in the Wyld of Kent, which contains fourteen parishes, and that it had been all woody ground, and is now converted into arable and pasture land; and that there had been a custom time whereof, &c. that no one shall pay any tithe of wood; and upon this suggestion he prayed a prohibition. And *Hendon* argued that a prohibition might well be granted; for, 1st. it seemed to him, that as an entire country may prescribe in *non decimando* for any particular thing, so may a particular place prescribe in *non decimando*; and that an entire country may so prescribe appears from the last chapter of the Doctor and Student. 2dly. The very statute of 2 E. 6. c. 13. discharges the Wyld of Kent from the payment of tithes of wood: for the statute says, that all predial tithes shall be paid in such manner and form as they have been of right yielded and paid within forty years next before the making of that act; and there were no tithes paid at all of wood, as appears by the alleged custom; wherefore it shall be now discharged from the payment of tithes. 3dly. The parson has now a greater benefit than he has had in time past; for now the Wyld of Kent is converted into arable and pasture land, so that now the parson has tithe corn and hay, where he never had any before; and therefore it is reasonable, that as there were no tithes paid of wood when there was a very trifling advantage to the parson, it should remain so now, when he has a great advantage. And he said in the Common Pleas, between *Downton v. Sir Moyle Finch*, in an action of debt upon the statute of 2 E. 6. it was holden that no tithes ought to be paid of wood, and that the custom *de non decimando* was good.

But *Coke*, Ch. J. and *Doddridge*, seemed to incline that a prohibition ought not to be granted, unless some ancient instrument in writing or matter



of record could be shewn, which should declare the foundation of the prescription in *non decimando*; for they thought that the prescription by a country in *non decimando* was in respect of some composition. And COKE said that both the Doctor and Student, and Lindwood agreed, that an entire country might prescribe in *non decimando* where there is sufficient maintenance for the parson without these tithes. But this is not an entire country, nor do the contents of the place appear to us, so that it may be greater or less for any thing we know; but there is only a suggestion made to the contrary, to which we are not bound to give credit. And as to the clause of the 2 E. 6. which was urged, they said, that, in the first place, the clause goes beyond what has been recited; for it not only says that tithes shall be paid in such manner as they have been paid by the space of forty years before; but it says also, "or of right or custom ought to be paid:" and tithes of underwood of right ought to be paid. It is possible too that there was not in this part any other wood but only great timber, of which tithe never was to be paid; and it would be hard that now, when there is underwood, no tithes should be paid of that, because there were not any tithes paid for it for forty years before the making of the statute. And if the statute be well observed, it will afford a strong argument that tithes ought to be paid, notwithstanding they were not paid by the space of forty years: for it has a clause by which it is enacted that no tithes shall be paid of barren heath ground for the space of seven years after its manurance; the inference from which is, that if this clause had not been introduced, the tithes of it must have been paid immediately after the manurance; and yet of such lands, being barren, there were no tithes paid by the space of forty years next before the making of the statute. And here COKE said, that Kent was conquered by William the Conqueror, though it might be that the conquest was made by a composition, and not by a conquest in battle. And he also said, that it was a great misery to the commonwealth to have the wood so consumed, as it is by the iron mills and glass-houses; since our ships are the walls of our realm.

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RUSSELL  
&  
PATRIDGE.

Trin. 12 Ja. B. R.

Cotes and Suckerman v. Warner. [MS. Calth. Vol. 1. 395. 415.]

1 Ro. 53. 252. 2 Bulst. 248. 1 Gw. 272.

SIR Henry Warner libelled in the spiritual court against Cotes and Suckerman (1) for the tithes of hay growing within the parish of Milnall. (2) Cotes and Suckerman upon a suggestion, that the abbot of St. Edmond's Bury in Suffolk was seised of the manor of Milnall in his demesne as of fee in right of his

1. Those who have *libertatem falcandi* in certain land are not occupiers of that abbey, land; and therefore as such are

not within a prescription of an abbot who held the land discharged for himself, his tenants, farmers, and occupiers of the land.

2. Where a declaration in prohibition alleged that the place where, was a waste parcel of manor of which the freehold was in an abbot, who held the land discharged for himself, his tenants, farmers, and occupiers of the said land, and it was pleaded that the land where, was the waste of the abbot, and the freeholders used to have *libertatem falcandi* to make hay, with a traverse of their being tenants, farmers, or occupiers of the land; a replication that they had used to put their beasts, and to mow their land for hay, *per quod* they were occupiers, was upon demurrer held insufficient, for the conclusion was not supported by the premises, for all this they might do, and yet they would not be occupiers, and what comes in the *per quod* is not traversable, nor can it make an issue.

3. In this case they were to have *libertatem falcandi* as appertenant to their freeholds, and were neither farmers nor occupiers under the abbot, but the court thought, that if it had appeared upon the record that they were tenants of the lord of the manor in which, &c. then they would have been discharged within the prescription.

4. Commoners, or those who have a *profit apprender*, are not tenants or occupiers of the land.

5. Where a libel is against two, they may join in prohibition, because the libel is joint against them, though they be several tenants.

6. A consultation shall never be granted, if it appear to the court upon the whole matter that no tithes ought to be paid.

(1) It appears from Rolle's and Bulstrode's Reports of this case that the plaintiffs in prohibition were freeholders. "COKE, CH. J. An abbot may prescribe for himself in *non de-*

*cimando*. But to prescribe for himself and for all his freeholders in *non decimando*, clearly this prescription is not good."—3 Bulst. 119.

(2) Milkenhall.

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and  
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abbey, (of which manor the closes in which the hay was made were parcel,) and that he and his predecessors time whereof, &c. had those closes exonerated and discharged from the payment of tithes for himself, his tenants, farmers, and occupiers, and that they so continued until the time of the dissolution, at which time the abbey and all the lands thereto belonging were given to King H. 8. and they descended from H. 8. to E. 6. and from E. 6. to Queen Mary, and from Queen Mary to Queen Elizabeth, and from Queen Elizabeth to the now King, who granted the manor of Milnall by his letters patent to Sir Henry Warner, &c. and that they (*the plaintiffs*) were occupiers of the said closes, and so ought to be discharged from the payment of tithes by the statute of 31 H. 8. c. (13.) and 2 E. 6. c. 13. had a prohibition granted to them. To which the defendant pleaded, that the abbot was seized of the manor of Milnall, &c. and that the closes in which the hay was demanded were parcel, &c. and that the King had granted the manor to him, &c. as in the count alleged; but he farther said, that Cotes and Suckerman were severally seized of an ancient messuage and two acres (of land); and that they time whereof, &c. have used to have *libertatem falcandi* fodder for their cattle which were levant and couchant upon the closes as appurtenant to their houses and lands; and that they cut the hay, and he, for the non-payment of the tithes upon request, libelled against them in court-christian; *absque hoc* that they were tenants, farmers, or occupiers of the said closes. To which Cotes and Suckerman severally replied, and confessed that they had the houses and lands aforesaid, and further shewed, that they used to put in their cattle in the said closes; and that in 31 Eliz. they put in their cattle, and mowed the grass, and carried it away, *per quod* they were occupiers of the closes. To this replication the defendant demurred. And it seemed to George Croke that the replication was insufficient, inasmuch as the *per quod*, being the conclusion, was not maintainable by the premises; for the premises shewing that the plaintiffs had a power of putting in their cattle, and mowing and carrying away the hay, did not prove them to be occupiers; for that they might do, and yet not be occupiers; as, in case they entered upon Sir Henry Warner, and put in their cattle, &c. they do what is alleged in the premises, and yet they are not occupiers; which being so that the conclusion was not maintained by the premises, the replication was insufficient; for that which comes in in the *per quod* is not traversable, nor can it make an issue. And of that opinion was COKE, C. J. DODDERIDGE and HOUGHTON, Justices. But then Goldsmith urged, that the replication was good enough, for that it met the defendant's traverse, and the conclusion of the replication of the plaintiff is an affirmative to the negative of the defendant alleged in his bar, and so it makes a good issue, according to the case in 17 E. 4. where in debt brought against executors they pleaded a recovery had against them by J. S. beyond which they had no assets; to which the plaintiff shewed, that there was not any debt due to J. S. and so the recovery was void; and this conclusion was holden to be good enough. 2. Goldsmith insisted, that the plea in bar was insufficient, 1. because the defendant by his own traverse had traversed that which was the title by which he must sue in court-christian; for he had taken a traverse *absque hoc* that the plaintiffs were the farmers or occupiers of the aforesaid closes; and if they were not so, then they ought not to pay tithes, and so, the suit in the court-christian for them was unwarrantable: 2dly, because the traverse is repugnant to what the defendant has before alleged in his plea; for in the beginning of his plea he has confessed that the plaintiffs have *libertatem falcandi*, (which makes them occupiers within the prescription,) and yet he has taken a traverse *absque hoc* that they were occupiers; which being so, the bar is insufficient, and therefore judgment must be given for the plaintiffs, although the replication be defective. For the court are to judge upon the whole matter together, and judgment must be given against those in whom the first fault in pleading is found, according to the case of *Hart and Smith*, 33 & 34 Eliz. where the bar to the avowry being bad, the court gave judgment for the avowant, notwithstanding the replication was insufficient; and in *Poulter's case*, Rep. 4 Co. 82, 83. we find that the plaintiff had judgment upon the bad bar, notwithstanding

standing his replication were insufficient; and in 7 E. 4. 3. it appears, that the court would not give judgment for the plaintiff where one of the defendants was found guilty, because it was apparent to them upon the whole matter, that the plaintiff had no title to the goods in question, and therefore no cause to have judgment.

*George Croke, & contra*, admitted that if the bar were insufficient, judgment ought to be given for the plaintiffs, notwithstanding their replication were insufficient; but he said that the bar was sufficient: for the defendant does not libel against the plaintiffs in prohibition as farmers and occupiers of the closes; but he libels against them as commoners, who have *libertatem falcandi gramen* for the maintenance of their tillage; which being so, the traverse neither crosses the ground of his suit in court-christian, nor is it repugnant to what he has before alleged in his plea: for commoners, who have *libertatem falcandi*, are neither farmers nor occupiers. And to that opinion the court assented; for they said, that those who cut the grass ought to pay the tithes, be they disseisors, commoners, purchasers, or by whatsoever other title they take it; for tithes are to be paid out of the profits renewing and growing upon the land, and it is immaterial whether the persons who take them are tenants, farmers, or occupiers. 3. COKE, C. J. and HOUGHTON, J. seemed to incline that those who had *libertatem falcandi* for the maintenance of their tillage were not within the prescription; for they are neither tenants, nor farmers, nor occupiers; and a prescription which goes to bar the church of the tithes which are due to it, is to be taken strictly. But they thought, that if it had appeared upon the record that they were tenants to the lord of the manor of Milnall, then they ought to be discharged within the prescription. 4. It was admitted in this case, that where a libel in the court-christian is against two several persons for tithes, they may join in a prohibition, because the libel is joint against them, though they be several tenants.—5. COKE, Ch. J. said, that a consultation shall never be granted, notwithstanding the insufficiency of the replication, if it appear to the court upon the whole matter that no tithes ought to be paid.

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*Cotes and Suckerman v. Warner.* 3 Bulstr. 119. 1 Ro. 252.

THIS case was moved again; and COKE, Ch. J. thought clearly that he who had *libertatem falcandi gramen*, &c. was not an occupier, farmer, or tenant, to take advantage of a prescription which extends to them; for he has only a profit *appendre*, and is not to be taken otherwise. 2. It was held that if the King, being lord of the soil where his tenant had *libertatem falcandi*, grant all his tithes in a place, the patentee shall have the tithes which the King was to have from those who had *libertatem falcandi* in his own soil as well as of all lands of which others were absolute *terretenants*; for if the parson, having tithes of the lessee of his glebe, grant all his tithes, the grantee shall have the tithes of the glebe as well as of other lands, and here the court much condemned all those who took upon them to argue a case after the court had delivered their opinion upon it, for, as COKE said, there never shall be a plea allowed after a *darrein continuance*.

1. The plaintiff in the above cause afterwards filed a bill in the dutchy court on the ground of an equitable discharge, but that court was prohibited from proceeding, on the ground that there could not be any equity against the payment of tithes;

and because a previous judgment had been given in a court of common law. 2. It appears that the former case was decided upon demurrer upon two grounds, 1st. That freeholders were not within the prescription, which was laid for the abbot, his tenants, farmers and occupiers. 2d. That those who had but *libertatem falcandi*, were not occupiers.

M. 12 Ja. A. D. 1614. B. R.

*Wortes v. Clifton.* [1 Ro. 61.] Cro. Ja. 352. 2 Bulstr. 283.

*Clifton v. Oates.*

WORTES (1) had a prohibition against Clifton, and shewed by his suggestion that Clifton had claimed the tithes by virtue of a lease from the parson in a suit in the spiritual court, and that he had claimed them by virtue of

One libelled in the spiritual court for tithes under a lease by

(1) It appears from Cro. Rep. that the plaintiff in the spiritual court applied for a prohibition to stay his own suit, and held good.

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a vicar: the defendant claimed to be discharged by virtue of a former lease and composition; held that the plaintiff might have a prohibition to stay his own suit, for though where the spiritual court has jurisdiction of the principal matter they shall try the accessory, yet where, as here, the main matter in dispute, which is the lease, is temporal concern, although the original suit for tithes were spiritual, prohibition lies.

of a former lease from the same parson, and as the question was, which of the two leases should be preferred, a prohibition was granted. *G. Croke*, a prohibition shall be granted, for 1 Ric. 3. (4.) where the spiritual court has the principal, there if a thing triable by the common law come accessorially in question, yet it shall be tried there also. *COKE, à contrà*, in one *Futter's case* there was a suit in the spiritual court, and tithe laid by grant of the rectory, and the other claims by a former grant, and a prohibition was granted; I agree with 1 R. 3. unless the spiritual law differ from our law in the accessory, as by the civil law a gift of goods is not valid without delivery, but it is otherwise in our law. — *DODDERIDGE*. Here the main matter, which is the lease, is temporal and not spiritual, and therefore it is not within the rule, but it is true that if the original be spiritual then the accessory shall be tried there also, otherwise *à contrà*; all which was assented to by *COKE*, who also said, that if a man claim in the spiritual court by virtue of a lease from the proprietor, and the other said he did not lease, a prohibition shall be granted; and in the case at bar the prohibition was affirmed by the court.

M. 12 Ja. A. D. 1614. C. B.

*Cowper v. Andrews*. [Moo. 863. Hob. 39.] 1 Ro. 120. Godb. 237. W. Ent. 603. 2 Br. & G. 35. 1 Gw. 275.

1. The court were divided on the question, whether a *modus* for a park of 24. a year, and a shoulder of every third deer killed in it, should be determined by disparking; but according to *Rolle*, the majority, if not the whole, thought that if the shoulder only had been payable, and the park had been destroyed by the act of the party, the *modus* would have been determined 2. Where there is a *modus*, the money has become the tithe, and may be recovered in the spiritual court: the tithes in kind are forever extinguished in their spiritual nature, and are become lay fee.

IN C. B. prohibition was sued upon a *modus decimandi* in a park, viz. that the vicar should have two shillings yearly, and the shoulder of every third deer killed in the park; the park being now disparked the vicar sued for tithes in kind in 140 acres, parcel of the park; and as to a consultation being granted the judges were divided in opinion; *NICHOLS* and *HOBART* being against it, *WINCH* and *WARBURTON* for it. *HOBART*, Ch. J. said that the two shillings is clearly a *modus decimandi*, which is certain and annual, and the disparking does not prevent the payment of the two shillings: the shoulders are casual, for if the owner do not kill any deer, or but two in a year, the vicar shall not have a shoulder. And *NICHOLS* said, that where the owner converts tillage into pasture, the parson shall lose his tithes of corn: and where the owner dispars his park, the parson shall lose the shoulders; but shall have the two shillings, and recover in the spiritual court a recompense in money for the shoulders; but the whole park is bound by the *modus decimandi*, and the vicar shall not have tithes in kind.

*WINCH* and *WARBURTON* thought, that by the disparking the prescription as to the shoulders was determined, and consequently, the whole *modus decimandi*, and then the vicar shall have tithes in kind; and if the park be revived, the prescription and *modus decimandi* shall be also revived, as tenure by castle ward, &c. See E. 38 El. *Bedingsfield v. Feake*, (1) and 21 & 22 El. in C. B. — (*Moore*.)

*Okenden Cowper* brings a prohibition against *Roger Andrews*, vicar of *Cowfield*, that whereas *Thomas, Lord de la Ware* was heretofore seised in fee of 140 acres of land in *Cowfield*, late parcel of an ancient park called *Ewhurst-park*, lately impaled and replenished with deer, and so seised, he and all those whose estate he had in the same 140 acres, and all the farmers and occupiers thereof, have used time out of mind, to pay the vicar of *Cowfield* for the time being two shillings a year, and one shoulder of every third deer that within the said park should be killed, in full satisfaction of all tithes renewing upon the same 140 acres, which the vicars have always accepted in discharge of all tithes; and then deduces down the 140 acres to himself, and then shews, that though he tendered the two shillings by the year in such years, and though in the same year there were no deer killed, yet the defendant refused to receive the same two shillings before mentioned to be tendered, and sues him for tithes in kind for those years.

The defendant by protestation denying the prescription, for plea, says, that the park, long before the time of the subtraction of the tithes aforesaid was disparked

disparked, and the deer in the same being utterly destroyed and killed by the occupiers and possessors of the said park, all the lands lying within the said park, were converted into arable land and pasture, and so remain; and because the plaintiff, after the disparking of the park, would not pay tithes for the cattle and corn, &c. therefore he sued him, whereupon the plaintiff demurred in law.

The first great point is:

If a park have been so time out of mind, and a certain sum of money have likewise been paid time out of mind for all tithes of it, and then the park be laid open, and all the deer destroyed by the owner; and further by judgment in a *Quo warranto*, the park fore-judged, and the liberties of park rescised; the question is, whether now the form of tithing be perished, and the tithe in kind may be required as of other land, because now it is no park, either *de jure*, or *de facto*.

The second great point:

Again, as the case is, if the prescription have been to pay money and some part of every third deer killed in that ground, then if the park be totally disparked, as before, by the owner, and by judgment of the law; then whether the prescription be ceased, and the tithes demandable in kind from thenceforth.

As to the first point, I hold that the form of tithing remains, though the liberty of park, and so the legal park, be lost; for it is land whereof the park consists that is to yield tithe or any thing in lieu of it; and the park, as it is but a liberty, is a thing incorporeal, and an imaginary privilege concerning that land, and can yield no profit to the owner, and therefore no tenth of the profit to the parson.

And therefore in his prescription, he might have laid it in the land, and might have omitted the name of park; for if the park were enlarged or straightened, prescription holds for the old ground.

And in this point *Lutteral's* (1) case is to all purposes more strong than this case: yet I grant, if a man have common of estovers to his house, and suffer his house to fall down, he can now claim no estovers; and if he sue for it, and the other plead that his house is down, he shall not have judgment with a ceasing of execution, till he has re-edified his house; as in a *Warrantia Charta*, or a writ of *Mesne*, where the defendant pleads that he is not sued nor distrained, he shall have judgment, but no execution for the present.

So in a writ of dower against the heir, if he plead that the demandant detains the evidence, he shall have judgment presently, with a *Cesset executio*. But in the case of estovers, the plaintiff shall be barred, for at the time of the action brought he has no right of estovers, but it is in suspense, and therefore it is not a perpetual, but a temporal bar, and if he re-edify his house in the same place, he shall have his estovers again. And so I think if he had pulled down his house and built it again. *Tamen quare*, if he bring an assise, or *Quod permittat* for his estovers where his house is down, and judgment passed against him; if he shall not be barred finally, rather than where issue in tail in a formedon is barred by warranty and assets, and then aliens the assets against his issues, yet the bar stands, which should not but for the judgment.

Upon the second point, two several branches are considerable, besides the first point before spoken of.

First, If that part of the manner of tithing by the venison be not so arbitrary and at the choice of the owner of the park, that if there be no deer killed, that the parson cannot complain, but must content himself with the two shillings.

(1) *Quere*, What was the judgment in this case? Answer, according to *Moo. 863.* the court were divided in opinion. *Nicolls* and *Hobart*, that the modus did continue notwithstanding the disparking. *Winch* and *Warburton*, that by the disparking, the modus was

detained, (determined) and tithes should be paid in kind (*Marg. note, Hob. Rep.*)

It appears from the report of *Poole v. Reynold*, *Hutt. 57. post*, that this case was never adjudged.

2. 4. Co. 86.

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Again, though the venison cannot be had in kind out of that ground, yet whether the parson may not have recompense for it by suit in the ecclesiastical court according to a valuation, as it was *communibus annis*, when the park stood.

As to the first branch of this point, I shall proceed by degrees.

First, If all the deer should die of some disease, I am of opinion, that the owner were not bound to replenish it to support his form of tithing, no more than the lessee to repair his house destroyed by tempest.

Also the owner may kill two deers yearly, and pay no shoulder; and I am of opinion, that the custom were as good if it were to pay a shoulder of the twentieth deer yearly; and then he might kill nineteen without paying any tithe venison.

So then the question must rest merely upon the wilful default of the owner's disparking; whereupon it is to be marked, that the two shillings a year is certain, and sufficient of itself to have made a *modus decimandi* without the help of the casual venison, so as it cannot fall into a *non decimando*, for want of the venison.

But if it had been casual and failed, it had been doubtful, not only because of the failing, but because of the original weakness of such a composition of *modus decimandi*; for since the tithe in kind is an inheritance certain, it is against nature that it should be extinguished by a recompense that is not as perdurable, though not so valuable as itself; like the very case of an exchange, and upon the reasons of *Vernon's case*, Co. lib. 4. where it is resolved, that a jointure made to a woman, must be for her own life, and not the life of another. But suppose that there were an ancient composition, that the parson should have the third part of the profits of a court of a manor for his tithes, and then the tenancies should escheat, so as the court were dissolved; whether the tithe should revive.

And now, to the case in question, the composition in the creation did carry in it recompense upon the tithe, part certain, that is, two shillings a year: and part uncertain, casual and visibly depending upon the will of the owner of the land; as if the parson had said in the beginning (for now you must imagine the form of the agreement or composition by consent of the patron and ordinary as the prescription lays it,) I will take for my tithes of my ground two shillings a year, and if you kill any deer in it you shall give me of every third deer a shoulder; for *modus et conventio faciunt legem*, 19 H. 6. 36. L. S. granted to I. N. common in his land, *quandocunque averia sua ierint*, if he employ the land to till, or let it lie fresh, the grantee has no remedy. And so is the book of 17 Edw. 3. 26. Now, suppose that such a common were granted for composition of tithe, 31 Edw. 3. Fitz. annuity, 28. A. grants an annuity to B. till he be promoted to a benefice *quod duxerit acceptandum*. Election is given to him, and therefore he may refuse for ever, 6 Ed. 6. Dyer, 70. if a man grant the office of a keeper of his park, yet he may dispark. So, if he grant the stewardship of his courts, he may release his rents and services. If I were bound in an obligation to give you a shoulder of every third deer which I kill in my park, yet I may dispark it. So these are not within the rule, that a man should not by his own act defeat or frustrate his own grant, but it is to use the liberty that I reserved to myself upon my grant standing with my grant, which was at the first made arbitrary. And therefore is not like the case of *Davenport*, Co. lib. 8. 144. where the words there are no more than the law spake, and therefore were void. But it would have been otherwise, if the case had been thus. If the vicarage fall void whilst the parsonage shall remain in his hand un-aliened; and the like I say of 6 Edw. 3. 54. in the case of *Thurston de Holland*.

A second reason is, that the composition is on both sides executed, fixed, and stated, so that though the parson cannot enjoy his *modus decimandi*, yet he cannot resort to the tithes in kind, the rather as this case is, where a part, that is to say, two shillings, is still due and payable, so as it is not fallen into a *non decimando*.

Wherein, first to remove that, which blears the eyes, which is, that because the tithe is supposed to be given originally for this recompense of money and venison,

venison, and therefore if the recompense be detained, the tithe must revive. And it is compared to annuities granted *pro consilio impendendo*, that for default of counsel the annuity ceases. And so of some other cases which have been put, whereof I will make mention in particular, and therefore I must begin with the consideration of the nature and operation of a grant of one thing for another.

Whereupon I lay this ground, that regularly this word (*pro*) or in consideration does not import a condition, or make the grant defeasible, though the thing taken in lieu be either taken away by the giver wrongfully, or by any other person upon a just title, so as the thing given be wholly lost. And therefore if I. S. give W. acre to I. N. for B. acre, and so *et converso*, without the word of exchange, it will be not defeasible, nay, more, if they use the proper word of exchange, and that be executed, a wrongful entry of either party will do no hurt, but a rightful eviction will. But without the proper word of exchange, though perhaps it were meant in the nature of an exchange, it will not defeat.

But it is true that the word (*pro*) in some cases has the force of a condition, when the thing granted is executory, and the consideration of a grant is a service or some other like thing, for which there is no remedy but the stopping of the thing granted, as in the case of annuity granted for counsel, or for doing the office of steward of a court; or the service of a captain, or keeper of a fort. *Ughtred's case*, Co. 7. lib. And in those cases the condition is not precedent, and therefore needs not to be averred performed, when the annuity is demanded: and these cases are within the reason of an exchange, where the land given is evicted; for here the failure of counsel or service is a kind of eviction of that which is to be done for the annuity, inasmuch as he has no means either to exact the counsel or recompense for it, but to stop the annuity.

And it is to be noted, that this has so far the force of a condition, that being denied once, it avoids the annuity, not for that one payment, but for ever, which is to be noted for use, after in the principal case, 5 Hen. 7. 10. I covenant with I. S. to give him ten pounds to serve me a year; in his action for his money he must count for his service done, and it seems, though he had covenanted, *et conseruo*, to serve me; for though in that case I might have an action for the service, yet it is not as of an estate vested of land of inheritance, as the case is here.

In another case it works by condition precedent, as in all personal contracts; as I sell you my horse for ten pounds, you shall not take my horse except you pay me ten pounds, 18 Edw. 4. 5. and 14 Hen. 8. 22. except I do expressly give you day; and yet in this case you may let your horse go, and have an action of debt for your money, and so may the tailor retain the garment till he be paid for the making, by a condition in law.

So if I retain one to serve me a year for ten pounds, he cannot demand the ten pounds, but he must aver he hath served me out the year. And 32 Ed. 1. ff. Avowry, 245. an avowry was made for not repairing a park-pale anew, the tenant answered that his tenure was to repair for the old pale. And Catesby, 15 Edw. 4. 4. puts it of a grant to make a new pale for the old, and holden in both cases, that if the old pale be withholden, he needs not to make a new, for here is no remedy for the old pale, and perhaps neither in case of tenure nor of grant; in this case the detaining of the old pale will discharge more than for that one time, for in that case the old is allowed towards, or for the new pale *per vices*; not so in the annuity granted *pro consilio*, which is totally for counsel, and therefore will extinguish wholly. And the case 9 Ed. 4. fol. 20. and 15 Edw. 4. fol. 4. is full in this point; for there was a composition between the Abbot of *Sempringham* and the Master of *Burton-Lazer*, whereupon the master granted that the abbot should have certain tithes, without contradiction; and the abbot granted him forty shillings a year out of the house for the same. And the opinion was, that though the master take away the tithes, yet the abbot must pay the rent, for both parts are executed, and either party has remedy for the wrongful detaining; but *Needham* says, that if the rent

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had been granted *pro decimis habendis absque calumnia*, it would have been otherwise perhaps. *Graye's case*, Co. lib. 5. fol. 78. is full to this. If one had a common in my ground time out of mind, and has paid me for it hens and eggs, yet this is not entire, that he need declare of both parts, because it is no condition, and consequently, though he refuse to pay the eggs, that he should hold the common. But if it were conditional, as in the case of *Pot-water*, there, paying, or to pay, because in that case there is no remedy as in the former by distress, will be taken conditionally.

Another reason that the tithe in kind cannot be restored is, because the tithe in kind is actually discharged and extinct, for now that which of common right should have been the tithe, is made of the same nature with all the rest of the fruits lay fee, so as if the owner should through ignorance of his case set out a tenth, yet if the parson should take it, the owner might bring an action of trespass as for any other part of the fruits: and if the parson sue for tithes in kind, the owner shall have a prohibition for drawing his lay fee *ad aliud examen*.

On the other side, that that was given in lieu of tithe is become part of the inheritance of the parson, and part of his spiritual fee, for which he shall have remedy in the ecclesiastical court. So in the case of the bishop of Winchester, Co. lib. 2. fol. 45.(1) where the land of the bishop being discharged of tithes, was discharged in the hands of lay farmers as mere lay fee, and the bishop could not demand tithe of his farmers, for there is no tithe for all his lay fee.

And so also the case of *Pigot v. Herne*(2) there, where it is prescribed, that the lord of a manor had used to pay, time out of mind, a pension to the parson for tithes of his manor and tenements, and had the tithes of it for it, and he sues for those tithes in the spiritual court, for it was instead of the true and spiritual tithes, though in lay land; otherwise here where it is discharged.

And 8 Edw. 4. 13. F. N. B. 41 G. and 43 K.(3) a prohibition upon prescription upon discharge of the tithes for lands given to the parson, and if the parson alien the land with consent of patron and ordinary, or suffer a recovery wherein aid is prayed of them, as Fitz. N. 48. b. is, I am of opinion that as his successor can have no *juris utrum*, so he cannot resort to his tithe.

And so the Reg. fol. 38. upon discharge of tithe by parson, patron, and ordinary, for land given unto the parson and his successors, runs thus, *Et quia discussio hujusmodi donationis et concessionis de laico feodo in curia nostrâ et alibi tractari debet, vobis prohibemus, &c. ne placitum aliquod laicum feodum tangens, &c.*

Also, the writ counts as well the grant of the land as the grant of tithes, lay fee. In all these cases, if the thing given were aliened, which cannot be without the parson, patron, and ordinary, who have absolute power, or were evicted, yet the discharge must stand for the reasons before mentioned. And because there is nothing in the prescription that enforces a condition, but rather only a consideration, which is the mere difference whereupon *Graye's case*, Co. lib. 5. fol. 78. stands. Now there is nothing in this case that can enforce an absolute dissolution of the composition. For, as it is said, there is nothing to let, but the park, or ground may answer tithe hereafter. And to say that tithe in kind may be required in the mean time is absurd, both because, as I observed, if it be a condition, it must destroy the whole estate; and also because there cannot be an inheritance in *modus decimandi*, and at the same time tithe in kind *contra modum decimandi*. And if it be a reason sufficient in this case to demand tithes in kind, because the *modus* is defrauded; by the same reason every wilful denial of a *modus* will give the like advantage; whereas though it be always laid in the prohibition, that the *modus* is tendered, yet that is never traversed, but only the prescription it self *de modo*; because that the denial does not alter the right, but you may and must sue for it as in other wrongs.

And though for the time that there are no deer in the park, there can be no venison according to the *modus decimandi*, yet the park may be restored and replenished at any time; and therefore there can be no extinguishment of the *modus*; and both tithes cannot stand together, the *modus decimandi* of the inheritance, as being extinct, and the tithe in kind as it were *hac vice*.

(1) *Ante*, 119.

(2) *Ante*, 135.

(3) *Ante*, 44.



The last great question is, Whether the vicar in this case can have any remedy for the loss he sustains, in that he has not the shoulders, nor can have them, because there are none. Wherein the doubt consists in this, how he can have recompense for that which is not.

I answer, that whosoever I suffer an injury joined with a loss, the law shall give me a remedy and recompense according to my certain or uncertain loss, yea, and sometimes where the thing is not in being, but utterly extinguished. If the case here were, that he should have yearly two deer out of the same park, the disparking would not hurt, for he should have the value ever; and so likewise where he sets not out his tithes nor pays the modus; for *nummus est vovus*, as it is the law and measure of all things, for no man ever doubted(1) that the non-payment of the modus restored the tithe in kind, though it be alleged of form that he was ready. And therefore if a man have common of estovers in my woods, so many loads by the year certain, and else uncertain, as much as he shall spend in fires and in repairs of his house; if I stub up this wood, so as there neither is nor will be any wood again, yet he shall have an assise, from year to year of his common of estovers, whereof these consequents follow; first, that the inheritance of the common of estovers doth remain, notwithstanding that there are no estovers, for else he could not have an assise, wherein he must declare of his inheritance or freehold at least by grant, or by prescription. Next he shall recover a seisin of those estovers which are not in being, whereof he is supposed to be disseised, and also damages, not according to that which it now yields, but according to that value that it yielded *communibus annis*, though it were uncertain. So in *Marie's* case, Coke, lib. 9. fol. 111. If any man feed in a common wrongfully, every commoner may have an action of the case against him; and by the same reason, if the lord of the soil plough it up, or make a water of it, every freeholder may have an assise, and every copyholder an action of the case; and yet at this time there was no profit of common at all, and the possibility of restoring of it less than in this case; and therefore there can be no reviving the very tithe which must be for the inheritance or not at all.

Touching the uncertainty, If a man grant an advowson with warranty, and the tenant in a writ of right of advowson vouch, he shall have (if he lose) recompense in value in land, or other certain profit, and yet the advowson itself is utterly of an uncertain value. So of a liberty, *bona et catalla felonum*, &c. which may be valued by an estimate *communibus annis*, if I let my *bona et catalla* or profits of court, rendering rent, it is no plea in debt for my rent, that he had no profits that year; but if the lessor discharge or release all, otherwise it may be, but here is no perpetual discharge.

But the very case seems to be, P. 18 El. Dy. 349.(2) where the case is, that the manor of Ellington, whereof an abbot was seised at the time of the dissolution lying within the parish of Pykerke, and so used to pay only tithe wool and lamb time out of mind, and now the land being used to meadow and tillage, the parson demands the tenth of hay and corn: and by the opinions of the justices and clerks of the King's Bench, prohibitions are usual in such cases by force of the word [discharged] in the stat. 31 H. 8. For *modus decimandi* discharges all other manners of tithing; *quod nota* for the use before, that where there is a *modus decimandi*, the tithe in kind is utterly extinct and discharged: and note that if a man have a manner of tithing of land arising upon the ground, and he turn his ground to another use, it shall neither fall to a non decimation, nor to a restitution of the tithe in kind, but to an allowance by estimate of the ordinary profit that the form of tithing was wont to yield. But *quare*, whether that case shall not be helped by force of the statute 31 H. 8. by which also unity of possession is holden a discharge of payment of tithe, though no discharge in right. And although it may be true, that in that case the land lay always to wool and lamb, so as there could be no other, but it was indeed the tithe in kind, and so not prescriptible; yet when the prescription is beyond memory, it may well stand that it was so, when the land was employed to corn, for the contrary appears not. And again, if the owners had not used to pay time out of mind the just tenth of the wool and lamb, but

(1) Apprehended.

(2) Ante, 66. Digitized by Google

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a less proportion, so as it were truly a *modus decimandi*, of a special commodity, if the land be turned to other use, as of grain or of hay, the form of tithing cannot change, except you will say, that he shall pay such a proportion of the fruits it now yields, as it did of the other: so the *modus* should be in the proportion, not in the kind of profit; yet that will not serve as the case may be: as if there be such a proportion of lamb, or so much in money for them at the pleasure of the tenant. And note that the statute 31 H. 8. was necessary in that case, because the dissolution else would have ceased the privilege; whereas in this case there is no cause of cesser, because it depends not upon any thing that ceases. But it seems, that had not the statute of dissolution provided for the continuance of the privilege of abbeys, they had all died; so then it seems that the very tithe had revived, *quære*.

Now a word of the exception:

It has been said, that the prescription of the *modus decimandi* is not well laid, because the park concerning which the prescription should be, is not laid to be by prescription, but only laid to be *antiquus parcus*.

Whereunto I answer two ways:

First, that the prescription is laid not in the park, but in an 140 acres in Cowfield, late parcel *cujusdam antiqui parci*, and that the tenant and farmers of the same 140 acres have used to pay unto the vicar of Cowfield two shillings yearly, and one shoulder of every third deer killed within the park in satisfaction of all tithe payable for the 140 acres.

Again, the liberty of park is not in question, but a form of tithing concerning the park, and therefore no cause to lay the prescription in the park, according to the rule in the bishop of Salisbury's case, Co. lib. 10. fol. 59. where one claims the office of a surveyor by grant from the predecessor bishop with a fee, and avers, that the same was *antiquum officium*, and it was held nought, because he claimed the office itself by prescription; so here, if he were impleaded in a *quo warranto*, for the park itself, it shall be no plea, to say that it was *antiquus parcus*, but there he must plead a prescription for the park; but where another thing is claimed as incident to the same, otherwise it is; as where a keeper claims profit of a park by prescription he alleges not a prescription in the park, but *antiquus parcus* general, 6 E. 6. Dyer. 71.

But if the disparking be a point material, it is utterly insufficiently pleaded; for it is a word vulgar, and even in vulgar sense uncertain; for common speech takes a ground disparked, when only the deer are taken away, though the pale stand, and the liberty of the park be found. But it is a word utterly unknown to the law, and therefore can bear no issue without more certainty; and the particulars of disparking are only that the deer were utterly destroyed, and the ground turned to arable and pasture; so the pale may stand and the liberty perfect, and so may be restored in *integral* at any time. Another gross fault is, that he laid the disparking to be by the occupiers and possessors, and not by the owners.

M. 12 Ja. A. D. 1614. B. R.

*Downes v. Hackseby.* [2 Bulstr. 289.]

If after a prohibition granted; the person libel again for the same tithes, an attachment lies, and also (according to Coke) an action on the case for the party grieved.

**I**N an attachment upon a prohibition, for proceeding in the spiritual court, in a suit after a prohibition granted upon a *modus decimandi*.

COKE, C. J. I have seen a good record, in the time of King E. 3. that if a court proceed contrary to a prohibition, that not only an attachment shall be granted for the King, but a special action upon the case for the party also, for this prosecution thus against him; for that *ubicunque est injuria ibi damnum sequitur* to the party, for which he shall have his action upon the case; and Fitz. Nat. Bre. fol. 92. E. has this case; an action of trespass upon the case brought by one having served one with a prohibition, and delivered the same unto him, for that he, *illud breve ibidem in luto projecit, & pedibus suis concucavit*, and contrary to this did prosecute his suit, in *eodem curia christianitatis*, in contempt of the King, and to the damage of the party, &c. the principal case here was, the defendant libelled in the spiritual court, for tithes in kind; a

*modus decimandi* pleaded; and upon this a prohibition granted; and afterwards he libels again there for these tithes. A recaption is by the common law, if a man distrains once for rent and after distrain again for the same rent, which he ought not to do, as appears by Fitz. Nat. Bre. fol. 71. E. here he libelled for tithes in the year 1610, a *modus decimandi* pleaded, and a prohibition granted; afterwards he libels again for tithes in kind for the year 1611; this he may well do, being out of the first prohibition; as estrepements are to be taken strictly, so shall inhibitions; he may well libel again for the same tithes, but not for these, in the same year, and for which he was prohibited to sue; the whole court agreed in this clearly, that if he libelled the second time for these tithes, in specie, for which before he was prohibited; if he thus sue again, an attachment lies.

**DONDERIDGE.** For other tithes, due for another year, he is not prohibited, but only not to sue again for the same thing, for which he was before prohibited; but as for any other tithes, he is left at large to libel again for them, but not for those contained in the first prohibition: and so the rule of the court was, that if the libel be for the same tithes in the former prohibition, that an attachment be granted for this his contempt, and the party also to have his special action upon the case, for this unjust vexation.

**COKE.** For this I can shew a very good and an ancient record in the time of E. 3. this being a very great contempt of justice, and of the law, for him to libel again for the same thing in the spiritual court, before prohibited; but if he libel for tithes due in another year, or if it be in the same year, but for other tithes, this libel is good; otherwise it is, if he libel for the same tithes, in the first libel and prohibition contained.

M. 12 Ja. A. D. 1614. Chanc.

*Hungate v. Crooke.* [Toth. 185.] lib. B. fo. 748 & 410.

**T**HE plaintiff being a common person having a lease of tithe in kind which has for a long time been obscured by union or otherwise; ordered, that a commission should go forth for setting out meadow and other grounds in lieu thereof. (Look in Hil. lib. B. 11 Ja. fo. 1202.)

A commission was issued to set out land in lieu of tithes, which had been long obscured during a lease.

H. 13 Ja. A. D. 1614. B. R. *Foster v. Hyde.* [1 Ro. 332.]

**A** PROHIBITION was granted to the spiritual court, for that they would try the boundary of a parish, which is triable at common law; and the plaintiff in prohibition for title shewed that the parsonage appropriate came to the crown by the statute of dissolution, and that Queen Mary granted it to a corporation who leased it for a certain term to him, but did not shew the letters patent nor the deed of grant from the corporation; and thereupon a demurrer in law for a consultation, for this is resolved not to be good. Co. 10. Dr. *Leyfield's case*, (1) — **COKE.** We will have the letters patent, and the deed shewn to us *d latere*, for the default of not pleading them; a consultation shall not be granted to enable the spiritual court to try the limits of a parish: and afterwards they took issue by consent.

Boundaries of parishes are to be tried at common law.

(1) *Ante*. 229.

H. 13 Ja. A. D. 1614. C. B. *Hoskin's Case.* [Hob. 115.]

**H**OSKINS sued in the ecclesiastical court, for all the tithes of the ground of one Eve, who prayed a prohibition upon surmise, that the Queen was seized of two parts of the tithes, and had granted them to one Weston; and so conveys them to another, to whom he had paid those two parts. Now the parson, by Serjeant *Harris*, prayed consultation for the third part, but it was denied him, because his consultation cannot be granted but according to his libel. Therefore he must libel for the third part *de novo*. *Quære* if he might not have had a consultation as to the third part only.

A parson libelled for the tithes of land of one, who shewed title to two-thirds in another to whom he had paid those two parts; held that the parson must

libel *de novo* for the other third part.

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H. 13 Ja. A. D. 1614. C. B. *Shelton v. Montague*. [Hob. 118.]

1. A prescription that the owners and occupiers of a certain park had used to pay £4 in full satisfaction of all tithes of the said grounds, held good.

2. Every *modus* is a discharge of the natural tithe, and so works by way of discharge, as is resolved in the parson of *Peykirke's* case.

**WILLIAM** Shelton, Esq. brought a prohibition against Richard Montague, and declared that whereas he holds and occupies; and by ten years last past, held and occupied one hundred acres of land, and ten acres of wood, lying within the bounds of the parish of Stamford Rivers, in Essex, within a park there called Ungar Park, being part of the said park which extends itself as well into the parish of Ungar (Ongar) as Stamford Rivers; and whereas the said William and all the occupiers of that part of the same park that lies in Stamford Rivers, &c. time out of mind, have paid and used to pay to the parson of Stamford Rivers aforesaid, &c. yearly, &c. four pounds in full satisfaction and discharge of all the tithes of the said grounds, which four pounds the parson had so accepted. Whereupon issue was taken and found for the plaintiff. And now Montague moved in arrest of judgment for two causes: first, because it was not laid that it was *parcus antiquus* to bear prescription as the case of *Ilebrewers Park*, 6 E. 6. Dyer. which was answered, that there the prescription was made for the keeper which requires a park and liberty. But here the park was laid but as land generally. The second exception was, that the prescription was laid in occupiers and not in owners, nor by way of custom in the place: which was resolved and answered by the court, that this was no matter of interest and inheritance, but in point of discharge; and therefore the precedents were very common in this kind, and so 15, 16 and 18 E. 4. inhabitants may prescribe for an easement. And I said that the prescription in this case did not so properly lie on the part of the parishioner, for no man can prescribe to his own charge only, as to pay four pounds per annum, but it took effect rather on the part of the parson that received it.

But the prescription indeed amounts to this, that the occupiers or parishioners have been time out of mind discharged of all tithes by payment of four pounds per annum; for every *modus decimandi* is a discharge of the natural tithe, and so works by way of discharge, as it is resolved in the parson of *Peykirke's* case, Dyer (349. b. *Ante*, 66.)

P. 13 Ja. A. D. 1615. B. R.

*Owen v. The Parishioners of All Saints in Northampton.*

[MS. Calth. Vol. 2. pp. 19. 32.] 1 Gw. 278.

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Appropriation, shall be tried at common law.

**A** CHURCH being appropriated, and having continued so for the space of sixty years without any presentation at all having been made to it; one Owen, pretending that it was a presentative church, and that it was devolved to the King by lapse, obtained a presentation under the king's letters patent, and was admitted to it, instituted, and inducted; and this being the church of All Saints in the town of Northampton, and belonging to one Carye, as committee of the wardship of one Alice Crompton, to whom it descended as a church appropriate, Owen libelled against the parishioners for the tithes. To which they make an allegation, that the church is a church appropriate, and that Catlin is vicar of it, and that they pay the tithes to the owner of the appropriation. And notwithstanding this allegation the spiritual court proceeded under a pretence that the appropriation was defective. And *George Croke* moved for a prohibition, because an appropriation is now become a lay-fee, and therefore it belongs to the common law to try whether it be an appropriation or not. And *Coke*, Ch. J. *ex assensu*, *CROKE*, *DODDERIDGE*, and *HOUGHTON*, justices, was of opinion, that a prohibition should be granted; for whether a church be appropriated or not, is a thing triable at common law: for an appropriation by reason of the interest which the King hath to present by reason of lapse, or of the minority of the heir of his tenant, cannot be made without the King's assent under his letters patent, as may be seen by 5 E. 3. & 22 E. 3. And where the spiritual law is mixed with the temporal law, there, the temporal law shall always have the jurisdiction, as being the elder brother. Besides it would be a mischievous thing that the spiritual law should try the validity of an appropriation, where it has been given to the King by an act of parliament, and by

the King to one of his subjects under his letters patent, and so by mesne conveyances come to several other persons; for that would be to try the inheritances of men, which it does not belong to the spiritual law to do, but to the common law. Indeed, the trial of a union and consolidation belongs to the spiritual law, because it is made by the ordinary without the assent of the patron or King. And COKE, Ch. J. said, that a reputative appropriation is given to the King by the statute of 31 H. 8. c. 13. & 37 H. 8. cap. though it may not be an appropriation within the strict rules of law: and for that reason he had known it decreed in chancery upon the opinion of two justices, that where an appropriation was made with the assent of the King, the patron, and the ordinary, it should be given to the King, notwithstanding the patron who assented was only tenant in tail, and so his assent was determined upon his death, and therefore it was an appropriation in reputation merely, and not in fact, at the time of the making of the act. It has also been lately adjudged in the common pleas, that notwithstanding a vicar was not endowed according to the statutes of 15 R. 2. c. 6. & 4 H. 4. c. 12. and therefore the appropriation was void by those statutes, yet such appropriation being an appropriation in reputation, was given to the King by the above statutes, and could not be avoided for this defect. (1) And DODDERIDGE, J. said, that there are few appropriations in England which have all the ceremonies required by the law to the making of an appropriation.

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This case was afterwards moved again by *Harris*, serjeant, who prayed that the prohibition might be dissolved, because it appeared that there had been four presentations made in the time of Queen Elizabeth, and that the profits consist merely in oblations, for which there was no remedy any where but in the spiritual court. But DODDERIDGE, CROKE, and HOUGHTON, justices, would not dissolve the prohibition, because the patronage was a lay inheritance, and the appropriation was now made a lay-fee, so that it was triable at common law: and the prohibition being founded upon the appropriation, it might be properly tried whether it be an appropriation or not; and it would be the speediest course to try it at the common law. And DODDERIDGE said, that an action of debt on the statute of 2 & 3 E. 6. does not lie for the subtraction of oblations.

(1) *Stafford's case*, ante, 182; vide *Grymes v. Smith*, ante 95; *Hunston v. Cocket*, ante, 196.

E. 13 Ja. A. D. 1615. B. R. *Anon.* [1 Ro. 172.]

**NOTA.** It was moved by *Davenport* for a prohibition in a Cumberland case that a parson had libelled in the spiritual court for tithes of hay, and that there had been a custom time, &c. to pay a load of hay for all tithes of hay growing and renewing upon the land where, &c. and he thought a prohibition ought to be granted for that it is a good prescription and is not tithe in kind; for we have alleged that we have used to make the grass into hay by our own labour, whereas, *de jure*, the parson ought to do this himself, for the tithes ought to be set out for the parson when it is cut, and is but grass; and therefore this is a good *modus decimandi*. But the prohibition was denied by the whole court, for that the parishioner ought to make the grass into hay; and so this is but tithe in kind, which cannot be a good *modus decimandi*. — COKE. As if a man should prescribe to pay certain sheaves of corn for all tithe of corn, this is not a good prescription; which was assented to by the court, for he ought to make it into sheaves, and therefore a part of what is due in kind, cannot be a satisfaction for the residue. — COKE. The payment of ten quarters of grain cannot be a satisfaction for twenty quarters. — HOUGHTON. If a man be obliged to pay £10. on a certain day, if he pay £5. on that day in satisfaction, yet it is no satisfaction; which was assented to by COKE and DODDERIDGE.

A *modus* of a load of the hay in a certain close, in lieu of the tithe hay thereon, on account of having made the grass into hay, is not good; (but the court decided upon the supposition that the party was bound to make his grass into hay.) They also said that a custom to pay certain sheaves of corn in lieu of all tithes of corn was void, for it ought of right to be made into sheaves.

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Tithes were assigned by writing on the back of an original indenture; held that they would not pass for more than one year without deed.

E. 13 Ja. A. D. 1615. B. R. *Sorrell v. Grove*. [1 Ro. 174.]

**SORRELL** sued Grove in the spiritual court as proprietor; defendant there pleads that he was not proprietor, and adjudged that he was not: upon appeal to the delegates it was adjudged that he was proprietor; and now a prohibition was moved for, for that he who was before proprietor had the tithes granted to him by indenture, and the grantee indorsed upon the indenture that the plaintiff should have them, which could not pass the tithes, for they could not pass without deed; which was assented to by the court; but **Coke** said that tithes might be granted for one year without deed, and not more. And day was given to hear both parties.

Tr. Ja. A. D. 1615. B. R. *Glover v. Shedd*. [1 Ro. 228.]

Where the question was, which of two was parson, (the determination of the temporal and spiritual law being different,) prohibition to the spiritual court was granted.

**PENDING** this suit, (1) Glover libelled Shedd (one of the parishioners of the church in question) for tithes, in right of the said rectory, and alleged that he was true and undoubted rector of the said church; and Shedd pleaded that he was not parson, but Morgan; which plea they had refused and given sentence against Shedd; whereas it appears to this court by verdict that Morgan is the true parson and not Glover; and thereupon a prohibition was prayed. — **Coke**. I think a prohibition shall be granted, for if Glover have the tithes of his parishioner, Morgan may charge him also, and so he will be twice charged; and it appears to us by record that Morgan is the true parson; and without doubt they have determined Glover by their sentence to be the true parson, for that they hold the institution of Morgan void by reason of the *caveat*, in which our law and the spiritual law differ *ex opposito*, for the libel is, that he is *verus et indubitus* rector, and that the suit is *de jure et titulo rectoris*; parson or not parson is triable by the common law; so wife or not, abbot or not; which was conceded by **DODDERIDGE**, who said that parson or not parson comprehends induction; which was conceded by **Coke**. And a prohibition was granted.

(1) *Hitching v. Glover*, the preceding case in Rolle, the nature of which is afterwards sufficiently explained by **Coke** in this.

Tr. 13 Ja. A. D. 1615. C. B. *Wilson v. The Bishop of Carlisle*. [Hob. 107.] 1 Gw. 279.

A custom to pay the tenth part of wool without view of the parson is bad.

**THOMAS** Wilson brought a prohibition against Henry bishop of Carlisle, and laid that there was within the parish of Graystock, this custom for tithing of wool amongst others, that if any inhabitants have five fleeces of wool or above, that then such inhabitants, after the shearing and binding up of the said five fleeces *absque fraude et dolo fideliter solvent rectori post monitionem, &c. apud ostium domus mansionalis ejusdem inhabitantis infra parochiam præd, decimam partem inde absque aliquibus visu vel tactu novem partium ejusdem lane resid, per rectorem, &c. Habendum vel scrutandum in plenam, &c.* And that the parsons, &c. have so accepted it; and then lays, that the bishop of Carlisle pretending himself parson or commendatory, &c. The bishop pleads himself the parson or commendatory of the church by presentation, &c. from the countess of Arundel, and yet shews that his faculty and confirmation was so long as he should remain bishop of Carlisle, (which may well stand together, that he may be parson absolute, yet qualified by his faculty to hold it but for a time,) and then to this custom demurred in law. And it was this term adjudged for the bishop with one consent; for the substance of the prescription is laid that the very true tenth is and ought to be paid without fraud, which is not prescriptible, for it is common right; then the sole point prescriptible is, that this is without view or touch of the nine parts, which is in effect repugnant to the other; for when you have laid truth in the former part, you lay the way to fraud in the latter; for it is against common reason that any man judge or divide for himself, and then take choice of his own division; against the rule

of

of partition, Litt. for the truth of the tenth depends upon the proportion it holds with the nine parts; and therefore for the parishioner, who is in the nature of an adversary to the person in this case, to set out a part for the tenth, which he only affirms to be just, is to give him merely power to tithe as he lists, and the prescription were as reasonable as to say plainly, that they might set out what tithe they list.

4 E. 6. 6. The guardian that tenders a marriage, must present the person to the ward. And it is a weak answer to say, that if it be not a just tenth he may refuse it and sue for his due. For first, he has no means to be assured whether it be true or not; so his suit may be causeless, sure he may be, it will be fruitless: but the law was provided not directly to ingender, but to prevent suits, and therefore provides, that things be done by indifferent means and persons, that there be no just suspicion of indirect dealing.

If a man were judge in his own case and judged amiss, a writ of error would redress it; so if a bishop disturb, or would not admit the clerk, he might be compelled; yet the law provides better, that is, that you have your right; and therefore that your means be such as are likely to produce it, you may challenge the array or the polls; yet you shall remove the *venire fac.* to another officer, as the coroner, where the sheriff is suspected in law by a provisional challenge afore to avoid delay, which is a kind of injury.

M. 13 Ja. A. D. 1615. B. R.

The Bishop of Hereford's Case. [1 Ro. 264.]

**T**HE bishop of Hereford was sued in the spiritual court of the bishop of Gloucester for tithes of his demesne(1) in Presberie(2) parcel of his bishopric: and now *George Croke* prayed a prohibition for him, for that he prescribes in *non decimando*, and this is *Wright's* case(3): resolved accordingly, and the prohibition was granted, for *Coke* said a spiritual man may prescribe in *non decimando*.

The bishop of Hereford was sued for tithes of parcel of the demesnes of his bishopric, and a prohibition was

granted on the suggestion of a discharge, in which, according to *Wright's* case, a spiritual person may prescribe.

(1) The word in Rolle is "demise," which is unintelligible, put by mistake for demesne.

(2) *Presbury*.

(3) *Ante*, 119.

M. 13 Ja. A. D. 1615. C. B.

The *Serjeant's* Case. [MS. Calth. Vol. 2. 81.] Winch. Ent. 197.

1 Gw. 281.

**T**HE *Serjeant's* case appeared upon the pleading, as I conceive, to be as follows: *Alexander Nowell*, dean, and the chapter of Paul's being seised of a rectory, make a feoffment in fee by deed in 17 Eliz. to *Philpot* and his heirs to the use and behoof of the Queen, her heirs and successors; after which a fine is levied, and then the statute of 18 Eliz. cap. 1. is made. *Alexander Nowell* dies; *Dr. Overell* is elected dean; five years pass; the Queen grants the rectory to H. D. and his heirs; *Dr. Overell* the dean, and the chapter of Paul's execute a letter of attorney to make an entry in their names to their use, and an entry is made accordingly; after which they grant a lease of it for three lives to *Bolton*. H. D. sows certain land, parcel of the possessions of the prior of St. John's of Jerusalem in England, with corn, and after the corn is severed carries it away, and *Bolton* brings an action of debt upon the statute of 2 & 3 E. 6.

Qu. whether the possessions of the prior of St. John's of Jerusalem be freed from the payment of tithes.

*Finch*, Serjeant, thought that judgment ought to be given for the defendant. And he said, that here was but one case, and but one question, for the case was but one, as it had been found by the special verdict; and the question is but one, namely, whether the action lies or not. Yet this case, though it be but one, concerns both the temporal and ecclesiastical state of the realm; for it concerns the King, who is the supreme head both of temporal and ecclesiastical persons; it concerns deans and chapters, who are secular corporations; and it concerns priors, who are regular and religious. It is founded on the four principal standards of the law: for it is founded upon a feoffment

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feoffment which is the conveyance of laymen for their possessions; upon a fine, which is the general assurance of the realm; upon a trust and confidence which has diffused itself into the estates of every one; and upon tithes, which are the flower of spiritual possessions; so that though the general question be but one, yet it divides itself into three general questions; the first of which is founded upon a feoffment; the second is founded upon a fine; and the third is founded upon tithes. And in the discussion of these questions there are five statutes which are to be taken into consideration. The first is the statute of 13 Eliz. c. 10, the 2d is the statute of 18 Eliz. c. 11; the 3d is the statute of 4 H. 7. c. 24; the 4th is the statute of 31 H. 8. c. 13; the 5th is the statute of 32 H. 8. c. 24. As to the first question, that subdivides itself into three parts; the first of which is, whether the Queen be restrained by the statute of 13 Eliz. c. 10. so that she cannot take any thing from a dean and chapter, they being persons disabled by that statute from making any alienation of their possessions: the 2d is, whether the feoffment made to Philpot be merely void, so that upon the words of the statute of 13 Eliz. c. 10. it shall be void to all intents and purposes, void against the dean himself who made it: the 3d is, whether the feoffment be made good by the statute of 18 Eliz. c. 11. or not. As to the second general question it subdivides itself into two parts: the 1st is, whether the fine and five years suffered to pass by the dean be a perpetual bar to the successors or not: the 2d is, whether, since the dean's successor suffered the five years to pass, he himself and his chapter can enter or not. As to the 3d general question, that also subdivides itself into two parts; the first of which is, whether the possessions of the prior of St. John's of Jerusalem shall be said to come to the King by the statute of 31 H. 8. c. 13; so that they shall be discharged of tithes by that statute: the 2d. is, admitting that they come to the King by the statute of 32 H. 8. c. 24. if they shall now be discharged of tithes by the statute of 31 H. 8. c. 13. made before it.

[Note. All the arguments, except those on the subject of tithes, are omitted.]

As to the first part of the third question, it seems to me, he said, that the possessions of the prior of St. John's of Jerusalem are not vested in the King by the statute of 31 H. 8. 1st. in regard that the statute of 31 H. 8. does not dissolve any monastery, nor give any thing to the King according to the 1 & 2 Mar. Dy. 3; and therefore these possessions could not be vested in the King by that statute. Secondly, it appears by the special verdict that the land is vested in the King by the 32 H. 8. if then it be vested in the King by the 32 H. 8. it cannot be said to be vested by the 31 H. 8. for as a child cannot have two fathers and mothers, so land cannot be given to the King by two acts of parliament; for it is of necessity that one of them must give it, and not both. As to the 2d part, it seemed to him, that notwithstanding the possessions of St. John of Jerusalem are vested in the King by the statute of 32 H. 8. c. 24. yet they are not to be discharged of tithes by the general words of that statute, which wills, that "the King shall have all liberties, franchises, privileges, parsonages, tithes, &c. which appertained or belonged to the said religion, &c." for the privilege of being discharged of tithes being a mere personal privilege shall never be transferred to another by the general words of an act; but, upon the dissolution of the corporation, there shall be also a dissolution of the privilege, according to the case of 7 E. 4. 22. where it is holden, that by a determination of the office there shall also be a determination of the fee which belongs to the office, because it is a thing incident to the office. And 35 H. 6. 56. upon the dissolution of the Templars, there was also a dissolution of the appropriations; and the personal privilege to hold in frankalmoigne could not be transferred by the general words of the 17 of E. 2. And it is resolved in the archbishop of *Canterbury's* case in 2 Co.(1) that the general words of 2 & 3 E. 6. do not give any immunity to be discharged of tithes. The same law as to the statute of 37 H. 8. And the very words of the statute of 32 H. 8. shew, that the privilege of being discharged of tithes appertains to the order of religion, and therefore the order being dissolved, the privilege is also dissolved; and though the words of this statute be, which appertained to the religion, yet that is to be intended of the order of religion, for

(1) *Ante*, 113.



otherwise the King could not have any of their lands, but they would revert to their founders, according to 5 H. 7. 37. and 7 E. 4. by Danby. But he said, notwithstanding they are not to be discharged by the general words of the 32 H. 8. yet they shall be discharged of the payment of tithes by the statute of 31 H. 8. c. 13. for in that statute there is a double provision and ordinance made for religious houses, in two distinct branches; the first of which is, that "all religious and ecclesiastical houses, &c. which hereafter shall happen to be dissolved, suppressed, renounced, &c. shall be vested, deemed, or adjudged by authority of this present parliament, in the very actual and real seisin and possession of the King our sovereign lord, &c. the King, &c." The 2d is, that "the King and his patentees, which have or hereafter shall have any monasteries, &c. shall have, hold, retain, keep, and enjoy, the said monasteries, &c. discharged and acquitted of payment of tithes, as freely, and in as large and ample manner, as the said late abbies, &c. had them." And here the King had and enjoyed those lands parcel of the possessions of St. John, &c. which by these words of the statute shall be discharged. Besides, the words dissolved, suppressed, renounced, and relinquished, being of one nature, and the words, forfeited, given up, or come, being of another nature, are to be observed. For where corporations are dissolved, there, if no other provision be made, the founder shall have their lands: but, if the lands are *relinquished*, there, neither the King nor the founder shall have them, but they remain as in the corporation: but by way of *forfeiture* or *giving up*, as in the case at bar, they may well enough be settled in the King, and the King shall have the benefit according to the provision of the statute. And as to what has been objected, that where lands come to the King by an act of parliament, that shall not be said to be such a *coming* to the lands as is comprised in the statute; in the first place he said, that that might be well enough said to be a *coming* within the statute; and so was the opinion of POPHAM, C. J. In the second place, the King does not come to them by the act of parliament; for the act of parliament cannot be a donor, as may be seen by *Wimbish's* case in Plowden; and therefore the prior and convent who surrendered them shall be said to be the donors, and it shall be said to be a *giving up* by them, which being so, it may well enough be comprised within the statute. And as to the objection which has been made, that a thing shall never be within the branches, which is not in the root, and that because the possessions of the priory of St. John's of Jerusalem are given by the act of 32 H. 8. c. 24. and not by the act of 31 H. 8. c. 13. they shall therefore not be capable of being discharged of tithes by a branch of the statute of 31 H. 8; he said, first, that a thing which is not within the root may well be within a branch; as, where lands devisable holden *in capite* are devised, the King shall have the wardship and primer seisin of a third part by virtue of a saving in the statute of 32 H. 8. notwithstanding the lands being devisable by custom are not contained within the body of the act, as appears from a case in 4 & 5 Mar. Dy. 155. and *Matthew Mene's* case, 9 Rep. 133, and Hil. 1 Eliz. Rot. 573. in the King's Bench. In the New Book of Entries, 454. there is a strong case to our purpose; and if the pleading there be good, as it is admitted, it overrules the case in question; for the pleading is *virtute actus*, 32 H. 8. c. 7. *et vigore actus parliamenti facti*. 31 H. 8. the King was seised; and it shall not be pleaded that he was seised by virtue of the statute of 31 H. 8. except in a case where he is to be discharged of tithes. And here he cited *Grenevil's* case, 31 El. where it was adjudged that a bishop is not within the statute of West. 2. c. 41. for the words of the statute do not extend to him, they being express of certain persons within the compass of which a bishop cannot be; for a bishop is a secular, and not a religious person. And he cited the opinion of MANWOOD to be, that by a grant of a monastery in the case of the King, any religious house, be it an hospital or any other, will pass.

*Chamberlayne*, Serjeant, argued for the plaintiff, but I have omitted the report of his argument because I heard only a part of it; and because the substance of it may be seen in my other book of reports in the cases of *Warren v. Smith*, and *Urrey and Bowyer*. (*Ante*, 214. vide *Whitton v. Weston*, *post*.)

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E. 14 Ja. A. D. 1616. B. R. *Lane's Case*. [Moo. 917.]

In a suit for wood under 20 years growth, a prohibition was granted upon a suggestion that it was used for hedge poles for coppices, for which poles tithe had not been used to be paid.

**L**ANE sued in the spiritual court for tithe of wood under twenty years of age. The defendant alleged that he had employed the wood in hedge poles for improving the coppices, and that he had not used to pay tithes of hedge poles, and thereupon a prohibition was granted.

E. 14 Ja. A. D. 1616. B. R. *Anon.* [Moo. 917.]

A modus suggested, and a consultation granted for want of proof within six months; another prohibition shall not be granted upon an appeal; but if a consultation be not well granted, there a fresh prohibition lies.

**I**T was agreed that where a prohibition is awarded upon suggestion of a *modus decimandi*, and a consultation awarded for want of proof of the suggestion within six months, there a fresh prohibition should not be awarded upon appeal in the same suit; but if a consultation be not well granted, there a fresh prohibition lies.

E. 14 Ja. A. D. 1616. B. R.

*Witt v. Buck.* [3 Bulstr. 165.] 1 Ro. 354. 4 Gw. 1574.

1. *Barren land*, by the statute 2 E. 6. is such ground as will not bear corn of itself, without very great costs in the extraordinary manuring of it; but if the same will bear corn without any great labour and manuring (but only with charge in regaining it from being overflowed), it shall pay tithes presently, for it ought to be *subapte naturâ barren*, or it shall not be within this statute and the clause of discharge; for if one gain land from the sea, which afterwards bears good corn, of this he shall pay tithes.

2. Wood ground is not barren ground within 2 E. 6. for if one stub up the wood, and convert it into arable with great cost and labour, yet he shall pay tithes for it presently.

**I**N a prohibition, upon the statute of 2 E. 6. cap. 13. the clause touching barren and heath ground, of which, after improvement, no tithes to be paid during the space of seven years after the improvement. For the prohibition, it was shewn by *Trotman* that this land, for which the parson libelled for tithes, was marsh and sandy land, and covered with salt water, so that time out of mind no grass had been there known to grow, nor any profit at all made of this, until now of late time, by and with the great costs, charges, and industry of the tenant. This ground had been lately gained from the sea and from its overflowing, by repairing and making new banks and sea walls, and by continual repairing of them; and so he had now converted the same into arable land, where he had corn; and of this land the parson libels for tithes in the spiritual court; and upon this matter thus shewn, a prohibition prayed, being to be discharged from payment of tithes for this ground for seven years; this statute being thus made for the encouragement of tenants to make improvements of their lands.

**COKE**, Ch. J. It was resolved in one *Farrington's case*, upon this statute of 2 E. 6. that wood ground is not barren ground within this statute; this was there adjudged in point, that if one do stock and grub up wood ground, and after convert this into arable ground, he has by this meliorated his land, but this with great cost and labour, yet he shall pay tithes for this ground presently; for that heath and barren ground, intended to be within the statute, the same ought to be such land, which is *subapte naturâ sterilis*, and barren.

**DODDERIDGE**, J. A salt marsh, if this be fenced, and so made good meadow, clearly he shall pay tithes of this presently; yet before this was so fenced and made firm, no tithes were to be paid of this.

**COKE**. The Isle of Dogs (juxta Greenwich), they are at great costs and labour, and that continually, to keep and uphold this, yet they are to pay tithes for this: here it appears unto us, this to be very good land, but all the charge is in the gaining and defending of this from the overflowing of the sea (this land shall be out of the statute, out of the clause of discharge for seven years, notwithstanding this charge the tenant has been at in gaining of this land from the sea); for to have this to be within the statute, and the clause of discharge, this land ought to be *subapte naturâ barren*, which here it is not, but by accident, by the overflowing of the sea thereon.

**HOUGHTON**, J. This land, if the salt water came not upon it, though it be sandy, would yet have borne good grass, without any labour, for this is very good land of itself.

**COKE**. If a man's land be overflowed for two, three, or four years, during

this time the parson can have no tithes here; but if he afterwards regain this his land from the overflowing, though this be at his great charge and labour, and this afterwards by his industry, bear grass or corn, he shall pay tithes of this; for this barrenness, as here in this case, is not so of itself, but by accident.

The whole court agreed in this, that by this statute barren ground is such ground as will not bear corn of itself, without very great cost in the extraordinary manuring of it.

But if the same will bear corn without any great labour and manuring (but only with charge in regaining it from being overflowed), he shall pay tithes for this presently; for the same ought to be *subtly natura* barren, or else the same shall not be within this statute and the clause of discharge; for if one do gain land from the sea, which afterwards bears good corn, of this he shall pay tithes.

The whole court also agreed in this, that if one do gain land from the sea, and that by his great cost, and he afterwards turn this to arable land, for this he shall clearly pay tithes, notwithstanding his cost, and notwithstanding that time out of mind no grass had been there growing; yet because the same is not barren land of itself, but only by accident (*sc.*), by reason of the sand, and salt water flowing over it, therefore so soon as this shall be regained and sown with corn, tithes shall then presently be paid for this land; for this land bears good corn, being regained, and that without any marling, or any great cost in manuring of the same; which proves evidently that this is not barren ground within the scope, intention, and meaning of the said statute, by which the same ought to be *subtly natura* barren, or not within the statute.

And in all this the court agreed clearly; and therefore the case appearing to be thus, that this is no such barren ground within the statute as ought to be discharged from payment of tithes, but tithes ought to be paid for the same, and that the parson had just cause to sue there for his tithes, so a prohibition was denied by the court.

E. 14 Ja. A. D. 1616. B. R.

*Laphome's Case.* [1 Ro. 355.] 1 Gw. 358. in n.

**L**APHOME sued in the spiritual court of Gloucester for tithe wood; and now *Bridgeman* moved for a prohibition, for that the suit was for beech of a great age, viz. eighty years at least, and also that the parson of the parish had had a consideration for tithe wood, viz. certain wood in the lord's wood for tithes of wood for time whereof, &c. and never had taken tithe wood, therefore, &c. — *Coxe. Buck.* is a beech, and the county of Buckingham had its name from the beeches there, and it is good timber in that county; and therefore it was adjudged in *Sir Edward Cary's case*, that waste lies for such beeches there; and in the parish where I live, the wood has never been paid; but the parson has a wood which is called *the tithe wood*, and he pays fourpence yearly to the lord of whom he holds it, and therefore it shall be intended that it was given upon a composition for all tithe wood within the parish, inasmuch as no tithe had ever been paid for wood: and a prohibition was granted.

Where by the custom of the country, beech trees are timber, no tithes shall be paid for them if above 20 years growth.

E. 14 Ja. A. D. 1616. B. R.

*Biggs v. —* [3 Bulstr. 182.] 1 Ro. 378.

**I**N a prohibition, a libel being against him in the spiritual court for tithes, a suggestion there made by him for a *modus* of two shillings for all tithes; upon this a prohibition granted: the parties at issue upon this, went to trial, and in this trial the plaintiff in the prohibition became nonsuit, because he could not prove the *modus*; upon this, a consultation was granted to the spiritual court, for them to proceed there; afterwards, a sentence there passed against him, against the *modus*; from this sentence he appeals to another court; upon

After plaintiff in prohibition nonsuited, judgment was given against him in the spiritual court on the original libel, from which he appealed, and applied for

another prohibition, varying the terms of the *modus* formerly suggested; held that another prohibition should not go.

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upon the same libel there against him, he suggests a new *modus* of two shillings for tithe corn and hay, and upon this prays to have a new prohibition, upon the statute of 50 E. 3. cap. 4. and this upon his own surmise, there being the same libel as before.

COKE, Ch. J. With them double pleas are not disallowed: this appeal here being in the same cause, shall not make us grant a new prohibition; the statute is after a consultation, duly granted. If a parson libel there for tithes of trees above twenty years growth, if a consultation be granted, and he libel there again for tithe of great timber trees, he shall here have a new prohibition, because the consultation was not duly granted. This act of parliament ought to have a reasonable construction (*sc.*) to be before the same judge, and for the same cause.

DODDERIDGE, J. The appeal only suspends the sentence, but yet the same stands still in force; in this case it would be very mischievous if a new prohibition should be granted, for so upon several appeals three or four prohibitions might be granted, which would be very inconvenient; notwithstanding the person of the judge be here altered, yet it is for the same cause as before.

HOUGHTON, J. The intent and purpose of this statute was, that he who has but one suit, should not be infinitely troubled.

The whole court against the prohibition, for the great inconvenience that might ensue, and so a prohibition in this case was denied.

E. 14 Ja. A. D. 1616. B. R. *Pitt v. Harris*. [1 Ro. 379.]

Prohibition to a suit for rakings. It was said afterwards that they were of great value. Coke said they might plead that for a consultation, if they chose,—he did not like such greediness.

A PROHIBITION was granted, for that the suit in the spiritual court was for tithe of rakings; and COKE said he did not like such greediness. On another day, after the prohibition was granted, Serjt. *Finch* said that the party made great gain of them, for he carried them to his barn. — COKE. The prohibition has been granted, and therefore plead this if you will for a consultation.

Tr. 14 Ja. A. D. 1616. B. R.

*Rudge v. Thomas*. [3 Bulstr. 201.] 1 Ro. 403.

A parson covenanted that one should have the tithes of certain lands for a term of years, and before the end of the term resigned: on an action of covenant by the lessee, it was held that covenants as well as leases, were void by non-residence for 80 days, by 13 El. & 14 El.

IN an action of covenant the plaintiff in his declaration sets forth, that the defendant was parson of Dale, and covenanted that the plaintiff should have his tithes of certain lands for thirteen years; and that afterwards he resigned, and another parson was inducted, by which means he was ousted of his tithes, and for this cause the action brought.

The defendant pleads in bar the statutes of 13 Eliz. cap. 20. and 14 Eliz. cap. 11. for non-residency: upon which plea the plaintiff demurred in law.

It was urged for the plaintiff, that the plea in bar was not good, because it is not averred that the defendant had been absent from his parsonage by the space of eighty days in a year, for otherwise the covenant is not void by the statutes.

For the defendant it was alleged, that the pleading of the statute of 13 Eliz. is idle, but by the statute of 14 Eliz. this covenant is made void; for by the statute all covenants shall be all one with leases made by such parsons; and in this case, if this had been a lease, this had been clearly void by surrender of the parson; and so in case of a covenant.

DODDERIDGE and HOUGHTON, Justices. The statutes of 13 and 14 Eliz. do not meddle with assurances at the common law, nor intended to make any leases void which were void at the common law; and therefore this covenant here is not made void by the statute, unless he be absent eighty days from his parsonage.

COKE, Ch. J. agreed herein with them, if a parson covenant that another shall enjoy his land for twenty-one years, and he afterwards resign, he shall be bound by his covenant; so if he be bound by his obligation to make such a lease,

a lease, this is good, and shall bind him; and so it was adjudged in the C. B. in the dean and chapter of Norwich's case, when I was there chief justice: and so it is, if tenant for life covenant that another shall enjoy his land for twenty-one years, and afterwards commit a forfeiture, he shall be bound by his covenant.

DODDERIDGE and HOUGHTON agreed with him herein: they all agreed in this case for the plaintiff, and that by the preamble of 14 Eliz. it is shewn the intent of that statute to be, to make covenants void, within the provision of 13 Eliz. by absence for eighty days.

In this case, by the rule of the court, judgment was given for the plaintiff.

Tr. 14 Ja. A. D. 1616. C. B.

*Jaker's Case.* [3 Bulstr. 212.] 1 Ro. 405.

**I**N a prohibition upon a libel in the spiritual court to have tithe of mills. Upon a suggestion of a *modus* to be paid for the same, and a prohibition granted.

COKE, Ch. J. In some cases tithe is payable for mills, and in some cases not. No personal tithe by the statute is to be paid for mills, but where by special usage the same has been paid, and not otherwise.

The court agreed with him herein, and therefore upon the same suggestion, a prohibition was granted.

*Nota*, that another prohibition in like manner was moved for upon a suggestion of a *modus*, to pay so much by a custom for all mills erected, or to be erected, and this appeared to be a new erected mill; whether the custom shall run to this or not, upon the statute of *Art. cleri*, cap. 5.

COKE, Ch. J. This *modus* cannot go to this new mill; for an ancient mill your *modus* shall be allowed, but not for the mill newly erected; the custom will not extend unto it; and therefore by the rule of the court, for this new mill, a consultation was granted.

In some cases tithe is payable for mills, in some not. No personal tithe by the statute is to be paid for mills, but where by special custom it has been paid.

A custom was alleged to pay a *modus* for all mills erected or to be erected; held that it could not extend to newly erected mills.

Tr. 14 Ja. A. D. 1616. B. R. *Berry's Case.* [Hob. 192.]

**B**ERRY sued for tithes of hay *in specie*, and in a prohibition issue was taken, whether the inhabitants had used to pay, for all tithes of hay of all ancient meadows within the town, a certain rate tithe. The jury find there was such a custom for all the ancient meadows, saving for certain called Barton meadows, for which tithes had been paid in kind, and that the party (sued in the spiritual court) had hay upon five acres of the Barton meadow. Now the question was, how Berry the parson should have his consultation; for if the jury had found against the custom generally (as they might well have done), he should have had his consultation for all; but now that the jury have found the truth distributively, that the plaintiff had cause to sue in the spiritual court for one part, but not for the other, we shall never give them a consultation, to proceed in all, no nor in part, where the suit appears to us originally ill founded; and a prohibition leaves more power in this court than the other actions, inasmuch as it locks up that court which cannot require it to be opened but with a key of right and justice, as in the case of *Pell and Sanderson*, M. 1 & 2 Eliz. Dyer, 170, 171. (1) A man sues for tithes in kind, the defendant sues a prohibition upon a surmise of mere barren land, paying no tithes, whereupon issue; and it was found that it was barren, but *yet paid* a small tithe. So it was found against the plaintiff; and yet consultation was denied, because he should not have sued for tithes in kind, which, if they should grant a consultation, should be allowed but for small tithe. But in this case Berry must have consultation for the Barton land only, for the libel for tithes in kind for the 100 acres is several for all or any part; and therefore here, for so much as was Barton and out of the custom, it was well libelled, as if it had been for that alone.

Where a custom is only found in part, a consultation shall only go for the part not found.

(1) *Ante*, 57.

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Tr. 14 Ja. A. D. 1616. C. B. *Thompson v. Comfort*. [Hob. 192.]

A parson libelled for tithes of several things, a prohibition was obtained as to all but one, sentence was given before it was delivered, if costs had been at that time taxed for the whole, they must have been appointed; but if they had proceeded to taxation afterwards, and under colour of the fact, set as much as they would have done for the whole, they would have been safe, for it is matter within their own jurisdiction.

**C**OMFORT sued for tithes of honey and divers other things. The plaintiff obtained a prohibition for all the tithes libelled, saving the honey. The parson had sentence for all the tithes before the prohibition delivered, and after the prohibition delivered, the judge proceeded to the execution of the sentence for the honey, and to taxation of costs. If the costs were taxed before the prohibition delivered, (which must be then understood as large as the sentence, which is for all,) then must they not proceed to the exacting of all the costs; but if they did tax the costs after for the suit of the honey, though they set as much as they meant to give for all, they are out of the danger of the prohibition; for where the cause belongs to them, the proportion of costs is of their jurisdiction, and not of ours. Now if after the prohibition, which was with an exception of the taxed costs, *pro expensis huius* generally, without the *quoad*, &c. yet I think it well enough, especially when his intent appears to proceed upon the principal, only for the honey excepted.

and under colour of the fact, set as much as they would have done for the whole, they would have been safe, for it is matter within their own jurisdiction.

M. 14 Ja. A. D. 1616. B. R.

*Gosling v. Harding* and others. [1 Ro. 419.] 3 Bulstr. 241.

Where the parson sued for tithes fish in the spiritual court, according to a certain custom of tithing, (which he might do,) viz. to take the half of the tenth part of all fish caught and brought into Yarmouth, but the defendant alleged another custom, viz. to pay the tenth part after satisfying the owner of the vessel for the charges of the voyages in fish, for which no tithe was to be paid; held, that as different customs were alleged, and the common law and spiritual law differed in the point of prescription, (which is there good in ten years,) prohibition should go.

**G**OSLING libelled in the spiritual court against Harding and others for tithes of fish taken in Iceland and brought to Yarmouth, and alleged the custom to be that upon return of the ships from Iceland to Yarmouth, all the fish taken shall be divided into ten doles, and the tenth dole is called Christ's dole, one half of which the parson ought to have for tithes, and the town of Yarmouth the other half, for the repair and benefit of the town; and the plaintiff (being parson) sued for his moiety of the tenth dole: to which the defendant then said, that the usage has always been for those who go in the ships to treat with the owners for a voyage to Iceland, and that upon their return they have been used to set out the composition fish for the owner of the ship, for the use thereof, for which no tithes have used to be paid, and that they have been used to divide the residue into ten doles, &c. agreeing with the plaintiff, and the defendant offered to prove the *modus* to be as he had alleged; but the spiritual court refused it, and therefore a prohibition was prayed. — **DODDERIDGE**. The parson may libel in the spiritual court upon a special *modus*, and no prohibition lies: which was assented to by the court. — **HOUGHTON**. But if they libel for one *modus*, and the plea be, that there is another *modus*, prohibition lies; for this is to be tried by the common law; for otherwise the temporal court would be ousted of all jurisdiction, for the parson might suggest a false *modus* of great value, on purpose to take away the temporal jurisdiction. — **DODDERIDGE** thought otherwise, for that they have jurisdiction of the special *modus*, and therefore the difference of the *modus* cannot alter the case; but if in the spiritual court they differ in proof of the *modus* from the common law, prohibition lies, as if they will not allow it because it is proved but by one witness. And in the case at bar, for that the spiritual court had refused the proof of another *modus*, than that the plaintiff had alleged, a prohibition was granted; but on another day the prohibition was granted by **MONTAGUE** and the whole court, for that he had mistaken his *modus*, and the spiritual court shall not try the *modus*, for the reason before mentioned by **HOUGHTON**, and also for that, according to **DODDERIDGE**, ten years usage makes a custom there, whereas by our law it ought to be perpetual, and **MONTAGUE** said the spiritual court had no jurisdiction in the matter, they having mistaken the *modus*.

M. 14 Ja. A. D. 1616. B. R. *Reynolds v. Newberry*. [1 Ro. 420.]

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**T**HE person libelled for that by the custom of the county of Devon, when the grass is cut down and put into grass cocks, the tenth cock ought to be set out to the parson for his tithes, who might by the custom make this into hay upon the land of the party, and the owner of the land disturbed him in his road to come to make this into hay. The court thought no prohibition laid, for that it was accessory to a thing spiritual, and F. N. B. is that the party may have his action upon the case for disturbance of such a road; but it was further alleged for a prohibition, that the custom of the county was, that the parson should not make the grass tithe into hay upon the land, but should carry it out; and so they would try customs which ought to be tried by the common law; but notwithstanding this, the court would not grant a prohibition; but though Warburton thought that this was an unreasonable custom, it did not appear that the court intended so much, for they did not speak upon it.

A custom was alleged that the tenth grass cock should be set out for the parson, who was then to make it into hay on the owner's land; upon a libel for disturbing the parson in the use of a way, a prohibition was refused, as the custom was accessory to the principal matter which was spiritual, although it were afterwards alleged, that by the custom of the country, the person should not have the privilege of making it there, but should carry it out for that purpose, which Warburton said, seemed to him unreasonable.

cessory to the principal matter which was spiritual, although it were afterwards alleged, that by the custom of the country, the person should not have the privilege of making it there, but should carry it out for that purpose, which Warburton said, seemed to him unreasonable.

M. 14 Ja. A. D. 1616. B. R. *Wintell v. Childe*. [3 Bulstr. 220.]

**I**N a prohibition upon a suit in the spiritual court, by the defendant, the vicar of D. for tithes: a prohibition was prayed upon his plea there of a *modus decimandi*, to pay so much yearly to the parson of Dale, in discharge of his tithes, and the same plea there disallowed. The whole court agreed, this *modus* between him and the parson will not discharge him from payment of tithes, as to the vicar, and therefore by the rule of court a consultation was granted.

Prohibition was refused upon suggestion of a *modus* paid to the parson in discharge of tithes sued for by the vicar,

plended and disallowed in the spiritual court, for they said a *modus* to the parson would not discharge him against the vicar.

M. 14 Ja. A. D. 1616. B. R.

*Anon.* [MS. Calth. Vol. 2. 378.] 1 Gw. 285.

**A** PROHIBITION was granted to a suit in the spiritual court for the tithes of a house in London, because by the statute 37 H. 8. c. 12. the mayor has jurisdiction given him to make order concerning the payment of tithes in London.

Prohibition granted, where the libel was for tithes of a house in London, for the mayor has jurisdiction.

M. 14 Ja. *Anon.* [MS. Calth. Vol. 2. 377.]

**A** PARSON libelled for tithes of his parishioners in the spiritual court. Sir Thomas Vavasour, being owner of a portion of tithes by virtue of the King's letters patent, came in *pro interesse suo*. Whereupon a prohibition was moved for by Hutton, Serjeant: 1. For that here was a double vexation of the defendant, which ought not to be by law. 2. Here was a disallowance of letters patent, which they have no power to try; *sed non allocatur*, for it is confessed by the defendant that tithes are due, and being so it belongs to the spiritual court to try whether they be payable to the parson or proprietary by virtue of the letters patent, and he who comes in *pro interesse suo*, is as a garnishee at common law, and it is the common course there to do so, but Houghton said, that if *non concessit* were pleaded, that the common law should try it to determine to whom; but if the grant by the letters patent had been in dispute, the common

Where a parson libelled for tithes in the spiritual court, and a portionist came in *pro interesse suo*, held that no prohibition laid, as tithes were admitted to be due, and the spiritual court were competent to try it.

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A custom to be discharged of tithe of neck-wool, in consideration of the payment of the tenth fleece at shearing time is good; but a prohibition was granted upon suggestion, that they used, for this, to wind up the other fleeces at their own charge.

It was insisted that an abuse in the cutting of neck-wool should be shewn on the other side, but denied by the court.

If corn be scattered purposely, tithes of rakings shall be paid.

M. 14 Ja. A. D. 1616. B. R. *Fosse v. Parker*. [3 Bulstr. 242.]

**BY** libel in the spiritual court, for the tithe of neck-wool of 800 sheep, which the defendants had cut, and converted the same to their proper use. The defendants there answered, that they used, between Michaelmas and All-hallowen-tide, to cut the head, neck, and ears, to preserve their sheep from vermin and flies, and so by this to make the fleece the better, and that they were to pay the tenth fleece at shearing time, but not to pay any of these neck-fleeces, being, as they alleged, of no value; the which plea they there refused, and gave a sentence for the plaintiff against them: for this cause a prohibition was prayed.

The court denied to grant a prohibition in this case.

**Houghton, J.** There may be much deceit used in this, as in the case of rakings: if purposely they will scatter corn, the parson shall have tithe of this, unless it be *minus voluntariè*; so here, if they cut great fleeces which will yield profit, the parson is to have his tithe of this.

**Dodderidge, J.** The suggestion here alleged is, because he paid the tenth fleece at shearing time; for this to be discharged of payment of tithe of the neck-fleeces, and that in consideration of this, the parson to have the tenth fleece after; this is due to the parson *jure divino*: they make too long neck-shearings, and upon this colour they use to shear all the shoulders also, and so by this to spoil the other fleece. If the parson be to have the tenth fleece of the back, he ought also to have the tenth fleece of the neck, and no reason for the contrary.

**Croke, J.** If they cut this neck-fleece, and convert this to their proper use, they ought of this to pay tithe to the parson.

It was then urged, that if such abuse was in the cutting of the neck-fleeces, this ought to come on the other side to shew this to be so, as in the case of rakings.

The whole court against this, and denied at this time to grant a prohibition, for that their answer in the spiritual court was no wise sufficient to débar the parson of his tithes of these neck-fleeces.

Afterwards this was moved again, and the suggestion appearing to be, that for this, they used to wind up the other-fleeces at their own charge, so for this cause a prohibition was granted by the court.

M. 14 Ja. A. D. 1616. C. P. *Copley v. Collins*. [Hob. 179.]

The six months in which a surmise in prohibition is to be proved are calendar months.

**I**N prohibition it was resolved, that the six months for proof of the surmise shall not be counted by twenty-eight days to the month, but according to the calendar.

Hil. 14 Ja. A. D. 1616. Exch. Chamb. *Colt v. Glover*. [1 Ro. 454.]

It was said by a civilian, that if a bishop have lands in a parish he shall pay no tithes, unless the parson can prescribe that he should, but the court denied this, and said that the prescription should be *è contrà*, and as a spiritual person he might prescribe in *non decimando*.

**DOCTOR Martin.** If a bishop have land within the parish of another parson, he shall not pay tithe to him, unless the parson has a prescription that he ought to pay them: which was denied by all the judges, who said that he should pay tithes unless he had a prescription *è contrà*, as he might prescribe in *non decimando*, being a spiritual person.

The court denied that he should, but the court denied this, and said that the prescription should be *è contrà*, and as a spiritual person he might prescribe in *non decimando*.

Hil. 14 Ja. A. D. 1616. C. P.

*Harris v. Cotton*. [1 Br. & G. 69.] Hob. 188.

If the vicar occupy his glebe, he shall pay no tithe, but if he let it, the tenant shall pay. The court seemed to think that if a vicar sowed his glebe and died, his executor must pay tithes.

**A**S long as the vicar occupies his glebe land in his own hands, he shall pay no tithes; but if he demise it to another, the lessee shall pay tithes to the parson that is impropriate. If the vicar sow the land, and die, and his executor



cutor take away the corn, and do not set forth his tithe, and the parson brought an action of debt upon the statute of 2 Edw. 6. the court seemed to incline that it would lie. (1)

(1) This last point (from the report in *Hob.*) seems to have been put to the court by counsel in the shape of a question, but "they would give no opinion, because it hanged before them in suit."

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P. 15 Ja. A. D. 1617. B. R.

*Gose v. Barnes.* [MS. Calth. Vol. 2. 429.] 1 Gw. 285.

**G**OSE, farmer of the rectory of Trumpeton, (1) libelled in the spiritual court against Barnes, for tithes of five roods of grass. The defendant set forth a custom that he was to pay the tenth cock in grass, after it is cut down and cocked; and before it is made into hay: to which the plaintiff replied, that if the ground be wet, he is to take the tenth cock in grass before it be made into hay; but if the ground be dry, then he is to have the tenth cock, after it is made into hay; and sentence was given [in the spiritual court] against the defendant, and he was adjudged to pay 12*d.* because he had paid neither tithe grass nor tithe hay, and twenty marks. A prohibition was moved for, because the issue was joined upon a *modus decimandi*, which was a thing triable at common law. And it was agreed, that where the issue is upon a custom which gives a recompense for the tithes in kind, there, a prohibition ought to be granted: but, where the dispute is upon a custom which gives no recompense, a prohibition ought not to be granted; and therefore in this case the prohibition was refused.

(1) Trumpington, Camb.

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Where the issue in the spiritual court is upon a custom which gives a recompense for the tithes in kind, a prohibition ought to be granted; but otherwise where the custom gives no recompense to the parson.

Tr. 15 Ja. A. D. 1617. B. R.

*Portinger v. Johnson.* [MS. Calth. Vol. 2. 474.] 1 Gw. 286.

**P**ORTINGER sued Johnson in the spiritual court for the tithes of grass to be made into full, sufficient and perfect hay. Johnson surmised that the custom was to cut the grass, and then to ted it, and to put it into grass cocks, and that then the parson is to take his tithe: and upon this surmise a prohibition was moved for: and the cases of *Aubrey v. Johnson*, in 34 Eliz. in B. R. where the libel was for tithe of aftermath, and *Portinger v. Johnson*, in 41 Eliz. (1) where upon the like surmise a prohibition was granted, were cited. A day was given to shew cause, and I was of counsel in the case, but the prohibition was denied; for it being confessed, that tithes ought to be paid, and the *modus* giving no manner of recompense to the parson, it is not to be resembled to a *modus* which gives a recompense, for this *modus* may well enough be tried in the spiritual court, and accordingly in the case of *Gose*, farmer of the rectory of Trumpeton, and *Barnes*, (2) a prohibition was denied for this very reason. And Johnson was parson of the church of Barfield, in Berkshire.

Where a *modus* is alleged which gives no recompense to the parson, a prohibition shall not go to the spiritual court, for it is not to be resembled to a *modus* which gives a recompense.

(1) In respect to the two cases above cited, the only satisfactory reference which can be made, seems to be to the case of *Johnson v. Aubrey*, Cro. El. 660, ante, 147, which was determined in 41 El. and not in 34 El.; the

other case, viz. *Portinger v. Johnson*, is the name of the principal case, and doubtless given by mistake, vide tamen, *Hall v. Pettipiece*, Cro. Ja. 42, ante, 157. *Parrey v. Chauncey*, Noy, 15, ante, 159.

(2) *Ante*, the next case.

Tr. 15 Ja. A. D. 1617. *Spencer's Case.* [Noy, 19.]

**I**T was said by HURRON, that by the civil law the parishioner ought to give notice to the parson when the tithes are set forth. But it was adjudged, that the common law does not so oblige a man.

Tr.

By the civil law notice must be given to the parson when the tithes are set out, but by the common law it is not so.

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The owner of land of the Cisterrians shall pay no tithes, but the tenant shall pay.

Tr. 15 Ja. A. D. 1617. C. B. *Anon.* [1 Br. & G. 44.]

SO long as the land is occupied by him that hath the fee-simple, which did formerly belong to the order of the Cisterrians, it shall pay no tithes, but if he let it for years or life, the tenant shall pay tithes.

Tr. 15 Ja. A. D. 1617. C. B. *Anon.* [Cro. Ja. 429.]

One obtained a prohibition, but laid by till after sentence, and during appeal served it; held that it was waived: it is otherwise where after prohibition granted and not served by the party, excommunication is pronounced for want of answer.

UPON a rule given in the common bench for a prohibition, the party laid by his prohibition; and the ecclesiastical court proceeded to sentence: afterwards the party appealed, and two terms after the other delivers prohibition. The court held, in regard he had surceased his time, and suffered the sentence to pass, that he now should not have the benefit of the prohibition; and a difference taken where a prohibition was granted, and the party not serving it, sentence of excommunication is pronounced in default of answer; there upon the matter he may have the benefit of his prohibition, but not where there is a sentence definite.

Tr. 15 Ja. A. D. 1617. B. R. *Anon.* [Cro. Ja. 429.] 1 Gw. 286.

A mill newly erected upon glebe land is tithable. The extent of an endowment is triable in the spiritual court.

A MILL is erected upon glebe land parcel of a parsonage which came to the King by the statute of dissolutions. The vicar, who is endowed with small tithes, sues the parson for the tithes of the mill. The parson applies for a prohibition, 1st, because the glebe upon which the mill is erected was discharged of the payment of tithes; 2d, because the vicar's endowment does not extend to the tithes of a mill. But the prohibition was denied; for the mill being lately erected, tithes ought to be paid for it, and the extent of the endowment is a matter triable in the spiritual court. The discharge of the glebe cannot extend to a mill erected *de novo*.

Tr. 15 Ja. A. D. 1617. B. R.  
*Hampton v. Wild.* [Cro. Ja. 430.] *Anon.* in Poph. 126.

Prohibition will lie for the tithes of agistment of a saddle horse, with an averment that it was used for labour, otherwise not.

PROHIBITION awarded to the spiritual court; for that Hampton, parson of Thimblethorpe, sued Wild in the spiritual court, because the said Wild had let a certain close, reserving pasturage for his saddle gelding; and the parson sued him for tithes to be paid of things renovant; but this horse, being only for labour and travail, would not renew: otherwise it had been if he had kept a horse to sell, whereby profit had been accrued, there he should have paid tithes. — *Houserton contra* in the principal point; because by the pasture he may increase profit; and so it is a profit *ratione fundi*, as in case of barren cattle: he ought to allege further, that they were used to labour. And by all the three justices, if he had averred in the surmise, that he used the horse for labour, the prohibition had laid. (*Vide contra, Pothill v. May, ante, 199. Underwood v. Gibbon, infra.*)

Tr. 15 Ja. A. D. 1617. B. R.  
*Dobitoff v. Curteene.* [MS. Calth. Vol. 2. 444. 552.] Cro. Ja. 458.  
MS. No. 34, p. 106, 1 Gw. 287.

An abbot seized of a rectory and lands therein simul & semel, in 26 H. 8. demised the lands for forty years, and the tithes of hemp, flax,

UPON a special verdict in an action of debt upon the statute of 2 & 3 E. 6. the case appeared to be as follows: William Fleming, abbot of Evesham, and his predecessors, having been seized time whereof, &c. of a parsonage and rectory appropriate, and of a certain grange within it, in the 26 H. 8. makes a lease for forty years to Richard Pigeon of the grange, and of the tithes of hemp, flax, corn, and hay, growing thereon, rendering rent for the same; and the lessor covenants that the lessee shall not pay the tithes of hemp, flax, corn, or

grain, but that he shall pay the tithes of wool and lamb, and further, that he shall pay those tithes to the vicar and his successors; the statute of 31 H. 8. c. 13. is made: the lease expires: the parsonage is granted by the King to one, and the grange is granted to another; and now the tithes of corn not being set out, Dobkoff, the patentee of the parsonage, brings debt on the statute of 2 & 3 E. 6.

George Croke argued that judgment must be given for the plaintiff; for tithes of lamb and wool being paid at the time of the dissolution, and of the making of the statute of 31 H. 8. and a rent being likewise paid for the tithes of hemp, flax, corn, and grain; the grange could not be said to be discharged from the payment of tithes at the time of the dissolution, and therefore is not within the compass of the statute of 31 H. 8. c. 13. For though lands are to be discharged of the payment of tithes which were discharged at the time of the dissolution by reason of a perpetual union, as appears by 2 Rep. 47. the Archbishop of Canterbury's case; (1) yet if the tithes were paid, or if the tithes of any lands were leased out at the time of the dissolution, tithes ought to be paid for such lands, as appears from the case of *Greville and Trot*, 2 Rep. 48. (2) and the case of the parson of *Peykirk*, 18 Eliz. Dy. 349. (3) where tithes were paid, as in the case at bar, under a lease; and notwithstanding that there a lease was made by the abbot himself, yet *de jure* he, being parson, ought to have tithes contrary to his own lease, according to 32 H. 8. and the case of *Perkins v. Hinde*, Hil. 31 Eliz. Rot. 138. (4) where it was resolved, that if the parson of a parsonage impropriate make a lease of part of his glebe reserving a rent, for all manner of exactions, matters, duties, and demands, yet he shall have tithes notwithstanding the reservation, because tithes are spiritual things, and the general words extend only to temporal things; and though a rent was here reserved for the tithes, and the tithes themselves were not paid, yet it is all one: for the rent is in lieu of the tithes, according to the case of 15 E. 3. [Fitz.] Execution, 63. where it is holden, that the rent reserved coming in lieu of the land, the rent may as well be extended upon a statute as the land.

*Bridgeman*, *à contrà*, argued, that there not being any tithes of corn and hay paid at the time of the dissolution, no tithes should be paid of them, because as to those tithes there was a discharge at the time of the dissolution. And this is evident from the above book of 18 El. Dy. 349. where it appears that the lands were discharged from the payment of all other tithes than those which were paid at the time of the dissolution, and from *Greville and Trot's* case, 2 Co. 48. where it is holden that tithes shall not be paid of those lands which were discharged at the time of the dissolution. As to the objection, that the rent in this case comes in lieu of the tithes, that cannot be; for tithes not being a thing manurable, a rent cannot be said to issue out of them, any more than it can be said to issue out of the toll of a mill, or such other thing not manurable, as appears by 30 Ass. 15. 4 El. Dy. 212. and 7 Co. 23. *Batt's* case. And though the lessee is by law to pay tithes notwithstanding the reservation of rent, or feoffment made of the land, because tithes are distinct things from the land; as is evident from 42 E. 3. 13. 30 H. 8. Dy. 43. & 32 H. 8. cap. 7. yet it appears in this case by the covenant and by the lease itself that it was not the intention to have such tithes paid: wherefore there being a discharge *de facto* from the payment of tithes at the time of the dissolution of lands which had been discharged time whereof, &c. tithes shall not be paid now of them, according to 30 E. 3. 3. 21 H. 7. 9. and 31 E. 3. *Garr. de Chartres*, 22. where it is holden, that if the grantee of a rent discontinue the terre-tenant, and make a feoffment with warranty, the feoffee shall vouch of the land discharged of rent; and yet there was only a discharge *de facto*, and not a discharge *de jure*. And the case of 44 Ass. pl. 45. was here cited. He further said, that

(1) *Ante*, 113. (2) *Ante*, 117, cited in *Green v. Baker*. (3) *Ante*, 66. (4) *Ante*, 98.

that there had originally been a discharge *de jure* by bull, composition, &c. *Dodderidge* doubted whether non-payment for forty years before 2 E. 6. was not a bar to the right of action under that statute, for as by the canon law twenty years possession makes a prescription for the church and forty years against it; he thought that non-payment for forty years prevented any remedy under the act to enforce a payment, for there being no remedy before this act at common law, a layman should only sue as the act enabled him.

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corn, and hay, growing thereon, and covenanted that the lessee should not pay tithes of hemp, flax, corn and hay, but that he should pay tithes of lamb and wool to the lessor and small tithes to the vicar: held upon severance of the land and rectory after the dissolution, tithes should be paid: for,

1st. The payment of rent in lieu of the tithes was a payment of the tithes, and amounted to as much.

2d. There had been a payment of wool and lamb always, which is sufficient within the meaning of the statute, for if tithes of one kind only have been paid, yet if the soil be changed so that tithes of another kind are to be paid, this payment is sufficient within the statute.

3d. The retention of the tithes by way of covenant is sufficient within the statute;

For from all it appeared that there was only a discharge of payment of tithes *de facto* by reason of the lease, which rebutted the presumption

if

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if the King grant lands, which have been always discharged of tithes, they shall remain discharged.

CROKE and HOUGHTON, Justices, thought that judgment ought to be given for the plaintiff. For they conceived, that there being tithes paid of some things at the time of the dissolution, and there being an express lease to the terre-tenant of the tithes of other things, and a rent reserved for them, tithes should be paid now as well as in the case of *Greville and Trott*, 2 Co. 48.(1) and 18 Eliz. Dy. 349.(2)

The case was argued again in Mich. term by *Davenport* on the part of the plaintiff, and Sir *Thomas Coventry*, the King's solicitor, on the part of the defendant.

*Davenport* conceived that judgment ought to be given for the plaintiff; as there was a lease of the tithes of corn and hay, and a rent reserved for them at the time of the dissolution, in 31 H. 8. and as there was also a payment in kind of lamb and wool, there was not such a discharge from the payment of tithes at the time of the making of the statute, as that these lands so in lease should be discharged for ever. For by the lease, there is an express contract for the tithes; and where a tithe is paid in kind, or a rent is paid for it, the perpetual union is satisfied, which occasions the discharge, as appears by *Priddle and Napier's* case, 11 Co. 13 & 14.(3) For, first, it is evident that tithes of themselves are an hereditament of that nature, that neither unity of possession will cause a suspension of them, nor will livery cause an extinguishment of them, as we may see by 42 E. 3. 13. though a livery will extinguish a rent, according to 35 H. 6. 56. wherefore the union does not of itself make a discharge from the payment of tithes, or a suspension of them; but upon a perpetual union a constructive discharge is raised, because it would be infinite to drive the patentees to shew in what manner the discharge came, whether by a composition, or by a bull of the pope, &c. but it being apparent in this case that the discharge from the payment of tithes of corn and hay was only in respect of the contract; upon the dissolution of that contract, and the determination of the lease, tithes must be paid in kind. Secondly, It appears by *Priddle and Napier's* case, that the union which creates a discharge from the payment of tithes, must have four qualities, viz. 1. it must be *justa*: 2. it must be *æqualis unio*: 3. it must be *perpetua unio*: 4. it must be *libera*, that is, free from the payment of tithes. But in this case there is no such union; for at the time of making the statute of 31 H. 8. there were tithes paid in kind of lamb and wool, and a rent was paid for the tithes of corn and hay. And it appears by *Trott's* case, 2 Rep. 48. that if the leasee pay tithes at the time of the dissolution, tithes in kind shall be paid afterwards; and though there be only a payment of rent for the corn and hay, and no payment of tithes in kind of them, yet the rent coming in lieu of tithes is all one with a payment of the tithes themselves. And upon this reason it appears by 31 E. 3. [Fitzh.] Assets, pl. 3. that a rent descending to a son and heir shall be assets, notwithstanding it be extinct upon the descent by reason of unity of possession; and by 21 E. 3. 18. F. N. B. 223, 224. & 38. Ass. pl. 17. a rent extinguished by way of release to an abbot will be mortmain; and 11 H. 7. 12. the tenant upon whom a mesnalty descends, being within age, shall be in ward, and pay a relief for it, notwithstanding that the mesnalty be extinct in law; and in *Carre's* case, 26 Eliz. cited in 3 Rep. 30 b. it appears that a rent extinguished will make such a tenure in *capite*, that the king shall have a third part of the lands in wardship: and it appears by 37 H. 6. 26. that the payment of a rent of ten pounds, by way of retainer, is a having and holding within the condition of an obligation; and 28 H. 8. Dy. 15. it appears that such a retainer upon a release made to him, is a purchase within the intent of a condition; and 13 H. 7. 16. the payment of an amercement for suit of court, is a sufficient seisin of suit of court, for it comes in lieu of the suit. As to the objection, that the rent could not be paid in lieu of tithes, because it issues only out of the land, and not out of the tithes, according to 5 E. 3. 68. he said that

(1) *Ante*, 117, cited in *Greco v. Balser*. (2) The Parson of *Peykirke's* case, *ante*, 66.  
(3) *Ante*, 205.

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though it issue only out of the land by way of remedy, for the grantor can only distrain in the land; yet it issues out of the tithes by way of recompense, for the rent is a recompense for the tithes, and it is increased in respect of them. And as to the objection, that an action of debt will not lie on the statute of 2 & 3 E. 6. for that the tithes of corn and hay have not been paid by the space of sixty years, and the statute wills, that "every of the king's subjects shall from henceforth set out, yield, and pay all manner of their predial tithes in their proper kind as they rise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid;" he said in the first place, inasmuch as the tithes of corn and hay have been paid by way of retainer, and a rent has been paid for them within that time, this shall be a payment within the act. Thirdly, Notwithstanding there was not any payment *de facto*, yet because there must have been a payment *de jure*, if it had not been in respect of this real contract, this shall be said to be within the act. Fourthly, Here is a payment of tithes in kind for part, and so the very words of the act are satisfied.

Sir Thomas Coventry, *à contrà*, conceived that judgment should be given for the defendant, in the first place, that the unity of possession of the rectory and lands in the hands of the abbot of Evesham caused a suspension of the payment of tithes, though it did not make an absolute discharge of the payment of them; for in 30 H. 8. Dy.(1) it is said, that if a person purchase land within his own parish, the land by reason of this unity is made *non decimabilis*; which being so that it causes a suspension, then the clause of the statute of 31 H. c. 13. extends to make it a perpetual discharge; for it says that "all and every person and persons shall have, hold, retain, keep, and enjoy, &c. according to their estates and tithes, discharged and acquitted of the payment of tithes, as freely and in as large and ample manner as the said abbots, priors, abbesses, prioresses, &c. had, held, occupied, possessed, or enjoyed them, &c. at the days of their dissolution." And this statute is to be expounded liberally, because it was the intention of parliament to advance the king's sales by the grant of these immunities, and to encourage people to purchase the lands; and for that reason, in the case of *Hollisell v. Johnson*, M. 39 & 40 Eliz. in the common pleas, it was adjudged, that where an abbot purchased a portion of tithes which another had in his lands, notwithstanding this unity did not make a perpetual discharge from the payment of tithes and an extinguishment of them; but, upon severance of the portion from the land, they would be again payable as before; yet it made a discharge upon the construction of the statute of 31 H. 8. so that the lands should be discharged from the payment of tithes in the hands of the patentee. And in the New Book of Entries, 453. Hil. 1 Eliz. Rot. and 24 Eliz. *Rose and Girling's case*, it appears, that upon the suggestion of a union, a prohibition was granted. And this construction to have such discharge upon the union is not prejudicial to any one. For 1. the king sustains no loss; for what he loses in the rectory by the discharge he recovers in the land. 2. Every one has benefit by it, because it settles quiet and repose. 3. This construction tends only to the preservation of ancient privileges *in esse* before the making of the statute of 31 H. 8. Whereas the intent of this statute was not only to preserve such discharges as were *in esse* at the time of the making of 31 H. 8. but also to discharge any charges which were *in esse* at that time; wherefore in the case at bar, there being a discharge of the payment of these tithes at the time of the making of the 31 H. 8. the discharge shall continue.

2. I conceive that the cause of the discharge by reason of union, is not removed either by the lease or by the reservation of rent; for as to the lease of the tithes of corn and hay, it would have been clear that if such lease of the rectory had been made to a stranger, the discharge would have continued, the lease notwithstanding; for the discharge goes to the freehold as well as to the possession; wherefore the freehold being discharged at the time of the

(1) *Ante*, 50.

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dissolution, it shall be said to be a discharge within this statute. And for this reason it is that in the bishop of *Worcester's* case, Hil. 41 El. Rot. 565. (1) it was adjudged, that a copyholder of the bishop should be discharged of the payment of tithes; for the freehold and inheritance were discharged, and therefore the possession shall be likewise discharged, by reason of such discharge. As to the cases of 16 El. Dy. 349. (2) & 10 Eliz. Dy. 277. (3) and *Trott's* case, 2 Rep. 48. cited, (4) the case of 18 Eliz. proves directly that tithes ought not to be paid of any other things than of wool and lamb, and that a prohibition should be granted as to all other tithes. And in the case of 10 Eliz. the discharge was personal *quandiu propriis manibus excoluntur*, upon which it was holden that the farmer should pay tithes: and in *Trott's* case, the lessee of the lands paid tithes of them to the abbot at the time of the dissolution: and in M. 40 & 41 Eliz. Rot. between *Benton* and *Trott*, (5) an issue was taken upon the payment of tithes; so that it should seem from this case, that notwithstanding there was a severance of the rectory and of the land, yet if tithes were not paid for the land at the time of the dissolution, they should continue discharged after the dissolution: for which reason in the case at bar, notwithstanding there was a severance of the rectory and of the lands in the hands of the abbot; yet inasmuch as for these lands so severed, there were not any tithes of corn and hay paid at the time of the dissolution, there shall not be any tithes paid at this day.

3. The union making a discharge, and no tithes of corn and hay being paid at the time of the dissolution, the reservation of the rent shall not charge the lands with the payment of tithes of corn and hay; for the *reddendo* of the rent being generally *proinde*, it cannot extend to make the rent to be for the tithes, because not being things manurable in which a distress could be taken, a rent cannot issue out of them, according to 11 H. 4. 40. and therefore the *proinde* must have relation to such things out of which a rent can arise. And though in 1 H. 4. it be holden that a rent may be well enough reserved out of a mesnalty; and in 10 E. 4. out of a reversion; yet that is in respect of the possibility that the land may be charged; for the tenancy may escheat, and the particular estate may determine; but there is not any such reason in the case at bar.

4. The payment of tithes by way of retainer cannot be any payment, because that might be alleged upon all unions whatsoever, and so no union would make a discharge, which is contrary to the statute of 31 H. 8. which operates a discharge in cases where there is a union and no payment of tithes. As to the covenant that he shall not pay any tithes of corn and hay, that cannot mend the matter, and indeed it rather enforces the contrary, viz. that tithes ought not to be paid. And in the case of *Child* and *Kitley*, P. 40 El. Rot. 458. which is lady *Russel's* case, which was for suing for tithes where no tithes were paid at the time of the dissolution in kind, but only a rent: the opinion of the court on this point, and also the issue, were special, if Anthony were seised at the time of the dissolution; and it was holden that no issue was found for the plaintiff, the name of the abbot being Philip, and not Anthony.

5. An action of debt does not lie upon the words of the statute for the tithes of corn and hay, because until the 26 H. 8. no tithes at all were paid, nor afterwards of corn and hay; so that no tithes being paid by the space of forty years before, an action of debt cannot now be maintained within the statute. As to the objection, that tithes, notwithstanding the union, *of right ought to be paid*, and so within the compass of the statute: it appears by 30 H. 8. Dy. (43.a.) (6) that unity of possession of the land and rectory makes it *non decimabili*. And as to the objection, that a rent has been paid for the tithes, which is a sufficient payment within the statute: it appears by the words of the statute, which will have the payment of all predial tithes in their proper kind, as they have been paid by the space of forty years before, that the payment within the forty years must be a payment in kind, and not a payment of a rent in lieu of

(1) Ante 119. (2) Parson of *Peykirke's* case, ante, 66. (3) *Stathome's* case, ante, 50. (4) Ante, 117, cited in *Green v. Balser*. (5) Ante, 142. (6) Ante, 50.

the tithes. Besides, if payments beyond forty years might be taken up, that would be a means of raising much debate, and it would be such a construction too as would make the words "by the space of forty years" void and idle; and it would be hard to subject a man to the penalty of treble damages where no tithes in kind were ever paid by the space of forty years. And there is a difference where an abbot, who was parson in person, made a lease for years of land lying in the same parish as the rectory, and where the king's patentee of an impropriate parsonage at this day makes a lease for years of his lands. For though the lessee in the first case ought to pay tithes, because they were spiritual things belonging to the pastor of his soul, and do not pass included within the land, as we see in 30 H. 8. Dy. (43.) (1) & 32 El. *Perkins* and *Hynde's* case, (2) where a lease for years was made of land, reserving rent for all secular exactions and demands, and it was holden that the lessee should pay tithes; yet in the other case the lessee or alienee of the glebe should not pay tithes, because they stood discharged from the payment of tithes upon the statute of 31 H. 8.

MONTAGUE, Ch. J. CROKE, DODDERIDGE, and HOUSEWORTH, Justices, held that judgment should be given for the plaintiff. For, they resolved, that unity of possession of the lands and rectory is not any extinguishment or suspension *omnino* of tithes, tithes being a mere collateral duty to the land, and not any way appertaining to it, as appears from 30 Hen. 8. Dy. 42 Edw. 3. 13. and 32 H. 8. c. And they may be resembled to a warren, which is a distinct thing from the land, and therefore not extinguished by a feoffment of the land, according to the book of 35 Hen. 6. as a rent or remainder are. And upon this reason it was adjudged, 38 El. that if a lease for years be made of land, reserving a rent for all exactions and demands, the lessee shall pay tithes of his land, because they are not issuing out of the land, nor appertaining to it; although they be suspended by the unity, they are but a mere collateral duty, due to the pastor in respect to his feeding our souls; and though the union occasion a suspension of the payment of tithes, because a man cannot pay tithes to himself; yet it does not occasion a suspension of the tithes, but they are *in esse* if there were any one who could take them. 2dly. They resolved that a unity of possession of the land and rectory in the hands of the abbot at the time of the dissolution in 31 Hen. 8. if it had the four properties and qualities mentioned in *Pridde* and *Napier's* case, (3) is a sufficient discharge from the payment of tithes within the statute of 31 Hen. 8. so that the surmise of such a union would be a good ground for a prohibition, if there were any suit for tithes against it: for when such union hath continued time whereof, &c. it shall be intended that there was some composition or bull of the pope which gave a discharge from the payment of tithes, so that no tithes ought to be paid, but which the party shall not be driven to produce by reason of the great inconvenience that might ensue from the infiniteness of search for such things; and in order to avoid that inconvenience the allegation of unity time whereof, &c. has been allowed to make a discharge from the payment of tithes. 3dly. They resolved, that unity of possession of the land and rectory *simul et some* at the time of the dissolution is not sufficient to discharge lands of the payment of tithes after a severance has been made of the land and rectory, if it appear to the court that there was not any composition or bull of the pope, &c. to discharge the land of tithes, but only a unity of possession; for then it appears to the court that there was only a discharge *de facto* from the payment of tithes, for that by reason of the union the abbot could not pay tithes to himself, and there was not any discharge *de jure* of the lands from tithes; and it must be, or be intended to be by reason of some composition or papal bull, where the lands shall be discharged by 31 Hen. 8. 4thly. They resolved, that the lease of the tithes of corn and hay to a lessee in the lease of the lands, and the reservation of rent *proinde*, make an exposition or explanation that the lands were only discharged of the payment of tithes by the unity of possession of the lands and rectory in the hands of the abbot, and not discharged of tithes by any composition or papal bull, or any other manner by which there should be a discharge *de*

(1) *Ante*, 50.(2) *Ante*, 98.(3) *Ante*, 206.

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jure. For if there had been any discharge *de jure* by composition or papal bull, then there would be no occasion for any contract for the tithes of lands, because the tithes ought not to be paid of them of right: but the discharge being only in respect of the unity of possession, there, without a contract made for the tithes, tithes are to be paid by the lessee; and here, upon the lease made, by which there is a severance of the land and rectory, the cause is taken away which occasioned the suspension of the payment of tithes. And for this reason it is that it was adjudged in *Trott's* case, that if the lessee of an abbot at the time of the dissolution paid tithes at the time of the dissolution to the abbot, the lands should be afterwards charged with the payment of tithes; because the payment of tithes to the abbot was a declaration that the lands were only discharged of the payment of tithes by reason of a unity of possession, and were not discharged of them *de jure*; so that when the unity of possession was afterwards determined by the severance of the lands from the rectory by the king's grant, then tithes should be paid for those lands, and as they were payable before the unity of possession: for the statute of 31 Hen. 8. c. 13. extends only to the discharge of payment of tithes in right, and not to a discharge of payment of tithes in fact without right, agreeable to the exposition of the statute of West. 2. c. 1. which says, *quod finis ipso jure sit nullus*, which is understood to avoid a fine as to the binding of the possession, not as to the binding of the right. 5thly. They resolved that the payment of the tithes of lamb and wool, if there had not been any contract for the tithes of corn and hay, nor any rent reserved for them, would have been a sufficient payment at the time of making the statute of 31 Hen. 8. to have made the lands chargeable with the payment of the tithes of corn and hay. For the payment of lamb and wool was a sufficient declaration that the lands were merely discharged of the payment of tithes in respect of unity of possession, and therefore a payment of part of the tithes is as good as if all manner of tithes had been paid. 6thly. They held, that the payment of rent in lieu of tithes was a payment of tithes, and amounted to as much; because the rent was reserved for the tithes, according to the book of 31 Edw. 3. where it was holden, that the seisin of an amercement for suit of court was a sufficient seisin of suit of court, &c. seisin delivered to the sheriff of a horse upon a recovery had of rent is a sufficient seisin of the rent, according to *Perkins*; and a seisin of a rose is a seisin of other rent that may accrue due afterwards, according to *Bevil's* case in the 4 Rep. And as to the objection, that the rent does not issue out of the tithes because they are not manurable, they said that the rent issues out of them by way of recompense and by way of increase, because the rent would not be so large but in respect of them. And by *Croke*, upon an eviction of the tithes there shall be an apportionment of the rent, though it do not issue out of the tithes by way of remedy, so that a distress might be had of them, if the rent be in arrear, or that upon an assise brought for the rent the tithes might be put in view. And by *Houghton*, if a bishop make a lease for years of tithes, rendering rent, and die, the rent shall not go to the successor, because there is not any local possession upon which a distress can be taken for it. 7thly. By *DODDERIDGE* and *MONTAGUE*, the retainer of the tithes of corn and hay by the lessee, by virtue of the covenant, is a sufficient payment of tithes to put the owner of the lands out of the benefit of the statute of 31 Hen. 8. for the payment of itself by way of retainer is of the same nature with an actual payment; and the rent or tithes so retained shall be said to be things *in esse*, and an account shall be made of them accordingly; for which reason in 2 Hen. 7. the rent which the tenant had by way of retainer upon the descent of the mesnalty was as *in esse* as to the lord; and *Perkins* in 41 Edw. 3. the feme tenant being to be endowed of the third part of the seignory by reason of her intermarriage with the lord, may retain the third part of the rent without any assignment of dower, and it shall be said as a payment to her; and 21 Edw. 3. *Exchange*, an exchange by release of a rent is good, because a retainer of a rent is all one with payment of a rent out of other land to him; and 45 Ass. pl. . . . where tenant for life recovers in value the rent reserved upon a lease for life, this retainer of the rent shall be of the same nature with the payment of a rent *in esse*;

and where the lord disseises the tenant, whereby he pays himself the rent by way of retainer, this rent so retained shall be recouped in damages upon an assise brought, as if it had been paid to him: but by *Croke*, if the person disseise another of his land, in this case the tithes shall not be recouped in damages upon an assise brought, because tithes are a duty collateral to the land. 8thly. They resolved, that an action of debt on the statute of 2 and 3 Edw. 6. lay well enough for the plaintiff. For 1. the lands being discharged only in respect of a unity of possession, there was not any discharge in right, wherefore since the lands ought to have paid tithes, of right, though there were no payment in fact of the tithes of corn and hay by the space of forty years, yet an action may well enough lie upon a statute which hath the word "or of right ought to have been paid:" for the statute goes to an absolute right of discharge. 2. Here has been a payment in kind of tithes of wool and lamb always, which is a sufficient payment within the words and meaning of the statute: for if tithes of one kind only have been paid by the space of forty years, yet if the soil be changed so that tithes of another kind are to be paid, this payment of tithes of another kind is a sufficient payment within the meaning of the statute. 3. The retainer of the tithes by way of covenant is a sufficient payment within the meaning of the statute. For if I contract for the tithes of Blackacre for forty years, and afterwards I purchase Blackacre, so that now I have the tithes by way of retainer; this having of the tithes by way of retainer will be a sufficient payment within the meaning of the statute, so that after the forty years expired, if the tithes are not set out, an action of debt upon the statute of 2 & 3 Edw. 6. will well lie. But *DODDINGTON* hesitated more upon this point than upon the other: for the statute 2 and 3 Ed. 6. being a law which gives a remedy for not setting out tithes where there was before no remedy at common law, ought to be followed; and the statute directing that there must be a payment within forty years to found an action upon it, that action fails if there have been no payment within forty years. Besides, it is to be observed, that the plaintiff who brings this action is a layman; and a layman was not capable of tithes at common law, as we see in *Wright's* case in 2 Rep. and therefore as the statute makes him capable of tithes and of suing for them, he must sue for them as the statute enables him. And he conceived that the insertion of forty years in the statute, and neither a greater nor a less number of years, was for this reason, viz. for that by the canon law as twenty years possession makes a prescription for the church, so the being out of possession by the space of forty years would be a sufficient prescription against the church, and therefore if there have been no payment of tithes for the space of forty years, which makes a prescription against the church, there shall not be any remedy allowed upon this law to enforce a payment. And *MONTAGUE* said, that all lands were titheable at common law, but that afterwards the pope, out of his respect to religious persons, discharged all the orders of monks from the payment of tithes; which being found inconvenient, *quia filia devoravit matrem*, *Paschal* the second confined the discharge to certain orders, viz. the Cistercians, Templars, and Hospitalers, which orders also increasing, *Adrian II.* made a constitution that only those lands *quæ propriis ipsorum manibus excoluntur* should be discharged from the payment of tithes. And he said further, that the unity of possession which will make a discharge from the payment of tithes upon the statute of 31 Hen. 8. must be perpetual: but the payment of tithes at the time of the dissolution, be it perpetual or temporary, will make a sufficient charge of the payment of tithes.

And afterwards *M. 17 Ja.* in another action of debt between the same parties, it was ruled upon evidence, that tithes ought to be paid, and that there was no such union in this case as would make a discharge from the payment of them.

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M. 15 Ja. A. D. 1617. B. R.

Saunders v. Sandford. [MSS. Calth. Vol. 2. 534.] 1 Gw. 298.

A portionist may declare generally on 2 E. 6. without setting forth his title, for the action is to punish a tort, and is not founded upon the title, so that the right may come in question; and it is not necessary to set out the quantity of every grain in specie.

IN an action of debt upon the statute of 2 & 3 Edw. 6. c. 13. after verdict for the plaintiff, it was moved in arrest of judgment by *George Croke*, that the declaration was insufficient, because it only stated generally that the plaintiff was seised of a portion of tithes of such lands, and made no title to the portion, which it ought to do, for a layman is not capable of a portion of tithes without special matter; and in 7 Edw. 6. Dy. (83.) it appears that there is a manifest diversity between a rectory and a portion of tithes. *Sed non allocatur*; for by MONTAGUE, Ch. J. CROKE, DODDERIDGE, and HOUGHTON, Justices, there is no difference in reason between a rectory and a portion of tithes; for a layman without special matter is no more capable of the one than he is of the other; and as it has been often adjudged, *quod tunc facti proprietarius* of a rectory generally without shewing any title is good enough, the declaration in the case at bar, though it disclose no title, must likewise be good enough. Besides, the action being an action founded on a tort, and to punish a tort; and not being founded upon a title, it cannot be necessary to set forth the plaintiff's title. If indeed it were an action founded upon title, so that the right might come into question, in that case undoubtedly a title ought to be shewn, and if the plaintiff make an insufficient title he shall never have judgment.

It was next objected, that the declaration was insufficient, because it states generally the asportation of so many loads of grain of several kinds, and yet does not state the value of them, as the precedents are, so that it may appear to the court, that the demand is according to law. *Sed non allocatur*, for the demand being of a certain sum, it is sufficient, though the value of the several things be not expressed.

M. 15 Ja. A. D. 1617. C. B. *Anon.* [Noy, 28.]

Where a suggestion is to be proved by two witnesses under 2 E. 6. it is sufficient that they have known it to be so, or that the common fame is so.

Where a suggestion was that the inhabitants of D. had paid a modus, and the proof was only that he himself had paid it, yet held sufficient to oust the spiritual court of consuance.

THE surmise was to have a prohibition, that the inhabitants of D. of which he is an inhabitant, have paid a *modus decimandi*, &c. and they were at issue, and he proved only that he himself had paid it, and yet well. And no consultation; for every particular is included in the general and proved by it. And it appears sufficient matter for a prohibition, and to oust a spiritual court of their consuance.

2. Agreed that where the statute appoints proof of the surmise to be by two, it is sufficient if two affirm that they have known it to be so, or that the common fame is so.

Nil debet a good plea in debt upon 2 Edw. 6.

M. 15 Ja. A. D. 1617. C. B. *Bawtrey v. Isted.* [Hob. 218.]

DEBT upon the statute 2 Ed. 6. for not setting out tithes: the defendant pleaded *nil debet*, and adjudged a good issue.

M. 15 Ja. A. D. 1617. In Canc.

Dunn v. Burrell and Goffe. [MS. Calth. Vol. 2. 447. 503. 641. 681.] Calth. Rep. 54. 1 Gw. 299.

The ancient rent was reserved upon a house in London, and also a further sum by way of fine and income. *Quere* whether tithes should be payable under the decree of 37 Hen. 8. according to the ancient rent only, or according to the ancient rent and the sum reserved by way of fine and income also? It was, however, agreed by the Lord Chancellor and the other assistants, that the sum reserved by way of fine and income was not a rent.

THIS case, which was argued by Sir Francis Moor, serjeant at law, and *Walters* of the Temple, before Sir FRANCIS BACON, Lord Keeper, assisted by the Chief Justices MONTAGUE and HOBART, and the Justices DODDERIDGE and HUTTON, was as follows:

Burrell, being seised in his demesne as of fee of a house called Green Acre, a shop

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a shop and a warehouse, in the parish of Gracechurch in London, for which a rent of £5 per annum had been usually paid, in the 3d of James made a lease by indenture for five years of part of the house and of the shop at the rent of £5 per annum at the four usual feasts by equal portions; and in the same indenture of lease it was covenanted and agreed that Withers the lessee should pay £150 in the name of a fine and income, the payment of which was divided at the rate of £30 per annum, to be paid in equal portions at the same feasts at which the rent of £5 was reserved to be paid. The term expires. Burrell afterwards in 10 Ja. made a lease for seven years by indenture to one Gosfe of the said part of the house and of the warehouse, at the rent of £5 per annum, payable by equal portions at the feasts of St. Michael the Archangel and the Annunciation; and in the same indenture it was covenanted and agreed, that £175 should be paid to Burrell, his heirs, executors, and assigns, in the name of a fine and income, viz. £25 per annum at the same feasts, at which the reserved rent was to be paid by equal portions; that is, £12 : 10s. at the one feast, and £12 : 10s. at the other feast. Dunn, parson of the church of Gracechurch, preferred a petition to the mayor of London, stating that Burrell and Gosfe did not pay him their tithes according to the rate of the fine reserved, and there sentence was pronounced against him: whereupon, upon the decree established by the statute of 37 H. 8. c. 12. which enacts, "that if any" of the said parties find themselves aggrieved with the end made by the mayor "and his assistants, that then the lord-chancellor of England for the time being, upon complaint made to him within three months next following, shall make an end in the same, with such costs to be awarded as shall be thought convenient," &c. he exhibited his bill of appeal to the lord keeper, in which he set forth the whole matter *supra*, and the statute of 27 H. 8. c. 12. and moreover that part of the decree which wills, "that the citizens and inhabitants of the said city and liberties of the same for the time being, shall yearly without fraud or covin for ever pay their tithes to the parsons, vicars, and curates of the city and their successors for the time being, after the rate hereafter following; (that is to wit), of every 10s. rent by the year of all and every house and houses, shops, warehouses, cellars, and stables within the said city and liberty of the same, 16½d. and of every 20s. rent by the year of all and every such house and houses, shops, warehouses, cellars, and stables; and every of them, within the said city and liberties, 2s. 9d. and so above the rent of 20s. by the year, ascending from 10s. to 10s. according to the rate aforesaid. And where any lease is or shall be made of any dwelling-house or houses, shops, warehouses, cellars, or stables, or any of them, by fraud or covin, reserving less rent than hath been accustomed, or is, or that any such lease shall be made without any rent reserved upon the same by reason of any fine or income paid before hand; or by any fraud or covin, that then in every such case the tenant or farmer, tenants or farmers thereof, shall pay for his or their tithes of the same, after the rate aforesaid, according to the quantity of such rent or rents, as the same house or houses, shops, warehouses, cellars, or stables, or any of them, were last letten for, without fraud or covin, before the making of such lease." To this bill of appeal the defendants put in their answer, in which they set forth that these never was any greater rent reserved than £5 per annum, and that they were ready to pay according to that rate; and they traversed the fraud and covin. To this answer, Dunn, the complainant, demurred.

Moor, serjeant, argued that judgment ought to be given for the plaintiff; he conceived that the mayor had erred in his decree in two points—1st, in not adjudging the reservation of £5 per annum by way of fine and income to be a fraudulent reservation to avoid the statute of 37 H. 8. c. 12. and secondly, in not adjudging Burrell to pay for the £25 per annum which he had so reserved by way of income. The case divides itself into two points. The first is, whether this reservation of £25 per annum by way of fine and income be a fraud and covin within the decree, so that in determining the rate at which the tithes shall be paid, respect shall be had to it; and this is upon the body of the decree. The second point is, upon the additional clause of the decree,

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which wills, that if any lease shall be made reserving a less rent or no rent, &c. and it is whether respect shall be had to what was reserved by way of fine and income in the lease to Withers.

As to the first point, he said, it is evident by *Dr. Grant's* case (1) that houses may by custom well enough pay tithes: for houses and shops being things in which persons exercise their trades and gain their livelihood, it is but reasonable that there should be a contribution to the minister out of them, as well as out of lands. In the case of *Green and Piper* in the King's Bench (2) in the 34th of Eliz. where a prohibition had been granted upon a suggestion that a house in London was parcel of the possessions of an abbey which was discharged of the payment of tithes by virtue of a papal bull at the time of passing the statute of 31 H. 8. c. 13. of monasteries, a consultation was afterwards granted, because the statute of 37 H. 8. c. 12. was subsequent to the statute of 31 H. 8. and by that statute no houses in London were exempt but the houses of noblemen. This being so then, that houses by a reasonable custom may be charged with the payment of tithes, it now remains to examine the fraud in the case at bar; for the better discussion of which I will proceed by three gradations. The first of which shall be to shew what eye the common law had to fraud without the aid of any statute: the next shall be to shew what consideration the law had against any fraud for the evasion of statutes in which there was not any express provision against the fraud. And the third shall be to shew the beneficial exposition of those statutes, which have made provision by express words against fraud. As to the first point it appears by 34 E. 1. Garr. 88. 19 E. 2. Assets, 3. 13 Eliz. Dy. 291. that where a tenant in tail after a feoffment with warranty of his lands in tail made a feoffment in fee of his lands in fee simple to his son and heir in order to avoid a descent of assets, it was adjudged to be a fraud at common law, so as not to prevent the descent of the assets. And the 24 E. 3. 10. and 4 & 5 Mar. Dy. 159. where one indebted to the King had fraudulently with the King's money purchased lands in the names of his friends, those lands were holden liable to the payment of his debts. In *Fitzherbert's* case, 5 Rep. 78. a collateral warranty was avoided, and adjudged to be a warranty commencing by disseisin, by reason of fraud. And in 1 Ma. Dy. 99. a sale in a fair did not change the property of a horse, where the contract was made out of the fair, for this was but a trick to cloak the fraud, which shall be prevented by the course of the common law, and shall aid no one. As to the second point, where any person would by a device evade a statute which has no express provision against fraud, the common law will aid and protect against the fraud; and to that purpose 46 E. 3. 2. upon the statute of West. 2. c. 39. which gives the counterplea that the vouchee was the first who abated, it was held that the counterplea shall not be barred where the son had the reversion granted to him, and he after aid prior vouched another, and upon the statute of Gloucester, c. 11. which gives remedy to the termor upon default of the tenant, it was holden, that if the tenant vouch, and the vouchee make default, it is within the equity of the statute; for such slight shall not protect the fraud. And in *Ekmer's* case, 5 Rep. 2. a surrender upon condition shall not be taken to be a surrender within the 13th of Elizabeth. And in 5 Rep. 14. the case of ecclesiastical persons, it is holden, that the losing by action tried in a writ of annuity after aid prior of the patron and ordinary is fraud within the statute of 13 Eliz. And in 11 Rep. 66. b. *Magdalen College* case, the permitting of a fine to be levied by the disseisor, and five years to pass, is within the statute of 13 Eliz. which speaks of connusces. And 43 Eliz. in the case of *Pawlet and Fry*, it was ruled by *POPHAM* and *ANSON*, that where a dean and chapter borrowed £1,000 which came to the use of the dean and chapter for the payment of their debts, and bound themselves in the penalty of £2,000 for the payment of £1,000 at a certain day, and afterwards a judgment was had upon this obligation, upon which a defeasance was made, that, if the dean and chapter, after the expiration of fifteen years, should make a lease to Fry agreeably to the first contract, that then, &c. this judgment was avoided by the statute of 14 Eliz. which makes all covenants and bonds void,

(1) *Ante*, 272.

(2) *Ante*, 105.

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this being only a fraud to evade the statute, which shall not be permitted. As to the third point, which is the beneficial exposition of statutes that have made an express provision against fraud, it is ruled by 21 E. 3. 28. that a release to an abbot of a rent is mortmain, notwithstanding the statute of Magna Charta, c. 36. *wills quod non liceat alicui dare*, and this cannot be said to be a donation. So upon the statute of 7 E. 1. *de religiosis*, which prohibits alienations to religious persons *arte vel ingenio*, it has been adjudged, that a recovery by default without title is mortmain, as appears by the statute of West. 2. c. 3. which gives a *quale jus* to examine the title in such case. So in 48 E. 3. 29 & 38. where a recovery has been upon the default of the vouchee; it has been adjudged within the statute. So 3 E. 4. 14. an estate gained by way of estoppel upon *nil waste* pleaded, has been adjudged within the statute. So Pas. in 14 Ja. Rot. 1026. in the common pleas, between *Winchcombe* and *Pulleston*, upon the statute of 31 Eliz. c. 6. which prohibits a presentation for money to a benefice with cure either directly or indirectly, it was ruled, that where Say for £89 contracted with Waller to present him to a church after the death of an incumbent who then lay in *extremis*, and to that intent procured the next avoidance to be granted to one Ebdon, who after the death of the incumbent presented Say without taking any money, that this was simony, notwithstanding the patron who presented received no money, because the grant of the next avoidance was derived out of the first contract, which was simoniacal, and merely a trick to defraud the statute. And notwithstanding in 3 Eliz. Dy. 193. and 10 Eliz. Dy. 267. it was ruled, that a feoffment to the intent to defraud creditors shall not be construed to be a fraud to deceive the King, because it was made with another intent; yet, upon the first clause in the statute 27 Eliz. c. 4. which speaks of fraudulent conveyances made to the intent to deceive purchasers, it is ruled in *Burrell's* case, 6 Rep. 72. that where a lease was assigned in order to avoid an extinguishment, it was fraud within that statute: and upon the second clause of the statute which speaks of estates made with power of revocation, it is ruled in *Bullock* and *Standen's* case, 3 Rep. 82 b. that a power of future revocation after the death of another, or a power of revocation with the assent of others, shall be adjudged a fraudulent conveyance within that clause of the statute. In the case at bar then, which is a case which affects religion, which is the case of God, a favourable construction shall be made, that this slight of a reservation of rent by way of a fine and sum in gross, shall not defeat the parson of that which is justly due to him.

As to the second point, which is upon the additional clause of the statute made to meet future fraud, it consists of two mischiefs and one reason. The first mischief is, where a lease is made of a house, and there is a reservation of less than the accustomed rent. The second mischief is, where there is no reservation of any rent at all. And the reason of both of them is given to be "by reason of any fine or income before paid, or by any fraud or covin." And here we are within one of the mischiefs; for whereas under Wither's lease there was a reservation of £35 per annum, here there is a reservation of only £30 per annum, and so there is fraud and covin; as has been proved above. And there is not any fine or income paid before hand, as the statute mentions, but it is future, if any be, which shews the fraud more apparently. And if a greater rent than the ancient rent be reserved; it is out of both the mischiefs of the additional clause; so that I conceive if a lease of a house in London be made *bond fide* for natural affection to a son without reserving any rent, the parson will lose his tithes: for it is out of the additional clause, the non-reservation of any rent being in respect of the advancement of the son, and not in respect of any income paid, or by reason of fraud and covin. But, if the lease be made only in trust for the lessor, then it will be within the additional clause; for the trust shall be said to be fraud and covin, and so it will be within the penalty of the statute, which says that the parishioner shall pay his tithes according to the rate of the ancient reservation; wherefore in the case at bar, Goff and Burrell must pay their tithes according to the reservation under Wither's lease, which shall be said to be made by fraud and covin as well as the reservation under the lease to Goff. And the last clause, which gives the

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penalty that the person shall have at the rate of the ancient reservation, does not take away the benefit of the first clause, which gives him the tithes according to the rate of 2s. 6d. for every 20s. rent. (1) So upon the statute of West. 2. c. 3. where one clause gives to a *feme a cui in vita*, and the other clause gives to her a receipt for the default of her baron, it has been adjudged in 38 E. 3. 12. that if a *feme* being received for the default of her baron make default, whereby a recovery is had against her, yet, after the death of her baron, she may well have a *cui in vita*; for the latter clause does not take away the benefit given to her by the former. So, upon the statute of 27 El. c. 2. which has one clause as to conveyances made with intent to defraud purchasers, and another as to conveyances made with a power of revocation, it has been adjudged in the case of *Standen and Bullock*, cited in *Twine's case*, 3 Rep. [86.] that a *bond fide* purchaser shall have the land, where the power of revocation has been extinguished by fine or any other such instrument; for the latter clause concerning a power of revocation does not take away the benefit of the former clause from the purchaser.

As to the objection, that this which is reserved by way of fine and income, is a sum in gross, and not a rent, because it is not incident to the reversion, &c. I answer that it has the properties and qualities of a rent; for the fine is reserved in the same deed and at the same time with the rent; at the same time that the rent is to be paid is the fine also; and the same means may be taken for the recovery of it; for he may either distrain for it, or have an action of covenant. This being so, it is at least a rent in reputation, though it be not a rent *re verid*; and if it be a rent in reputation, that will be sufficient within the statute of 37 H. 8. c. 12. as a chantry in reputation shall be said to be a chantry within the statute of chantries, as we see in *Adams and Lambert's case*, in 4 Rep. [104.] and in 5 Rep. [3.] *Jewel's case*, where there was a rent reserved upon the lease of a fair, it was said to be a rent in reputation, and that an action of debt would lie upon the contract for it. "And he concluded with the Acts of the Apostles, where is declared the judgment which fell upon Ananias for detaining part of what he had, that such was the condition of the houses, and with the saying of the Psalmist, *Caritas de terra orta, justitia de celo descendit*."

Walter, contra, who said the case was briefly this—Burrell being seised of a house which from time whereof, &c. had been let for £5 per ann. makes a lease of part of it, reserving the rent of £5 per annum with a covenant also for the payment of £175, in the name of a fine and income to be paid by £25 per annum during the term, £12: 10s. at the one feast of the reservation, and £12: 10s. on the other. And I am of opinion that the person is only to have his tithes after the rate of £5 per ann. and not after the rate of £30 per ann. To support this conclusion I will shew in the first place that tithes are not due for houses by the common law of the land, before the making of any statute. 2dly. I will shew that the constitutions and ordinances of the pope cannot make tithes payable for those things which are discharged of common right. 3dly. I will shew that an act of common council in London cannot lay the imposition of tithes upon houses discharged by the common law of the land. 4thly. I will shew that the letter of the decree and act of 37 H. 8. c. 12. does not extend to the fine and income in the case at bar. 5thly. I will shew that by the equity and intent of the statute, tithes are not to be paid according to the rate of the fine and income.

As to the 1st, of common right and by the common law of the land, tithes are not due, nor payable of any thing but only of that which yields an increase and a renewing profit, and not of those things which neither increase nor renew, but rather decrease; of which nature are houses, which require repairs; and therefore F. N. B. 53. lays down the rule that tithes shall not be paid but of such things as renew by the labour of man. 2d. Houses being things of inheritance, and the rent reserved being of the same nature, tithes are not payable of them; for by the rule in law tithes are not to be paid of any part of the inheritance, but only of those things which renew; and it is for that reason that tithes are not payable of coals, slates, &c. for they are part of the inheritance

(1) The MS. is not clear here.

and [not] renewing. 3d. Houses being things necessary for habitation, and conducing to the benefit of the parson in another kind, tithes are not to be paid for them; and thereupon it was adjudged in the King's Bench in 31 Eliz. that tithes are not payable for the agistment of draught oxen, because they manure the land, and tend to the benefit of the parson in another way, and of themselves yield no increase. And in *Broughton's* case, in the King's Bench, M. 32 & 33 Eliz. it was ruled, that tithes are not payable for the agistment of draught oxen or a riding gelding, because they yield an increase in another way, and are things of necessity and of help; in the case at bar then, as houses are things of necessity for the rest and habitation of man, and for protection against the weather and otherwise; and not giving any increase, (for there is neither grass mown nor corn sown in them,) tithes ought not to be paid for them. And Finchden, in 38 E. 3. (1) says, that the tithes in London are oblations and obventions called rate-tithes, and no other. And as custom may discharge a spiritual person from the payment of tithes, I do not deny but that custom may create a rate-tithe, and charge those things with the payment of tithes, which of themselves are discharged in law, as is agreed in *Dr. Grant's* case, 11 Rep. (2) and we see in the decree of the statute of 37 H. 8. that the houses of noblemen are discharged of rate-tithes. In the case of *Dawson and Green*, in the King's Bench, in 34 Eliz. (3) and in *Dr. Leyfield's* case, in the Common Pleas, in Tr. 12 Ja. (4) it was adjudged, that houses were at common law discharged of the payment of tithes.

As to the second point, respecting the validity of the ordinances and constitutions of the pope, I submit, that an ordinance of the pope cannot bind my temporal inheritance: and therefore where there was an ordinance of the pope for the payment of 5s. (5) 6d. in every pound of rent reserved in London, it was not binding; for the pope, though he had power to dispense with any act done against the canons of the church, as we find by 2 H. 4. yet he had no power to alter the law and to charge my inheritance: and therefore, though he might dispense with the holding of several benefices, and though he might by his dispensation empower one to hold a church in *commendam*, notwithstanding his entry into religion, (for all these are merely dispensations with the canons of the church made against such things,) yet he could not alter the law of the land, and charge the inheritance of a man. It has been thereupon adjudged, that a provision made by the pope is void in law against the patron, inasmuch as it is an impeachment of his inheritance. So, a license of the pope that a monk shall hold a temporal inheritance is void in law according to 3 H. 6. for the entry into religion being a civil death, the monk cannot, by the common law, have the land afterwards. So, in 1 H. 7. it is agreed, that the pope cannot make a sanctuary, though he may consecrate it after it is made by the King. So, in *Graddon's* case in the Commentaries, (6) it is holden, that the pope cannot make an appropriation, any more than he can make a union according to 11 H. 7. for it concerns a temporal inheritance.

As to the third point, namely, the power of the common-council in London: he said, though an act of common council may bind men in point of order and government, yet it has not power to bind them in point of their inheritance. The act, therefore, of the common council, which, together with the constitution of the pope, imposed upon every inhabitant of London who paid 10s. rent, an offering of a farthing on the vigil of every feast-day, which were eighty-five in number, was not binding. For as it appears in 5 Rep. in the *Cases of Bye-laws*, though the tenants of a manor may make a bye-law that a commoner shall not turn his beasts upon the common until such a day, yet they cannot make a bye-law to exclude a commoner from his common, because that concerns his temporal inheritance, which cannot be bound by such a bye-law.

As to the fourth point, the body of the act being for the payment of 16d. for every 10s. rent, the letter of the act extends only to the case of a rent, so that if this be no rent, then the body of the act will not extend to it; and the fine of £25 which is to be paid annually besides the £5 is not a rent: 1st. Because

(1) *Ante*, 20.

(2) *Ante*, 222.

(3) *Green v. Piper*, Cro. El. 276. *ante*, 105.

(4) *Ante*, 232.

(5) So in the original.

(6) *Ante*, 67.

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it does not issue out of the land. 2dly. Because there can be no distress for it of common right, as for a rent. 3dly. Debt will not lie for it, as for a rent. 4thly. It is not incident to the reversion. 5thly. It will not descend to the heir, as a rent will; as in a case of 10 Eliz. Dy. where a covenant was to pay a sum in gross to another and his heirs, it was holden, that it could not descend. 6thly. If part of the reversion be granted away, there will be no division or apportionment of it, as there would be of a rent. 7thly. An entry of the lessor into part of the house will not cause a suspension of it, as it would of rent, according to the resolution in *Albany's* case, in 33 Eliz. where there was a proviso to pay such a sum as in the present case annually; and it was holden, that entry into part did not suspend the condition. It being so then, that this is no rent, because it is founded merely on the covenant, the letter of the decree of 37 H. 8. will not extend to it; and if it be not within the letter of the decree, neither will it be within the equity of it; for it is a penal law, and therefore shall not be extended by equity. 2dly. The body of the act directs that there shall be a payment, &c. without any fraud and covin; so that the body of the act only makes it to be a fraud and covin where the payment is not according to the quantity of the rent; and the fraud and covin, if there be any, will not make that to be rent, which the law says is not rent: and to talk of fraud against the common law, and against the statute, is not to the purpose, since the question arises merely upon the body of the act which creates the payment of tithes where it was not held to be before in the eye of the common law. As to both the cases which have been cited on the other side against frauds at common law, they do not meet the case in question, inasmuch as in those cases the fraud was committed in prejudice of a person who had an interest in being at the time it was committed: as in *Fitzherbert's* case, 5 Rep. 78. the person who was to be bound by the collateral warranty, had an interest in being at the time. So, in 24 E. 3. 10. the King had a debt in being at the time; and in 34 E. 1. Garr. 88. the feoffee of the lands had an interest in being at the time of the feoffment of the lands in fee simple. But in the case at bar, at the time of making the lease and committing the fraud, there was no interest in being in a greater rent than the rent of £5 per ann. for no one could claim the tithes for a greater rent than 5*l*. Which being so, the fraud cannot extend to it, as it might do to an interest in being. And as to the case in 34 E. 1. Garr. 88. if the feoffment to the son in fee simple of the lands had been prior to the feoffment of the lands in tail, there would not have been any fraud at common law, because the feoffee of the lands would have had no interest therein at the time of the feoffment to the son. So in the case at bar, because there was only a rent of 5*l*. per ann. *in esse* at the time of the fraud committed, (admitting that there was any fraud at all) the common law can give no aid; neither can the statute of 37 H. 8; for if any aid were given, it must be either upon the body of the decree, or upon the additional clause of the decree; and as to the body of the decree, which says, that the citizens and inhabitants, &c. shall, without fraud or covin, pay for every 10*s*. rent by the year 16*d*. it does not give any relief for the payment of more than after the rate of 5*l*. per ann. because there is no more rent reserved; for the other 25*l*. per ann. reserved is not a rent, as I have shewn already. And as to the additional clause in the decree which directs, that if by fraud or covin any less rent than the accustomed rent, or no rent, shall be reserved, that will not aid; for here is the rent of 5*l*. per ann. reserved, which is the ancient and accustomed rent, and so it is out of the provision of the additional clause of the act.

And as to the fifth point, namely, that the equity and intent of the act will not extend to the fine of 25*l*. he said, it appears by the additional clause, that it only points to the ancient and accustomed rent, and not to any new advancement of the rent: for, 1st. there is not a word of any increase of rent throughout the whole decree. 2dly. The clause which says, "that if a lease shall be made of any house, &c. by fraud or covin, reserving less rent than the accustomed rent," &c. shews that it was not the intent of the statute to meddle where there was any greater rent reserved than the ancient and accustomed rent. 3dly. The penalty expressed in the act where a less rent than the accustomed rent, or no rent at all, is reserved, shews that it looks merely to the

reservation of the ancient rent; for the penalty where a less or no rent is reserved, is merely "that the tenant or farmer shall pay for his tithes of the same according to the quantity of such rent or rents as the same houses heretofore have letten for, without fraud or covin, before the making of such lease;" and to extend the penalty beyond what it is expressed in the act, is an unusual thing. For if a law introduce a new thing which was not before, and express a fraud and covin, and inflict a penalty, there, by construction, another thing shall not be said to be a fraud which is not expressed in it; nor shall there be any further penalty added than what the statute inflicts. And therefore, in the case at bar, since the ancient rent of 5*l.* is reserved, and according to that rate tithes are to be paid to the parson of the parish; the reservation of the fine of 25*l.* to be paid annually, shall not be said to be a fraud within the statute, and tithes shall not be paid according to the rate of that fine. And if in *Myght's* case, in 8 Rep. [163.] it be resolved, that if tenant *in capite* make a feoffment in fee to his son or wife of two parts of his land, an averment shall not be taken that it was a fraud to cheat the King, because the statute enables him to dispose of two parts; by the same reason, as the ancient rent of 5*l.* is reserved in the case at bar, an averment shall not be permitted, that the reservation of the 25*l.* was by fraud and covin, because the statute requires no more at the hands of the lessor than the reservation of the accustomed rent. And as it is resolved in *Myght's* case, that if the father and son be joint purchasers to them and their heirs of lands holden *in capite*, an averment shall not be permitted, that this joint purchase was by fraud to deceive the King, because the King's title was not in being at the time of the purchase; so, by the same reason, it shall be taken here, that as this increase of rent is *de novo* and was not in being before, this increase, by way of fine, shall not be averred to be by fraud to cheat the parson; and more especially so, because this reservation of 25*l.* per ann. by way of fine and income, may be founded upon good reason; for it may be, that the lessor is tenant in tail of his house, and so if he were to make a lease, reserving the rent of 30*l.* per ann. it would be of this prejudice to him, that he could not afterwards grant a lease reserving a less rent, which might be very hurtful to him, and therefore he reserves the 25*l.* per ann. by way of fine and income. Besides, in London, men live by trade and merchandize, and they must of necessity take houses, shops, and warehouses; and if young men were to pay the whole fine in one entire sum, it might be a great hinderance, for which reason, in a lease of such premises, they use to take it by way of annual payment, like a rent. As to the objection, that lands in the country are improved, and so, consequently, are the parson's tithes, and therefore it is reasonable that the tithes of houses in London should have a like increase; I answer, 1st. That the tithes of houses in London are only a rate tithe: and where there is a *modus decimandi* for lands in the country there is not any increase. 2dly. As lands improve, so there is an increase of houses in London, which yield a benefit to the minister. 3dly. Lands yield an increase of their own nature; but houses in London do not, but require a great charge to maintain them; so that there is no reason that the tithes of houses should be increased as those of land are. And the statute of 2 E. 6. discharges barren lands, which require great expense for their manurance, from the payment of tithes [for seven years]. In the case of *Scudamore and Bell*, in the Common Pleas, Mich. 3 Ja. it was adjudged, that there could not be fraud averred for the sum that was reserved by way of fine; for it being a rent only in imagination, and the ancient rent being reserved, it shall never be taken that it was the intent of the statute to extend to it: but, if no rent had been reserved, in respect of a sum in gross to be paid in future, or, if there had been a reservation of a greater rent only for one year; there the additional clause of the statute would give relief.

The lord keeper said, that the question rests merely on the body of the act: and that there is no colour to bring this reservation within the clause which speaks of the reservation of no rent, or of a less rent: but the only question is, whether this imitative rent be a rent within the body of the act. He said further, that there is no question but that the statute extends to the case where

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a greater rent than the ancient rent is reserved: and he advised the counsel to take into their consideration what authority the lord keeper had upon appeal from the mayor, and in what manner he was to proceed. *Et adjournatur.*

Afterwards, in E. 16 Ja. at the request of Sir Francis Bacon, Lord Chancellor of England, a special commission was granted to the Archbishop of Canterbury, the Lord Chancellor, the Earl of Suffolk, Lord Treasurer of England, the Earl of Worcester, Keeper of the Privy Seal, the Earl of Pembroke, Lord Chamberlain of England, the Bishop of London, the Bishop of Ely, Sir Henry Montague, Chief Justice of the King's Bench, Sir Henry Hobart, Chief Justice of the Common Pleas, Sir Julius Caesar, Master of the Rolls, Dodderidge, one of the Justices of the King's Bench, and Hutton, one of the Justices of the Common Pleas, in which there was a recital of the question depending between Dunn and Burrell and Goffe, to hear and determine the cause, giving them also power to mediate between the ministers of the churches in London and the citizens of London, to make an arbitrary end between them, by which a competent provision might be made for the ministers and too heavy a burden might not be upon the citizens, and commanding them to certify to the King what they should do in the premises.

The case therefore was now argued at York-house, by Sir Henry Finch, one of the king's Serjeants, that upon the matter in law, judgment ought to be given for the plaintiff. And he said, that before he went into the particular question now to be treated of, he would shew in what manner and how tithes and offerings ought to be paid in London. As to this, Lindw. f. 146, in his book *de Decimis*, in the chapter *Sancta Ecclesia*, word *Negotiationum*, says, *quod artifices et negotiatores civitatis London, ex ordinatione antiqua in dicta civitate observata, tenentur singulis dominicis diebus, et in principalibus festis et sanctorum apostolorum et aliorum quorum vigilia jejunantur, offerre pro singulis decem solidis redditus domus quam inhabitant unum quadrantem. Et hec ordinatio indifferenter aretat quoscunque inhabitantes, sive sunt artifices, sive mercatores, sive quicvis alii.* This ordinance commented upon, mentioned by Lindwood, who lived in the time of Henry VI. had reference to a constitution made by Niger, Bishop of London, in 13 H. 3. anno 1228, which was confirmed 21 Rich. 2. by Thomas then Archbishop of Canterbury, and afterwards by Pope Innocent in 5 Hen. 4. And subsequently to that, in 31 Hen. 6. Pope Nicholas ordained by his bulls that tithes should be paid of houses in London, *ut supra*, they being valued according to the true and common estimate of houses, and the rate according to that proportion amounted to 3s. 5d. in the pound for each house; for there were eighty-two vigils of saints that were fasted, and of Sundays. In 36 H. 6. there was a composition made between the citizens and clergy of London, that a payment should be made by the citizens for their houses according to the above rate, and if the houses were kept in the hands of the owner, or leased to any other without reserving any rent, the churchwardens of the parish where the houses were, should appoint a rate of the houses, and according to that proportion a payment should be made. In the 14 Edw. 4. an act of common council in London passed for the confirmation of the bull granted by Pope Nicholas. But there being afterwards a great variance between the clergy and citizens of London, they submitted themselves to the award of the Lord Chancellor and divers others of the privy council, who in 1535 made an order that every inhabitant and citizen should pay at the rate of 16d. for every 10s. for every house, and in 27 Hen. 8. there was a proclamation made for confirming that order; and in the same year, as appears by the statute of 27 Hen. 8. c. 15. there was a statute made which ratified the said order, and a proclamation issued as I have mentioned, until an order for the payment of tithes should be made by thirty-two persons to be nominated by his majesty, which was never made, for the king never nominated any; and other disputes afterwards arising concerning the payment of tithes and offerings, by the statute 37 Hen. 8. c. 12. a submission was made to Thomas Cranmer, Archbishop of Canterbury, Sir Thomas Wryothsley, kt. Lord Chancellor of England, Thomas, Duke of Norfolk, and divers others; and it was enacted, "that such end, order, and direction, as should be made, decreed, and concluded by the aforesaid arch-

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"bishop, lords, and knights, or any six of them, before them, before this feast
"day of March next ensuing, of, for, and concerning the payment of tithes,
"oblations, and other duties within the said city and liberties of the same, and
"enrolled in the king's high court of chancery of record, should stand, remain,
"and be as an act of parliament, and should bind as well all citizens and inha-
"bitants of the said city and liberties for the time being, as the said parsons,
"vicars, &c. according to the effect, purport, and intent of the said order
"and decree so to be made and enrolled." Afterwards in the same year,
an order was made by all the commissioners except the Duke of Norfolk
and Sir Richard Lytster, Chief Justice of England, that the citizens and
inhabitants of London should pay at the rate of 2s. 9d. for every pound of
rent that was paid for the houses. And upon two branches in this order or
decree arose the present question, which is to be contested. The first of
these branches is, that "the citizens and inhabitants of the said city, &c. shall
"yearly, without fraud or covin, for ever pay their tithes to the parson, &c.
"after the rate hereafter following, (that is to wit) of every 10s. rent by the
"year 16½d. and of every 20s. rent, 2s. 9d." The second branch is, "and
"where any lease is or shall be made of any dwelling-house, &c. by fraud or
"covin, reserving less rent than has been accustomed or is, or that any lease
"shall be made without reserving any rent upon the same by reason of any
"fine or income paid beforehand, or by any fraud or covin, that then in every
"such case, the tenant or farmer, &c. shall pay for his or their tithes according
"to the quantity of such rent, &c. as the same were last letten for, without
"fraud or covin before the making of such lease." And now the only question
in this case will be, whether there shall be 2s. 9d. in the pound paid according
to the rate of 5l. or according to the rate of 25l. per annum, which is reserved
annually by way of income. And this question, though in this particular it is
of no great moment, because it is but for forty shillings per annum more than
is paid, yet in its consequence it is of very great importance, inasmuch as it
concerns the city of London, so that it may not only be said that it is *magnum*
in *parvo*, but that it is *maximum* in *minimo*, and the case may be termed *virginæ*
causa, there having been none of this nature before; and it comes properly
under the meridian of the chancery, the chancellor being the proper judge of it,
and the person to whom it is principally referred. And I am of opinion that
judgment ought to be given to the plaintiff; for I conceive that this rent of
25l. per annum, which is reserved by way of fine and income, is a rent properly
and truly within the words and letter of the decree. For 1st, the etymology
and true propriety of the word rent shews that it is so. 2d. It is so in com-
mon acceptance and *secundum opinionem vulgi*. 3d. It is a rent in the judg-
ment and eye of the law. 4. It is a rent in the understanding of the spiritual
and ecclesiastical law; so that being a rent in all these four ways, it would be
hard that it should not be a rent within the words of the decree. As to the
1st, in Latin, a rent is called *redditus*, *ita dictus à redeundo sive à reddendo*, inas-
much as all profits of what kind soever that come in annually, may well be
termed a rent, according to the opinion of *Lindwood*, 64. in his chapter *Quoniam*
autem, and word *redditus*. For he says, *quod vocabuli redditus significatio*
intelligitur omnis fructus, et est generalis ad omnem utilitatem, with which also
Lindw. 96. accords. Which being so, this rent of 25l. per annum, reserved by
way of income, cannot but be a rent. As to the 2d, which is the common ac-
ceptionation, I say, that the words are of the same nature as coin is; and as coin
must be received according to its usage, so words must be taken in their
current sense; and so it is said, *communis usus loquendi prævalet communi signifi-*
cationi verborum. And therefore in 34 Edw. 3. 24. it appears that a remainder
limited to Richard, the son of Richard Marwood, is good, notwithstanding he
be a bastard, and so in law *nullius filius*, because in common reputation and
understanding he is known by such name. So in Sir *Moyle Finch's* case,
6 Rep. 65. where a fine was levied with an exception of the manor of Bram-
stone, it was holden, that notwithstanding there was no such manor *re verè*,
yet as there was such a manor in common reputation, the exception was good
enough. So in *Carter's* case in 25 Eliz. it was ruled on the statute of 1 H. 5.

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c. 5. that an addition given to a man by which he is commonly known is a sufficient addition, though he be not called by his true addition, and therefore the addition of gentleman in the indictment was good, notwithstanding the party was in truth a yeoman; in the case at bar therefore the 25*l.* per ann. being a rent in common acceptation (for if Goffe were asked what rent he paid, he would answer 25*l.* per annum.) it shall be a rent within the words of the decree. As to the 3d, which is the judgment of law of this rent, I insist that, notwithstanding the rent in the case at bar is not any one of the three rents mentioned by Littleton, in his chapter upon rents, yet that is no argument that it is not a rent in judgment of law: for there are many annual payments which the law calls rents, and yet they are not any one of the three rents mentioned in Littleton: and therefore in the Regist. 158 & 159. you will see that the writ calls every annuity a rent; for it is said in the writ, *precipimus tibi quod justicies A. &c. quod reddat B. centum marcas, decem quarteria frumenti et viginti robas, que ei a retro sunt de annuo redditu centum solidorum, duorum quarteriorum frumenti, &c.* and F. N. B. 152. calls an annuity issuing out of the coffers of another, or to receive from his person, a rent; and 9 Hen. 6. 12 & 53. an annuity granted by the queen *percipiendum de quiddam summa assignata in partem dotis ipsius regine de magna custum London*, is called a rent; and in 1 H. 6. 1. where a lease for years was made of certain sheep, rendering yearly for every sheep 4*d.* annually, that sum so reserved was called a rent. And it is such a thing that in debt brought for it, the defendant might wage his law. And in 30 Ass. pl. 5. where a lease is made of an advowson or of the toll of a mill rendering rent, this is called a rent; and yet it is not a rent out of any thing manurable, as Littleton's rents are; and for such a rent the king may distrain according to 14 Edw. 3. *scire facias*, 122. and 5 Rep. 4. Mountjoy's case. In the case at bar, therefore, there can be no reason but that the rent of 25*l.* per annum reserved by way of fine and income should be a rent. As to the objection, that the before-mentioned rents should not be any rents within the statutes of 32 H. 8. c. 28. 1 El. c. 19. 13 Eliz. c. 10. and therefore shall not be rents within the ordinance and decree in the case at bar, they are not to be compared together. For statutes are to be interpreted *secundum subjectam materiam*; and therefore those statutes aiming only at the benefit of the issue in tail or successor of the bishop, &c. are to be intended to relate only to such rents as are incident to the reversion, and so may go to issue in tail or the successor of the bishop. But there is no such respect to be had in this decree; for it is all one to the parson and his successors, whether a rent, an annuity, or whatever it be. As to the 4th point, viz. the understanding of the spiritual and ecclesiastical law, it appears by Lindw. f. 64. in his chapter *De officio vicarii*, that Stephen, Archbishop of Canterbury, in his constitutions directs, *quod ad minus redditus quinque marcarum assignetur vicario perpetuo*, and f. 109. in his chapter *De rebus ecclesie non alienandis*, where there is an ordinance *quod clericus inferior possessiones vel redditus dignitatis vel ecclesie sibi commissa consanguineis vel amicis suis, &c. alienare non presumat*, that the ecclesiastical law considered the annual pension which is reserved by way of income to be as a rent; and it being a rent in their law, the judges who are used to consult with all manner of professions for the deciding of those things of which they are properly conversant in their professions, (as in 9 H. 7. 16. pl. 8. where there was a consultation with grammarians about the meaning of *puri auri*; in 11 Hen. 7. 2 Hen. 7. 9. a. where there was a consultation about the validity of a union) and to give judgment according to their law, ought also to adjudge this rent of 25*l.* per annum to be a rent within the words of the decree. And here I take occasion to commend the nobleness of our law, which, though it be the *primum mobile* that attracts all the planets, yet applies itself to all other professions, and becomes *omnia ad omnes, ut distribuat justitiam ad omnes*; for in matters which belong to grammarians to discuss, it gives judgment according to the opinion of grammarians, (as in the case before cited,) and with respect to the meaning of the word *seniori puero* in Dy. 337 a.: and where the matter is of a spiritual nature, and it belongs to the spiritual judges to discuss it, it gives judgment according to the spiritual law; and therefore in Cawdrey's case, 5 Rep. an allowance was made to the pleading of a sentence

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sentence in the ecclesiastical court according to the form there prescribed : and where the thing is customary and concerns a custom, it gives judgment according to the custom ; and therefore in 24 Edw. 3. 4. where an action of accoutp was brought by an heir in gavelkind when he was only fifteen years of age, it was holden, that an action brought at such an age was well enough, inasmuch as it was the full age of an heir in gavelkind according to the custom ; and yet by F. N. B. and Littleton, the age of an heir at common law upon the statute of Maribridge, c. 17. at which he may bring an action of accoutp, is not until he attains the full age of twenty-one years ; and so, where an administration of the goods and chattels of an intestate is committed according to the statute of 31 Edw. 3. c. 11. the administrator shall have a defessance avoiding an obligation, and other such things ; and yet they would not pass under the general name of goods : but rather than that the law will fail of giving remedy, it will apply particular words to general things. And for that reason in 8 Hen. 6. 34. Br. tit. Lease, pl. 71. where the king made lease by these words *committo tibi tales terras*, &c. it was holden to be a good lease, and the law remitted somewhat of the strictness of the words to apply them to the ancient usage of the exchequer. In the case at bar, therefore, the law will apply this 25*l.* per annum so annually reserved as aforesaid, to a rent, and will construe it to be a rent, in order that the parson may receive what is due to him under the decree. But 2dly, admitting that the 25*l.* per ann. were not a rent within the words and letter of the decree, yet it is a rent within the intent and meaning of it. And the decree may well be taken by equity : 1. Because it was for the good of the church, and so consequently of God, and for that reason a liberal construction is to be made if it. 2. Because it conduces to the maintenance of religion, *et summa ratio quæ pro religione facit*. 3. Because it tends to the avoiding of fraud which here stares in our face, and it is the *Cacus* to conquer which is one of the labours of Hercules : and if the penal laws, which trench upon the estate or life of a man, shall be taken by equity, as we find by Litt. s. 67. who holds that an action of waste upon the statute of Gloucester, c. 7. may be well maintained against one who is tenant for half a year, notwithstanding that the statute only speaks *de dimissione ad terminum annorum* ; and by Plowd. 467. who is of opinion, upon the statute of 1 Edw. 6. c. 12. that clergy shall be taken away from a man who steals one horse, notwithstanding the statute speaks of those who shall steal horses in the plural number ; then *a fortiori* shall this decree, which is *pro bono ecclesie*, and tends to the maintenance of religion and the suppression of fraud, be taken by equity. And therefore it seems that if the rent of a robe, or of quarters of corn or grain, be reserved upon houses in London, and there are such rents, as we may see in F. N. B. 152. b. and the Regist. 158, 159, the parson shall have tithes of such rents according to the value thereof, and yet they are not within the words of a rent of a sum certain. And if the lessee by the same indenture by which the lease is granted, covenant to pay 10*s.* per annum to the lessor for a house in London, this is a rent within the intent of the decree, so that the parson shall have tithes of it, and I think that if the lessee for years of a house in London grant a rent with a clause of distress in recompense of the lease of the house, it is a rent within the equity of the decree. 4. The consideration that this decree is not by way of amplification for the increase of the parson's revenues, but rather by way of diminution, (for whereas the ordinance of Niger, Bishop of London, the Pope's bull, and the constitution made by the common council, allow 3*s.* 6*d.* in the pound annually, now this decree gives only 2*s.* 9*d.* in the pound) is an argument that the decree should be taken by equity. Besides, this decree not enacting any thing new, but only making a provision that whereas such offerings and at such time were paid for houses in London, there should be now such a sum according to such a rate paid at such a time, it is reasonable that a liberal construction should be given to it. And as to the objection, that the constitutions of the bishop of London, the Pope's bulls, or the acts of the common council, cannot impose charges upon the inheritances of men, I will not maintain that they have any such power ; but I say that, before any of those ordinances were made or papal bulls granted,

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by the custom of London there was such a duty due out of the houses in London to the persons, as it appears by Dr. *Grant's* case, 11 Rep. (1) where it is holden, that a suit may be maintained in the spiritual court for such duties. And the original instrument of ordinance made by Niger and the pope's bulls shew as much: for it is said that the citizens of London shall pay such rates *pro ut etiam extensis longe retroactis temporibus et tempore præscriptibilibus per parochianos ecclesiarum dictæ civitatis consuetum extiterat*. 5. It appears by the ordinances that the rates shall be paid *pro ut domus et hospitibus locabuntur, sive locari poterant, secundum veram estimationem*: the ordinances of ancient time therefore being so, and there being now an alteration in the manner of the rates only, it is reasonable that this decree should be expounded according to the ancient ordinances; wherefore as this reservation of 25*l.* per annum by way of fine and income tends only to defraud the parson of his tithes, according to a due proportion, and would have been a fraud cursed with "bell, book, and candle," in ancient times, and shews that the house is of such a value to be leased, and might have been leased at such value; according to that rate then shall the tithes be paid. 6. As the decree has by an equity been interpreted to the disadvantage of the parson, by the same reason should it be expounded by an equity for his benefit and advantage; and therefore, in 21 Eliz. in the King's Bench it was adjudged, that where the owner of a house in London paid a rent to the King which was given to him by the statute of 1 E. 6. c. 14. made against superstitious uses, he should only pay tithes according to the value of the house beyond that rent, and not according to the true value: and the law should be the same, where he paid a quit rent or rent charge to another out of the house; for it is not reasonable that he should pay tithes according to the true value of the house, and yet should be chargeable farther with a rent to another person. So then in the case at bar, since the owner has a benefit upon the reservation of the 25*l.* per annum by way of income, it is reasonable that the parson should be regarded according to that benefit which arises to the owner. As to the objection, that here is not any fraud at the common law, nor fraud within the meaning of this decree, because the rent in which the fraud is supposed to be committed, and the person against whom it is intended were not in being at the time, I deny the ground of it, because it is repugnant to several acts of parliament: for it appears by the statute of Marlbridge, c. 6. that where the tenant enfeoffed his first-born son or a stranger by collusion to defeat the lord of his wardship, it was fraud at the common law, and it is also fraud by that statute: and yet the lord against whom the fraud was committed had no present right. So, where one, pending an action against him, makes a feoffment to his friends to the intent to hinder execution from being had against him of his lands; this is fraud by the common law according to 13 Eliz. Dyer, 294. and it is also declared to be so by the statute 27 Eliz. c. 4. and yet the judgment which made the land liable was not in being when the feoffment was made. And I am of opinion, that if there be a sale of lands without any consideration, and afterwards he become indebted to the King, such lands will be liable to the King's debt. As to what has been put on the 34 E. 1. Garr. 88. that if before any purchase of the lands in tail the tenant in fee make a feoffment of his lands, and afterwards purchase lands in tail and make a feoffment with warranty, there is no fraud at all in that, and therefore it is not to be resembled to other cases where there is fraud. And as to the objection which has been made, that the second branch of the decree shews that here has not been any fraud, inasmuch as the rent which was of ancient time reserved is here paid, and the second branch aims only at this, because where the ancient rent is not reserved upon a lease, or there is no rent at all reserved, the penalty is only to pay tithes according to the proportion of the ancient reservation, I answer, that there has been a greater rent in time past than there is now: for there has been a reservation before in the same manner as the reservation is now made; so that notwithstanding Burrell has hoped to deceive the church by this fraudulent reservation by way of income, yet there being fraud in the *intentione et proposito*, and

(1) *Ante*, 222.

*fraus in executione, non ita effugiet, et fullere fullentem non est frater, and by reason of the preceding reservation he shall be forced to pay tithes according to the rate of it.*

An argument that tithes should be paid according to the rate of the reservation by way of fine and income, may be well enough drawn *à convenienti*. For justice being the rule of convenience, and the law being the rule of justice, if the law be that tithes shall be paid according to such a proportion, then it cannot be denied but that it is also convenient. And that the law is so, appears 1st, from *jus humanum*, that is, the common and statute law, of which as he had made mention before, he did not much enlarge upon. 2. It is *jus divinum*; for though the canonists differ upon the question, whether *decima pars* be due *jure divino*; yet they all agree that there is a *convenient* portion due for the maintenance of the minister; wherefore this proportion of 2s. 9d. in the pound being manifestly a *convenient* portion for the maintenance of the minister, the subtraction of it is *contra jus divinum*. 3. The law of the custom of the city says, that a payment ought to be made according to the reservation of rent, as we see by Dr. Grant's case, 11 Rep.(1) *et consuetudo ex rationabili causa usitata privat communem legem*, be it *jus canonitum*, or *jus non scriptum*. 4. The law of the *consulta prudentum* has directed the payment of tithes for houses in London to be made in this manner: as Niger, bishop of London, in the time of H. 3. pope Innocent in the time of H. 4. pope Nicholas in the time of H. 6. the order, decree, proclamation, and statute, in the time of H. 8. which payment of duties therefore ought to be now continued accordingly, and not a fraudulent subtraction contrary to law and justice. 5. The law, from the danger to which the ministers of London expose themselves more than other ministers of the country do, requires the payment of tithes at the hands of their parishioners according to the due proportion allotted to them. For they are bound to be resident, and to give comfort to their flock, in the time of the plague, when their bodies are subject to the danger of infection, their minds to fear, and their souls to sorrow; so that being in greater danger than others, they ought to have a greater reward than others have. There are many other conveniences which I will not now insist upon, because in speaking of them in this place and at this time, I should be like a Phormio teaching the precepts of war to an expert Hannibal. 6. And as to the objections which have been made, that if tithes were to be paid *secundum veram æstimationem*, every parish would be as great in value as a bishopric, I answer, 1. that this parish of Gracechurch, being a parish consisting of very few families, is not in any danger of that abundance. 2. The value will not be greater in proportion now than it was before the making of the statute of 37 H. 8. at which time there was a greater sum paid. 3. Where the parishes are so large, there is a means afforded of associating other learned men to them, for the discharge of and the endowing of vicarages. And as to the objection that houses are for expense and hospitality, and therefore not to be resembled to land, I answer, 1. that that objection might have been made before the statute, and there is no better ground for it now than there was then. 2. The statutes of 27 H. 8. & 37 H. 8. do not conceive any deduction to be necessary for the repair of houses, as the 1 E. 6. does for barren ground, and therefore they made no provision for it, nor are we to make it. 3. The law favours agriculture more than houses, the one being more beneficial to the commonwealth than the other.

In the following term, viz. Tr. 16 Ja. the case was argued in the same place by Sir Thomas Coventry, the king's solicitor, for the defendant. He said, I shall consider, 1. how the case stood before the decree. 2. I shall consider the several parts of the decree. As to the 1st point, before the decree and the act of parliament, there were not any tithes due by the course of the common law of houses in London. 1. In regard that tithes are only due of such things as yield an increase, of which nature houses are not, for they rather decrease than increase, inasmuch as they require reparations. 2. Tithes are due out of the profits and revenue of things, and do not charge the inheritance; and it is for that reason that they are determinable in the ecclesiastical

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tical court; for if they charged the inheritance, then they would be determinable at common law; but of houses there is no profit or revenue, and therefore tithes cannot be due of them. 3. Tithes are things collateral to the land, and not issuing out of the land; and therefore, according to 42 E. 3. 13. & 30 H. 8. Dy. (1) the parson shall have tithes of land contrary to his own feoffment or lease; and in 7 E. 6. Dy. (2) in an assize for a portion of tithes, it appears that it is not necessary to name the terre-tenant. But, if tithes were to be paid of houses, then they would issue out of houses, which is contrary to the rules of law. 4. It has been often adjudged that houses are discharged from the payment of tithes by the common law, without a special custom; and for that reason, in 39 & 40 Eliz. in the common pleas, between *Dalison* and *Romer*, it was adjudged that tithes were not due of houses, and with that accord the resolution in *Dr. Grant's* case, (3) and the case of *Dr. Leyfield*, (4) in the 12th of James, in the common pleas. 2. Notwithstanding tithes were neither paid nor due for houses in London, yet from the beginning the ministers of London had a competent provision made for them by glebe which was given to them, oblations, obventions, and other casual duties, which arose upon marriages, christenings, burials, and such other things, as it appears by 30 E. 3. & 38 E. 3. 13; (5) and by the records in London it appears that the offerings for houses in London were paid in this manner: for he who paid twenty shillings rent, on every Sunday and every Apostle's day, the vigil of which was a fast, paid a halfpenny; or, if he paid but ten shillings rent, he was to pay only a farthing; which amounted at the most but to 2s. 6d. in the pound, and sometimes indeed it was less, as, when one of the Apostles' days fell upon a Sunday, for then there was only one halfpenny paid for both. And this manner of payment rather decreasing, it was established by a constitution of *Roger Niger*, bishop of London; and it so continued without any alteration till the 13 R. 2. when *Thomas Arundel*, archbishop of Canterbury, made an explanation of the constitution of *Niger*, and obtruded upon the citizens of London twenty-two days more than were usual, which raised the sum to 3s. 5d. in the pound. And this explanation was confirmed by pope *Innocent* in 5 H. 4. and afterwards by pope *Nicholas* in 30 H. 6. But there was a constant struggle by the citizens of London against this explanation, and the records of *Guildhall* in 32 H. 6. shew this order of explanation to be *destructorius* rather than *declaratorius*, and to be obtained *surreptivè et abruptivè* without summoning the citizens, and without any assent to it on their part; and thereupon there was after that time a perpetual agitation between the ministers and citizens of London in the court of *Rome* and in the ecclesiastical courts, about the payment of those offerings, until at length it was settled in part by the decree made in 27 H. 8. when it was established according to the purport of the decree. And upon the several parts of this decree arise the two questions which have been made and argued on the other side: the first of which is, whether, as the twenty-five pounds were reserved by way of fine and income, payable during the term at the same days and feasts as the rent of five pounds is payable—whether tithes shall be paid according to the rate of five pounds only, or according to the rate of thirty pounds, and if the twenty-five pounds shall be said to be a rent? 2. Whether the reservation of this twenty-five pounds *per annum*, by way of fine and income, shall be said to be a fraud to evade the statute? As to the first question, I say that these twenty-five pounds which are reserved by way of fine and income, cannot be said to be any rent of the houses; for according to *LITTLETON* there are only three rents, namely a rent-service, a rent-charge, and a rent-seck; and this fine and income cannot be said to be any of those three rents, whence it follows that it is not a rent, *et argumentum à divisione fortissimum*. 2. This fine and income has none of the qualities and properties of a rent; for, 1st. There is no distress incident to it: 2. Upon an eviction of the house there will be no discharge of this fine. 3. There will not be any apportionment of this fine upon an eviction or grant of part of the house: 4. Upon an entry or feoffment over

(1) *Antè*, 50.(2) The Dean of *Bristol's* case, *antè*, 51.(3) *Antè*, 222.(4) *Antè*, 232.(5) *Antè*, 20.



of the house, there will not be any extinguishment or suspension of the fine: 5. This fine or income is not incident to the reversion, nor will it pass with it. 6. It shall not be said to be a rent either in respect of the lessor, or in respect of the lessee; for in respect of the lessor, it is a *chose in action* which cannot be granted over, and which will go to the executor, and will not descend to the heir; and in respect of the lessee, it will not bind as a rent will do; and for that reason, in the book of 45 E. 3. 11. if a lease be made to baron and feme with such a reservation of a fine as in the case at bar, it will not bind the feme, notwithstanding that she agreed to the lease, as another rent would do: and 10 Eliz. Dy. 275. in the Lord *Darcy's* case, it was resolved, that where such a reservation was made as in the case at bar, the King should not have the rent, nor could relief be given upon the ground of fraud.

As to what has been objected, that the fine in the case at bar shall be said to be a rent for five reasons: 1st. from the etymology: 2. from the common appellation: 3. the judgment of the common law: 4. the judgment of the ecclesiastical law which is to be regarded in a case of tithes: 5. from the intention of the decree:—I answer, that as to the etymology, which is a *reddendo vel redeundo*, in which *omnis fructus* is comprehended, that it is not sufficient to draw it within the general word of a rent; but it must be a rent of houses, according to the words of the decree and Niger's constitution of Niger, which call it *pensio domus*, and Lindwood, who calls it *pensio quæ provenit ex domo*: and this fine and income cannot be said to be a rent of a house, nor to be recoverable from it, because this fine charges only the person, whereas a rent of a house charges the house, and the person is only charged in respect of the house; and therefore, notwithstanding the house be burnt and consumed, or the lease thereof utterly avoided, yet shall the lessee pay this fine; for his person is bound in respect of the collateral covenant, and the fine neither issues, nor is it rendered, out of the house. Then as to the second point, viz. common appellation, this is not a rent even in that sense; for the Londoners take notice of this as a fine and income, and call it so, and not a rent: admitting that this fine were a rent in common appellation, that is no argument to make it a rent within the interpretation of a statute, which requires a legal interpretation, and not a vulgar appellation, according to the case of 13 & 14 Eliz. Dy. [296 b.] where it is adjudged, that a bastard shall not be a child advanced within the statute of 32 H. 8. c. [1.] and yet according to 39 E. 3. he is a son in common appellation, for he is *filius naturæ*. And if a person or other ecclesiastical person covenant that another shall enjoy his land for so many years; notwithstanding this is a lease in common appellation, yet it is not a lease within the statute of 13 Eliz. c. [13.] so as to be avoided; for the statute of 14 Eliz. was made on purpose to avoid such covenants. 3. The statute of 37 H. 8. being penned by so grave and learned men who are named in the statute and decree, it is not requisite that an interpretation be made according to vulgar appellation, they being sufficiently conversant what phrases to use. 4. Admitting that an interpretation were allowable of a rent according to common appellation, yet this fine is not a rent within the compass of the decree, because this manner of reservation by way of fine and income was not in use before the making of the decree and statute of 27 H. 8. and not being a rent in common appellation at that time, it cannot be drawn within the statute at this day, notwithstanding that it be now a rent in common appellation: and *Carter's* case, in 25 Eliz. does not make against this, because that statute was made on purpose to be applied to a vulgar appellation. As to the third cause, viz. the judgment of the common law, notwithstanding that the lessor in his reservation of it call it a rent where it is reserved out of a mill, out of an advowson, or out of goods, yet in judgment of law it is only an annual payment, and not a rent; and so the judgment of law is that it is not a rent, as we see by 1 H. 6. 9 H. 6. 30 Ass. whatsoever the reservation of the party may be. 2. It is to be observed that 11 H. 4. & F. N. B. call it *annuus redditus*, and not by the name of *quatuor libratas redditus*, which is that by which a rent is demanded, as we see by the books before cited; and therefore the books which are produced to prove an annuity to be a rent in judgment of law, strongly prove the contrary. For, 1st. A rent is not demanded

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by the name of *annui redditus*, but *quatuor librarum redditus*: 2. The warrant of attorney in a writ of annuity is in a plea of *debt*; whereas in a precept for rent it is in a plea of *land*, according to 11 H. 4. which shows that *annuus redditus* and a rent are different: 3. It is not sufficient to prove it a rent in judgment of law, without proving it to be a rent out of a house; and of that nature this fine and income is not, because it is a *chose in action*, which charges the person, like an annuity, and is not grantable over: and if an annuity be granted to pay out of one's coffers, the grantee must resort to the person of the grantor to charge him in a writ of annuity, and cannot go to the coffers to take the annuity out of them. As to the 4th point, viz. the judgment of the ecclesiastical law, it is not material in the case at bar what that may be; for a construction is not to be made in this case of canons of the church or any other part of ecclesiastical law, where their exposition and judgment are to be received, and credit is to be given to them; but an exposition is to be made of an act of parliament, which is part of the temporal law: and must be according to the temporal law, notwithstanding that it concern ecclesiastical things. And for this reason it appears by 7 Eliz. Dyer, 237. 8 Eliz. Dyer, 255. 4 Rep. *Holland's case*, that the statute of 21 H. 8. is expounded to make an avoidance without any declaratory sentence, according to the common law, notwithstanding it concerns an ecclesiastical person. The same exposition is also made of the statute of 13 E. c. 12. for not reading the articles, as we may see by 23 El. Dyer, 377. and 30 Eliz. *Morris and Eaton's case*, and yet it concerns both an ecclesiastical thing, and an ecclesiastical person. It is to be observed too, that the act of parliament makes the lord mayor of London and the lord chancellor of England the expositors of this statute, for which reason an exposition is to be made according to the common law, and not according to the judgment of the ecclesiastical law; and prohibitions have been often granted where a libel has been exhibited in the ecclesiastical court for the tithes of rent of houses in London, as was done in the case of *Price and Watts*, 34 Eliz. B. R. and M. 5 Ja. in the case of *Scudamore and Bell*, in C. B. and in the case of *Dr. Prouse*, Tr. 16 Ja. which shews, that the judges of the ecclesiastical law are not judges in this case, but that judgment is to be given here according to the rule of the common law. 3. Here are no Latin words for the grammarians, nor civil law terms for the civilians to give their exposition of: but here is a plain English statute, of which a construction is to be made according to the rules of the common law. And it hath been often adjudged upon the statute of 31 E. 3. c. 11. which warrants the granting of administration of the goods of an intestate, that a lease for years is *bona* within that statute: and in 7 H. 4. 6. it is ruled upon the statute of 4 E. 3. c. 7. which gives trespass *de bonis asportatis in vita testatoris*, that executors may have an *ejectione firme* upon an ejectment in the life of the testator; and so they may have a ravishment of ward according to 11 H. 4. 55. As to the fifth point, viz. the intent of the decree, I insist, that this fine and income of £25 per annum is not a rent within the intent of the decree. For when an act of parliament speaks of a rent, it must be intended to be such a rent as is properly a rent; as, where an act of parliament makes mention of escuage, it is to be understood of that which is properly escuage, which is escuage uncertain. Besides, every rent is not within the compass of the decree; and therefore if the rent be not of a certain value, as, if the rent reserved be a spur or a horse, &c. without the addition of any value thereto, it is not a rent within the statute, not being of any certain value. So, it must be a yearly rent; for which reason if it be a rent of that kind upon which an action of debt does not lie till the last day, as in *Walker's case*, 3 Rep. 22. and F. N. B. 130 H. and in the case at bar therefore of fine and income, it is not a rent within the intent of the decree. 2. It appears by an examination of the several branches of the decree, that the rent which the decree regards, is such a rent as is properly a rent, and arises upon a reservation, and issues out of the houses: for the first which is, where any lease, &c. shall be made of any house reserving less rent than shall have been paid, &c. the second is, where any person shall demise any dye-house or brew-house, or the like, reserving a rent, &c.: the third clause is concerning the payment of tithes according to the rates of those several rents reserved; so that if there be

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not a rent reserved and issuing out of the houses, (and the fine and income in the case at bar is not such,) then it is not within the intention of this decree. 3. The decree has a clause for an abatement of the rent in case where the house is burnt; and this income is not within that clause, because it shall be paid notwithstanding any such casualty, and there is no need of any new reservation. 4. By a clause in the decree, assignees are chargeable according to a proportion with the rent, and there cannot be any apportionment of this fine and income, and therefore it is not within the intention of the decree. 5. It is not the intention of this decree to take up the rack rent, for that is contrary to the intent of all the other acts, as 31 H. 8. c. 13. 37 H. 8. c. 12. 1 E. 6. c. 13. 13 Eliz. c. 10. which only aim at the reservation of the ancient rent; and if the makers of the decree had aimed at the value of the houses, they might have said a rate to be paid according to the value of the houses, and not according to the reservation of the rent. 6. If tithes should be paid for this fine and income, there might be a payment beyond the value of the house; for the lessee is bound to pay this income whatever may become of the house; and therefore it is possible, that the house might be forfeited, or there might be an eviction, or a new lease might be granted of it reserving rent; and then tithes would be paid for it according to this income, and also according to the proportion of rent newly reserved, which is contrary to the intention. 7. It never could be the intention of the decree to oppress young tradesmen, and if the law should incline to this exposition, that tithes should be paid according to the proportion of this income, they would be oppressed; for either they must pay great sums immediately, which they are not able to do; or beyond their fines and incomes which they pay annually, they must pay an eighth part more for tithes, which would be exceedingly mischievous. Besides, it would be very inconvenient to force men to lease their houses at a rack rent, as suppose they should be tenants in tail, &c. for after they have once raised the rent, they cannot lower it when they will. And as to the objection, that this construction to pay tithes according to the proportion of income is *pro bono ecclesie*, and therefore the decree is to be extended as far as it can be, I answer, in the first place, that it is observable, that this decree is made in enlargement and amplification of what was paid to the ministers before, and not by way of diminution; for whereas only 2s. 6d. was due before the decree, now by the decree it is at the rate of 2s. 9d. in the pound. 2. This rate of 2s. 9d. in the pound being more than is allowable either *jure divino*, by the common law, or by custom, (for those laws allow only a tenth part, whereas this is an eighth part) it is not reasonable to extend it farther than the words purport. 3. There being an imposition of the payment of tithes upon several things, as dye-houses, brew-houses, stables, gardens, &c. upon which there was not any imposition before, it was consistent with reason only to give an allowance of payment of tithes according to the rate of what is properly a rent, and not according to the rate of the fine or income; and the more especially so, because the ancient constitution was that tithes should be paid at the rate *prout domus locabantur*, and not *prout locari poterant*. 4. The decree imposes fine and imprisonment upon those who do not pay their tithes, and therefore it is to be *stricti juris*, as we see by Dr. Bonham's case in 8 Rep.

As to the second question, which is, whether this reservation of £25 per ann. by way of fine and income, be a fraud or not, I say, 1st, that it cannot be a fraud upon the rules of the common law, because the person against whom the fraud is supposed to be had no interest at all in the £25 per annum, in the reservation of which the fraud is supposed. For there was only £5 per annum anciently reserved, and he who shall have remedy against fraud at common law, must have a precedent interest according to the cases of 22 Ass. pl. 72. 43 E. 3. 2. 48 E. 3. 12. 8 E. 2. Assise, 396. 3 Rep. 83. *Upton* and *Basset's* case; in all which cases there was a precedent interest in the person supposed to be defrauded; and for that reason he had remedy at the common law. But, if there were no such precedent interest, then there was not any remedy given; as, where a villain alienated his goods by fraud, the lord had no remedy for them, because his interest commenced only upon the claim or the seizure.

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seizure. And upon 7 E. 3. 54. and 3 E. 3. Collusion, 29. where the tenant alienated by collusion, the lord had no remedy before the statute of Marlbridge; because he had no interest precedent to the alienation, and at this day the lord shall not have aid for his relief in case there be an alienation. And before the statute of 3 Ja. c. 5. if a recusant had purchased lands in the name of another person, the King had no remedy for those lands, because he had no precedent interest. So in *Myght's* case, in 8 Rep. where the father and the son are joint purchasers of land holden in *capite*, there is no remedy for the King. 2dly, I conceive that this reservation is not fraud, nor material; inasmuch as the fraud, if it be a fraud, rests on non-feasance, viz. in the non-reservation of rent out of the house; and the common law extends only to a fraud which consists of a misfeasance, and not to one which consists of a non-feasance; and therefore where a usurpation was had upon an infant or feme-covert by fraud, there was no remedy before the statute of West. 2. c. 5. it being a fraud that consists of non-feasance. 3dly, The reservation of £25 per annum by way of fine and income, cannot be worse than it would be if there were no such reservation; and if only the £5 per annum had been reserved, without reserving the income, it had been well enough, because the ancient rent was reserved, and the law requires no more; wherefore it shall be well enough now that the reservation is made of this income. I conceive that this can be no fraud upon the decree itself; for the decree only extends to cases where either no rent is reserved, or there is less than the ancient rent reserved; and there is no provision to compel the reservation of a greater rent than was paid before. 2. The fraud and covin mentioned in the statute go to the payment, and not to the reservation; and here being a payment of tithes according to the rent of £5 per annum, which was the ancient rent, the statute will not extend to it. 3. Upon the decree itself, if Burrell had not made any reservation of rent at all, he would have paid only after the rate of £5 per annum; he shall not therefore be now in a worse plight than if he had not reserved any rent at all: which being so, it is a very strong argument that tithes should be paid only after the rate of £5 per annum and not according to the rate of the income, and the reservation of the income should not be said to be fraudulent, and to be made by fraud to evade the statute. As to what has been objected of the conveniency of having tithes paid according to the proportion of the income, I admit that the rule of justice is the rule of conveniency, and that what is just is convenient; and if the law be as I have argued it is, then, upon the rule of justice, tithes ought not to be paid after the rate of £30 per annum, but only at the rate of £5 per annum: and the statute of 37 H. 8. c. 12. is as well a restriction upon the parsons that they shall not demand more than 2s. 9d. in the pound, as it is an obligation upon the citizens that they shall pay according to that proportion. And as to the argument which has been drawn *de jure divino*, that can be of no avail in the case at bar, because the 2s. 9d. in the pound, being more than the tenth part, is more than can be demanded by the law of God. And as to the argument which has been drawn *à consensu civitatum et sapientium*, neither of those will warrant the opinion of the payment of tithes according to the rate of the fine and income, but the contrary. And as to the argument which has been drawn *à convenientiâ rei*, if we are to be determined by this, it could never be the intent to require a payment of a greater proportion than according to the ancient rent; for it would be inconvenient, 1st. to compel men to lease their houses at rack rents: 2dly, it would be an imposition of a great burthen upon young beginners who are unable to give fines in *pecuniis numeratis*: 3dly, it would be a discouragement to laying out any money upon their houses, since their charge would be raised according to the money laid out: 4thly, it would be the disturbance of a settled opinion, which has been holden time whereof, &c. 5thly, the London benefices would exceed many bishoprics in England. And in M. 5 Ja. in C. B. where *Scudamore* and *Eire* were plaintiffs in prohibition against *Bell*, parson of Queenhithe, it was resolved, that there could be no suit in the ecclesiastical court for tithes of houses in London, because the statute had appointed other persons to be judges in that case. 2dly, it was agreed

agreed, that no tithes could be demanded of those houses which were built subsequently to the making of the decree, because the statute extends only to those houses which paid tithes before. 3dly, it was resolved, that a greater proportion could not be demanded of houses in London than according to the ancient reservation, and that no respect was to be had to fine and income.

It was agreed by the lord chancellor and other assistants, 1st, that the £25 per annum reserved by way of fine and income, was not a rent. 2dly, it was ordered, that the records which had been cited, should be produced. For if the rate paid of ancient time was only 2s. 6d. and so the decree went in amplification of the ancient proportion, then it was of some moment, Niger's constitution being *ex antiqua consuetudine et tempore præscriptibili*. 3dly, the record in the 32 H. 6. c. . was a record made by the citizens themselves, and therefore not of so great authority.

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Hil. 15 Ja. A. D. 1618. C. B. *Pinder v. Spencer*. [Noy, 30.]

**A** PARSON prefers his bill for tithes of hael, holly, willow, whitethorn, &c. A prohibition was moved, because they were of twenty-one years growth, and more, and by the common custom in Hampshire they were used for timber to build and repair their ploughs, and cited P. 14 Jac. C. B. rot. 1918. *Guffy's* case (1) against the parson, for holly, willow and maple, and a prohibition was awarded. And HOBART said, in Cumberland beech was used for timber, and the use of the country, for scarcity of other trees will alter the case. (2) used for timber to build and repair their ploughs; and a case was cited for holly, willow, and maple. It was also said, that in Cumberland beech was used for timber, for scarcity of other trees will alter the case.

(1) *Guffy v. Pinder*, post, 295.

(2) *Vide Laphome's case*, ante, 255.

Hil. 15 Ja. A. D. 1618. C. B. *Dr. Brigman's Case*. [Noy, 31.]

**T**HE parson libels for tithes of hay, &c. The parson said that the custom of the parish has been, that he that has corn within the parish ought to reap the corn, and also the tithes of the parson, and to make them into cocks, and to preserve them until the parson shall carry them away. And a prohibition was granted; for although that the parishioner ought, *de jure*, to reap the corn as it was agreed T. 28 Eliz. B. R. yet he is not bound to guard the tithes of the parson, &c. but if the parson do not carry them away in convenient time an action on the case lies against him. P. 20 Jac. B. R. rot. 286. there such an action was brought by Wiseman against the rector of Landen, in Essex, for not accepting, &c. of the tithes of cheese.

granted, for he is not bound to guard the tithes, and if the parson do not carry them away in convenient time, an action on the case lies.

In a libel for tithes it was alleged that the custom was (*inter alia*) that the parishioner should preserve the parson's tithes until he should carry them away; prohibition was

Hil. 15 Ja. A. D. 1618. C. B.

*Wright v. Gerrard & Hildersham*. [Hob. 306.] Cro. Ja. 607.

W. Jo. 2. 1 Gw. 375.

**T**HE plaintiff declares in prohibition, that Richard Stowden, the last prior of the monastery of Hatfield, and his predecessors, were time out of mind seized as well of the rectory of Hatfield, as of a certain farm there called Downhall Farm, in his (and their) demesne as of fee, and by reason thereof did enjoy the said lands discharged of tithes, and then recites the statute of 27 H. 8. for dissolution of abbeyes, and that the said priory was under two hundred pounds per annum, and that by virtue of that statute King Hen. 8. was seized, *simul & acmel* of the said parsonage and lands discharged of tithes, and that the abbess of Barking was seized of the manor of Littington, and she so seized, November 3, 29 Hen. 8. conveyed the manor of Littington to Hen. 8. and King Hen. 8. conveyed the said lands, called Downhall Farm, and the said rectory, to the abbess of Barking; by virtue of which conveyance she was thereof seized, (and then speaks not of the discharge of tithes) and 14 November,

1. Three judges held, that all appropriations belonging to smaller monasteries were given to the King by 27 H. 8. Warburton thought that they were given by 31 H. 8. and that the provisions of the latter act extended altogether

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ther to lands, &c. which came to the King by the former.

2. Discharge of tithes of the lands of monasteries by prescription was not personal; for having been always (as prescription presumes) in spiritual hands, the law judges that they were never charged with tithes; as the pleading is that the lands were *immunes à solutione decimarum negative non privative*, viz. uncharged, not discharged, as if they had been once chargeable. The reason whereof was, that being spiritual persons they were able to minister to themselves spiritual rights, and therefore performing *offitium*, they might retain *beneficium*; and this non-charge standing upon prescription was inherent in the land, not as a thing given, but a *non ens*.

Lands that never yielded tithe, and land of the little monasteries so free of tithes, the King, by 27 H. 8. and his patentees were to hold free, not by reason of any privilege which needed to be preserved by any statute, but ever by the grant of the land by any kind of conveyance.

3. The prior of Hatfield was seised of a rectory appropriate and lands therein, the priory was dissolved by 27 H. 8. and its possessions came to the King, who, anno 28, granted them to the abbey of Barking, which was dissolved by 31 H. 8. held that upon severance the lands were not entitled to the benefit of 31 H. 8. and so discharged by unity, although perhaps by prescription they might according to *Hobart*, but such prescription might be avoided by showing that the abbey was discharged by order, composition, or bull within time of memory, for such privileges being personal were not continued by 27 H. 4.

4. Such unity as is allowed for discharge is not so allowed for itself, and of its own strength, but in contemplation of a true discharge, which in such confusion of possessions and privileges of all natures may well be presumed, though it cannot be proved.

31 Hen. 8. she surrendered them again together with the whole monastery to Hen. 8. and then recited that one only clause of the statute 31 Hen. 8. for enjoying of abbey lands discharged of tithes; and that by force of the grant of the abbess of Barking and of the said statute King Hen. 8. was seised of the said lands discharged of tithes: and he being so seised granted the same to William Barns, and others, and brings down the title of the land to one Glascocke, and the plaintiff by lease, and then recites the statute of 23 Hen. 8. and 2 E. 6. that none should be compelled to pay tithes for lands discharged of tithes, and that though the said farm and lands were discharged of tithes, &c. that yet the defendants sued Glascocke and him for tithes, &c. That Glascocke died, hanging the suit there, and that he pleaded *ut supra* there, and yet then refused, &c.

Whereupon the defendant by protestation denying the unity by prescription in the prior of Hatfield, demurs upon the declaration, and prays consultation.

The plaintiff demurs, and prays that no consultation be granted. It seems his prayer should be, that the prohibition should stand. But either is well enough.

The case in short is thus. The prior of Hatfield and his predecessors, time out of mind, were seised of the parsonage of Hatfield, and a farm in the same parish, called Downhall Farm, together.

The priory being under £200 per annum, was given to the King by the statute of 27 H. 8. the King gives the parsonage and farm to the abbess of Barking, the abbess surrenders all to the King. The question is, whether the King and those that claim under him shall hold this farm discharged of tithes, by force of the perpetual unity.

And it was adjudged against the plaintiff, and a consultation granted, by the uniform consent of all the judges. (1)

This case consists of two great points, as they arise in order of time.

The first great point is, whether as this case is, and as it is pleaded, this land ought to be discharged of tithes, though it had come to the King only by the statute of 31 Hen. 8. That is to say, that it had never come to the prioress of Barking, by reason whereof and of her surrender it was vested in the King by the statute of 31 Hen. 8.

And I am of opinion, that in that case they had not been discharged.

The second great point is, whether upon the whole matter, and the consideration of a double means whereby it came to the King, viz. by 27 H. 8. from Hatfield, and by 31 H. 8. from Barking, and upon consideration of both these statutes, this land ought to be discharged by this unity of tithes. And I am of opinion that it is not discharged.

Now the first great point I subdivide into four petty points, which all conclude to the judgment of the first great point.

First, whether the appropriation in this case came to the King, and remained in

(1) *Hutton, Winch*, and *Hobart* resolved for the defendant; but *Warburton* held that appropriations were not given to the King by the stat. 27 H. 8. wherefore to supply that defect the 31 H. 8. was passed; and so these appropriations being given to the King by 31 H. 8. the discharge extends to them. 2dly.

That the intent of 31 H. 8. was to give equal discharge as well to the land given by 27 H. 8. as by 31 H. 8. And upon this reason *Spurking's* case upon the statute of the procession of the prior of St. John of Jerusalem, in 20 Ed. 1. was adjudged; but notwithstanding consultation was granted. W. Jo. Cro. Ja.

in him: a personage appropriate by force of the statute of 27 H. 8. only, as well as the like appropriations did by the other statute of 31 H. 8.

And I am of opinion, that it came to the King appropriate, and so remained in him by force of that statute only: for if that were not so, the appropriation had been dissolved *ipso facto*, by the dissolution of that abbey, and so had not come to the King, nor the abbess of Barking from the King, nor from her again to the King.

The second point, whether unity of personage appropriate and land, and having been in a small abbey time out of mind (as in this case it was) and so coming to the King by the statute of 27 H. 8. only, works a discharge of payment of tithes.

And I am of opinion that it will not. Wherein we will speak of discharges of tithes in general, within that law of 27 H. 8., which stand clear with that law, and which not.

The third point: whether the clause of discharge of payment of tithes, contained in the statute 31 H. 8. can be extended to the small abbeyes and their lands which came to the King by the statute of 27 H. 8. only or not.

And I am of opinion that it cannot be extended to them.

The fourth point, as this case is pleaded, that is to say, repeating only the clause of the statute 31 H. 8. that gives the discharge of payment of tithes, without mentioning either their preamble, or any of the other clauses that refer and restrain that statute to those abbeyes that came to the King after the 4th of February, 27 H. 8. which excludes this abbey. So that now this clause may seem as general to the court in meaning, as it is in letter, so that it may comprehend as well those abbeyes that came by the statute of 27 H. 8. and so before the 4th of February, &c. as well as after; whether now the court shall judge upon that clause of the statute of 31 H. 8. only, without taking knowledge of the other parts of the said statute, which give the clause another construction, than by itself alone it should have.

And I am of opinion, that the court shall take notice of the whole statute: (though part be omitted material) and judge accordingly. And that therefore: if it had not come by Barking, and so within the statute of 31 H. 8. the court could not relieve it by this clause, as general to all abbeyes, by the advantage of the generality of the clause, (as it is delivered in pleading) so this point is handled, as though it had not appeared to come to the King by Barking, *scilicet* by 31 H. 8. but only by 27 H. 8. because as the clause is general, it seems to benefit both alike, as well those that come by the 27 as 31 H. 8. though in truth, and upon the consideration of the whole statute of 31 H. 8. it do not so.

Now to the first point, or question of the first great point.

It is true, appropriations are not regularly grantable over, neither can they endure longer than the bodies, whereunto they were first appropriate; whereof the reasons are, because they carry not only the glebe and tithes, (which they might grant away) but they also give them the spiritual function, and make the persons of the church, and supply institution and induction, which being the highest parts of trust, cannot be estranged: and therefore the instrument of appropriation runs in these words, that they and their successors (not their assigns) shall be persons, or by *periphrasis* hold the church in proper use. Now yst, by parliament appropriation may be translated. But the question is, whether the act of 27 gave them unto the King (in stat. of appropriations.) Against which it is objected, that the statute has not the word of appropriation; which in a thing of so singular nature, and so fixed to one certain body, in point of care and function, shall not be taken within the meaning of the law, without some perfect and proper word to carry it.

Secondly, it is objected that the opinion in the Bishop of Canterbury's case, Co. lib. 2. fol. 47. (1) that all impropriations had been dissolved upon 31 H. 8. if the clause of discharge in that statute had not been. To this an answer has been endeavoured, that the statute gives to the King their tithes and their land which carry their glebes, which is the whole parsonage, say they; but I allow not this answer. For these words may well be taken for common lands; and tithes, for portions of tithes divided from the pastoral charge: for it shall never

(1) *Ante*, 113.

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be understood that the appropriation should be dissolved, and the church made presentative, and yet by the same statute, both glebes and tithes should be taken from the church; and given to the King. For this were as much as is said of Julian the *Apostata*, that he did *occidere, non presbyteros, sed presbyterium*.

But I hold, that appropriations are well given to the King; and that by a word proper enough. For the statute gives (*inter alia*) the churches, chapels, advowsons, and patronages of such monasteries, which must be understood their churches, as they were in them, either appropriate where they were so, or their advowsons where they were not: otherwise it were a mere tautologism, Fitzh. N. Br. 32 G. *ecclesia & rectoria*, are *synonyma*, and words of appropriating are, that they may hold *ecclesiam & rectoriam in proprios usus*, as *Grendon's case* is. (1) Again, this statute gives all those monasteries whereof the possession did not exceed £200 per annum, so whatsoever made to that yearly revenue was meant to be given to the King. And it was notorious, that a great part of their yearly profits did consist in appropriations; for it was easy for them to get advowsons, and as easy to get them appropriate.

Also it was the clear purpose of the statute to give the King all that those abbeyes had, and therefore the saving excludes the founders, patrons, donors, &c. But if the appropriation should be dissolved, the giver should be restored to his patronage; and *Priddle's case*, Co. lib. 11. 13. (2) says, that appropriations in reputation passed both by the statutes of 27 and 31 H. 8.

Also note, that the statute 31 H. 8. recites the surrender before made of divers abbeyes, and *inter alia*, so all their churches, chapels, advowsons, patronages, (and names not appropriations there) but in the purview gives appropriations by name, in *majorum cautelam*, as being granted before in true meaning, though it be true, that such grants or surrenders without the statute, would not have carried appropriations. Therefore by the word churches, the appropriations were conceived to be granted; and so settled by the statute, and therefore the pleading is, *Virtute sursum redditionis præd. ac vigore stat. &c.* For the statute gives not in intent, but vests only, saving this special case, which I note, because it is a singular case.

And upon this I observe further, that all the appropriations of abbeyes that were surrendered between 27 and 31 H. 8. were *ipso facto* dissolved, with the dissolution of the corporation, and were presentable and might have new incumbents. But as soon as the statute of 31 H. 8. came, the appropriations were restored, and given to the King, and the incumbent ousted.

And touching the opinion before-mentioned, I wonder from whence it sprang; for since the body of the statute of 31 H. 8. gives appropriations by name, what needs the other clause for that purpose? and if a by-clause can do it, why should not the main body? So that conceit is vain.

Now to the second point, or question, of the first great point. This statute has no clause for discharge of payment of tithes, as that of 31 of Hen. 8. has, neither any thing to give colour to it, other than the clause, that the King shall have the lands, &c. in as large and ample manner as the abbots held the same.

Now there are five ways or means whereby abbey lands are holden discharged of tithes, that is to say, composition, bull or canon, order, prescription of discharge, and unity of possession of parsonage and land time out of mind together, with[out] payment of tithes. Of these five the four first discharges the abbots themselves had, or might have them, but the fifth was no discharge in the hands of abbeyes, but it made a discharge of payment of tithes to the King, and those that claim under him by the favourable construction of that clause of 31 H. 8. for so much as that clause extends to, which opinion was long controverted, being confessed of all hands, that it was no full and perfect discharge in law: so then it follows, that these lands can receive no good by this unity, unless they be within the relief of that clause of 31 (Hen. 8.) whereof we shall speak hereafter.

Now of the other four, the first three, that is, composition, bull or canon, and order were granted and affixed unto the body of the monastery, and were granted unto them as personal privileges, in respect of their spiritual abilities or functions, and their capacity of tithes, and discharge of tithes for that cause: as

(1) *Anti*, 67.(2) *Anti*, 305.



and therefore these had all vanished and expired with the dissolution of the body, if they had not been preserved to the King and his patentees by that clause. But discharge of tithes of the lands of monasteries by prescription is of another nature; for having been always (as prescription presumes) in spiritual hands, the law judges that it was *never charged* with tithe: as the pleading is that the lands were *immanes à solutione decimarum negative, non private, scilicet, uncharged*, not discharged, as if they had been once chargeable: the reason whereof was, that being spiritual persons, they were able to minister to themselves spiritual rights, and therefore performing *officium* they might retain *beneficium*: and this non-charge standing upon prescription was inherent to the land, not as a thing given, but as a *non ens*. Lands that never yielded tithe, and land of the little monasteries so free of tithes, the King by the statute 27 Hen. 8. and his patentees were to hold free, not by reason of any privilege, which did need to be preserved by any statute, but ever by the grant of the land by any kind of conveyance.

And therefore though I said, that discharge of bull or composition was to die with the corporation, yet if it were once run out time out of mind, it was then to be pleaded and used as a non-charge, by prescription, which was a title of discharge by the temporal law, and if it were impugned, it was to be drawn by prohibition to a trial at the common law, and this without the help of any statute. And therefore in the Bishop of *Winchester's* case, (1) it was resolved that the bishop holding lands of his bishopric, discharged of tithes by prescription, his farmer being a layman, shall have a prohibition for his discharge; and so shall the bishop have himself, though he be a spiritual person. And yet bishoprics and their lands are, in point of discharge of tithes at the common law, out of all statutes: so then, the conclusion is, that of the five ways of discharge of tithes, (three; that is to say,) order, composition, bull or canon, are preserved and kept alive by the clause of discharge in the statute of 31 Hen. 8. and a fourth, which is unity, is created by that branch, and the fifth, which is prescription, stands by the common law, and has no need nor use of any statute.

Now to the third question, of the first great point, the lands of the small abbeyes coming to the King by the statute, made at the parliament holden February 4, 27 Hen. 8. cannot be aided by the discharge of tithes in the statute of 31 Hen. 8. for first, all the small abbeyes shall be said to come to the King the first day of the parliament, *scil.* Feb. 4. according to the rule of 33 Hen. 8. because acts take effect the first day of the parliament.

Then take the whole statute of 31 Hen. 8. and you shall find that the monasteries therein mentioned, are divided, both in the preamble, purviews and other branches, into those that come to the King since (that is after) 4 Feb. 27 H. 8. as it were *de industria* to exclude the little monasteries given by that statute, and that those should come to the King after the statute of 31 Hen. 8.

And so he proceeds in that clause, that puts them in the survey of the court of augmentations, and in the other clauses always uses the said late abbeyes which restrains them; and even in this clause of discharge though there be in the body "any monasteries" indefinite, yet the preamble of that clause recites "where divers of the said abbeyes enjoy their lands discharged of payment of tithes: be it therefore, &c. that the king, &c. shall hold discharged of tithes as the said late abbots, &c. did," so the preamble is plainly restrained to the abbeyes in that law, and the purview "be it therefore," depends upon the reason of the preamble and "the said abbots," in the conclusion reduces it to this, that the land of any monasteries shall be holden discharged as the said abbots (*scilicet* mentioned in this law) held them; and this case is in effect judged in the Bishop of *Canterbury's* case, (2) where it is judged, that lands of chantries coming to the crown by the statute of 1 E. 6. are not within the relief of this clause for three reasons.

First, that a branch of a statute shall not be taken larger than the body.

Secondly, the chantries being in the King by one act of parliament, shall not be judged in him by another.

Thirdly, that the form of pleading was never so, the King was seised by force of both acts: all which fits this case. And yet more (as has been said)

(1) *Ante*, 119.

(2) *Ante*, 113.

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the lands of 27 H. 8. are by express terms excorporated out of the statute of 31; which is not so in *Canterbury's* case, (1) and so 10 Eliz. Dyer, 841. for the point of leases.

Now to the fourth question of the first great point; if this had been a particular statute, whereof the court could take no other knowledge but as it was pleaded, this clause must have been taken generally for all monastery lands; because there was nothing in the plea that restrains the generality of the words, and the defendant might at his choice either plead that there was no such act of parliament, or else might shew the farther additions, and that in another term: as if a man should plead a devise to him and his heirs, and the devise indeed is so in words, but then goes on, and adds, that if he die without issue, it shall remain over, the adversary may either traverse the devise generally, or shew the addition, but being a general law, the court may take knowledge of the whole. But then, though it be a general law, if it be mis-recited, the court shall take knowledge of it, as it is resolved in *Partridge and Croker's* case, Flow. 84. and *Lord Cromwell's* case: Co. lib. 4. fol. 14. But note in the first of those cases, the statute was pleaded made at a parliament, when there was no such parliament; and in the other the substance of the statute was mis-recited, so both appeared to the court false. But in this case there is nothing pleaded false, but only there is an omission of some part of the statute that may give another sense to this clause.

Now then this being a general law, there was no need to plead it, nor any part of it, no more than when you plead a feoffment to uses, to say that *virtute legis et vigore statuti, de usibus*, &c. though the use of pleading be so; for when you have laid down the case, the court, in general statutes, makes application of the law without your help. So then, since he has in this case recited some part of the law, which he needed not have done, and that truly, you shall not require at his hands to repeat either the whole law, preamble and all, or else at his peril to cull out all parts that are material to give construction to that part that he pleads; for that is the office of the court, and not of the party.

Now to the second great point of the case, the judges must be very considerate, not to extend the discharge of tithes, by way of unity, beyond the bounds whereof it has got possession; for divers reasons.

First, It is no friend to religion; for, it takes away the nourishment and reward of learning, and industry of churchmen.

Secondly, It is against common right, and the common law of England; for according to them it is no discharge.

Thirdly, It is an encroachment, even beyond the usurped authority of the see at Rome, by which it was no discharge.

Fourthly, It was such a bear's whelp, as it was an age before it would be brought into any shape, and yet when all was done, it was cast into a form of pleading, which departs from the rules of all art of reasoning: for it is pleaded thus for example. The prior of Hatfield, &c. time out of mind, was seized of the parsonage and land, *simul et semel, et ratione inde* held the land discharged, &c. And yet you may not deny the argument, which must be; that unity by prescription discharges, though it be confessed to be false. And if you suppose the major, and turn it into a syllogism, you are not allowed to deny it as to demur in law upon it; yet wheresoever such an unity is with a clear non-payment of tithes, time out of mind, in a body spiritual, capable of a non-charge, it might have been laid as an absolute discharge upon better reason directly, than to lay it upon the unity; for, the presumption of a perfect discharge, in that case, was not doubtful; for in *Priddle's* case, Co. lib. 11. fol. 14. (2) it is truly said; that a unity and a perfect discharge by prescription may stand together.

Now then it is agreed, that where the unity is such as is allowed for discharge, it is not so allowed for itself, and of its own strength, but in contemplation of a true discharge, which in such confusion of possessions and privileges of all natures may well be conceived, though it cannot be shewed. Now that presumption fails in this case. For where there are four ways, as has been said, to discharge abbey lands of tithes: that is to say, order, composition, bull

(1) *Ant. 123.*(2) *Ant. 205.*

or canon, and prescription; all these may be presumed to maintain the discharge by unity, where the same body of the abbey continued seised both of the personage and the land, from beyond memory, till the statute of 31 H. 8. for then that statute, and the clause of discharge thereof, did attach upon it with full advantage. But in this case, which is a novelty, three of these presumptions fail with the priory of Hatfield, as has been said, that in (of) order, composition, and bull or canon.

Now if it be said, that if the abbey of Hatfield were discharged by prescription that that remains, I answer, that if it be so taken, it makes expressly against the plaintiff, for that discharge is sufficient of itself according to the course of common law, and has no need of the help of any statute, as has been said, and therefore cannot be admitted in understanding to maintain an unity, which has no force but by the statute of 31. For fiction is never admitted where truth may work, as where *cestuy que use*, and his feoffee joined in a feoffment, it shall be the feoffment of the feoffee. So where in *Priddle's* case it has been said, that an effectual unity must have four qualities; that is to say, it must be *perpetua, equalis, legitima, et libera*; you must add unto it a fifth, that is, it must continue in the same body: or else the presumption of true discharge ceasing loses its force. And I am of opinion, that if in this case the plaintiff should lay the discharge by prescription, that the defendant might avoid it by shewing, that the abbey was discharged by order, composition, or bull, within the time of memory, or at the least it were a great evidence for him.

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H. 15 Ja. A. D. 1618. B. R. *Jones and Gauril's Case*. [2 Ro. 2.]

**F**OR tithes of pigeons no prohibition lies, and so it was resolved; for the court said, that tithes ought to be paid of pigeons, and for coney, by *DONDERIDGE, J.* to which the court assented.

Tithes shall be paid of pigeons, and also of rabbits.

H. 15 Ja. A. D. 1618. C. P.

*Guffy v. Pindar*. [Hob. 219.] Cited in *Noy*, 30, *ante*, 239.

**A** RECORD of a prohibition was shewed by *John More*, serjeant, P. 14 Jac. Rot. 1918. between *Guffy*, plaintiff, and *Pindar*, parson of *Mottesfont*, in the county of *Southampton*, for tithes of willows, upon surmise that they are of use as timber in that country. If willows grow within the site of an house, it is waste to fell them, yet if they be felled, I hold they shall pay tithes. Note the reason.

Prohibition was granted to a libel for tithe of willows, in Hampshire, upon a surmise that they were used for timber in that county.

E. 16 Ja. A. D. 1618. B. R.

*Fulcher v. Griffin*. [Anon. in *Poph.* 140.]

**T**HE parson of D. covenanted with one of his parishioners that he should pay no tithes, for which the parishioner covenanted to pay to the parson an annual sum of money, and afterwards, the tithes not being paid, the parson sued him in the court-christian, and the other prayed a prohibition; and it was agreed that if no interest of tithes pass, but a bare covenant, then the party who is sued for the tithes, has no remedy but a writ of covenant: and the better opinion of the court in this case was, that this was a bare covenant, and that no interest in the tithes passed.

A parson, in consideration of a certain sum, covenanted with a parishioner that he should pay no tithes; held, in prohibition, that as this was a bare covenant,

nant, by which no interest in the tithes passed, the only remedy was an action upon the covenant.

Tr. 16 Ja. A. D. 1618. B. R. *Barnewell v. Tracy*. [2 Ro. 49.]

**A** PARSON libelled in the spiritual court for tithes, the defendant there pleads, that the parson by his deed covenanted and granted, that the defendant should hold his land discharged of tithes during the life of the parson, rendering therefore an annual rent, upon default of payment the grant to be void, and alleged that on such a day the rent was not paid according to the condition,

A parson granted by deed that one should hold his land discharged of tithes during the par-

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son's life, to be void upon non-payment of a rent reserved: upon a suit in the spiritual court, alleging a breach of the condition, held, that if the parson denied his deed, and they would not allow proof by one witness, prohibition should go, but not if the dispute were whether the rent had been paid or not, unless they proceeded to determine this incidental matter against the rules of the common law.

condition, wherefore, &c. A prohibition was moved for, for that the question now was upon a real contract, and that in the spiritual court they would not allow the testimony of one witness, as our law does. — MONTAGUE, C. J. It is clear, that if the parson had denied his deed, and the question had been, whether a demise or not, prohibition would have been granted *caused quod supra*, but he has confessed the demise, and therefore inasmuch as the spiritual court has consance of the principal, it shall have consance of the accessory, 2 E. 3. — HOUENRON, J. agreed, the issue now is upon the payment of rent, and that they may well try, but if they will not allow one witness to prove it, upon suggestion thereof, prohibition will be granted. — DODDERIDGE and CROKE, Justices, agreed; but wherefore prohibition was denied, see 8 E. 4. 13 Fitz. 43. k

Tr. 16 Ja. A. D. 1618. B. R.

*Richardson v. Cabell.* [Anon. in Poph. 142.]

Agistment shall be paid for pasture fed by an innkeeper with guest horses, unless it had been moved before, and tithes paid of the hay.

**R**ICHARDSON, being a parson, libelled against Cabell in the spiritual court for tithes, because the said Cabell being an innkeeper, took all the benefit of his pasture by putting guest horses into his pasture; whereupon Cabell prayed a prohibition, and it was not granted, for it is titheable in this case: but if Cabell had taken a crop of hay and afterwards he had put guest horses into the pasture, in that case it had not been titheable, for he had his tithe before, and thereby it should seem that some crop is not titheable.

Tr. 16 Ja. A. D. 1618. C. B.

*Scott v. Wall.* [Hob. 247.] Hetl. 193. 1 Gw. 431.

If a *modus* be admitted by the parson, it may be sued for in the spiritual court as well as the tithe in kind, but if the custom be denied, it must be tried at the common law.

**T**HE plaintiff had a prohibition containing, that where he had twenty acres of wheat, and had set out the tenth part of it, that the defendant pretending that there was a custom of tithing that the owner should have forty-five sheaves and the parson five, and so sued for that, where there was no such custom: for the court said, that the *modus decimandi* must be sued for in the ecclesiastical court, as well as the very tithe, and if it be allowed between the parties they shall proceed there; but if the custom be denied it must be tried at the common law, and if it be found for the custom, then a consultation must go, otherwise the prohibition stands.

Tr. 16 Ja. A. D. 1618. C. B. *Napper's Case.* [Hob. 286.]

A custom was alleged to pay the tenth part of the rent reserved upon leases for tithes: the court took time to consider the custom.

**N**APPER libelled in the spiritual court of Wells against divers parishioners of Tintonholt, in the county of Somerset, for tithes in kind. The defendants plead in the spiritual court a custom that they there have used to pay the tenth part of the rent reserved upon their leases, &c. And the judges of the spiritual court proceed to examine witnesses to prove this custom. The said Napper, for that a custom is determinable at the common law, and not before a spiritual judge, moved for a prohibition to the spiritual court, that they should not proceed to try this custom before them, and the court gave day till the next term to shew cause, &c. and in the mean time to stay the proceedings to examine the said custom. — (*Vide infra*, 308. S. C.)

Tr. 16 Ja. A. D. 1618. C. B. *Farmer's Case.* [Hob. 286.]

A prohibition was granted, and upon issue joined, the plaintiff was non-suited and

**I**NTER Farmer *et* (Sherman). A prohibition was granted out of this court in the spiritual court, upon discharge of the payment of tithes in the hands of the abbot, upon the statute of 31 H. 8. and upon issue joined the cause was tried at the bar, by a jury of the county of Northampton, and after full evidence given, the plaintiff was nonsuited, and a writ of consultation awarded,

awarded; and after the consultation, the plaintiff in this court pleaded the same plea, in discharge of payment of tithes in the court-christian, which was alleged in the prohibition, which plea the spiritual judge accepted, and proceeded to try the same there; and the court was moved on the part of the said Farmer, the parson, to have a prohibition to the spiritual judge, that he should not admit of this plea, which was once tried in this court, and which merely appertained to the judges of the common law to determine, which was granted by the court; for the trial at the common law, and the consultation upon it is final in this very suit, and upon that libel.

bition which the spiritual court was proceeding to try; held that the parson should have another prohibition to the spiritual court to stay proceedings upon a plea which had been finally determined in the proper court.

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A consultation awarded; the defendant in the spiritual court then pleaded the same matter as he had surmised for prohibition which the spiritual court was proceeding to try; held that the parson should have another prohibition to the spiritual court to stay proceedings upon a plea which had been finally determined in the proper court.

M. 16 Ja. A. D. 1618. B. R. *Barnwell v. Pelsie*. (1) [Godb. 272.]

**A** PARSON did covenant and grant by deed with one of his parishioners, that in consideration of £6: 13s. 4d. per annum to be paid him, that the said parishioner should be discharged of all tithes, upon condition to be void upon default of payment. Afterwards the parson against his grant did sue the parishioner in the spiritual court for tithes in kind; and it was moved for a prohibition. But the court would not grant it, because that the original, viz. the tithes, do belong to spiritual jurisdiction. But it was said, that the parishioner might have an action of covenant against the parson upon the deed in the temporal court.

that prohibition should not go, but an action on the covenant would lie against the parson in a temporal court.

A parson covenanted by deed that for a certain sum a parishioner should be discharged of all tithes, but afterwards sued in the spiritual court for tithes in kind: held that prohibition should not go, but an action on the covenant would lie against the parson in a temporal court.

(1) This appears to be the same case as *Barnwell v. Tracy*, ant<sup>2</sup>, 295.

M. 16 Ja. A. D. 1618. B. R. *Pemberton v. Shelton*. [Cro. Ja. 498.]

**D**EBT of £33. against the defendant, upon the statute of 2 E. 6. for not setting forth his tithe: the plaintiff being parson of High-Onger in the county of Essex, shews that the defendant occupied so much of arable land, and the corn was worth the tenth part whereof was and so much of meadow, and that the hay was worth 33s. and 8d. per annum, so the entire value was worth £11 and the treble value £33, for which he brought the action: the defendant pleaded *non debet*, and found against him for 20s. And it was now alleged in arrest of judgment, that the declaration was not good, for the third part of £33 and 2s. is £11: 8d. and not £11 only, and the treble value of £11: 8d. is £33: 2s. and not £33 only. And he ought not to demand less than the due debt, unless he shew satisfaction; as in 40 Ed. 3. 13. and 9 Ed. 4. 51. debt upon a specialty or annuity cannot be demanded less than is in the specialty, but he ought to acknowledge satisfaction of the residue: *sed non allocatur*; for all the court held, it was well enough; for there is difference, where it is grounded upon a specialty; or upon a contract, which is a sum certain, or upon a statute, which gives a certain sum for the penalty; for no demand can be of a lesser sum, but he must shew how he was satisfied of the residue; and he may not vary from the specialty; but when the demand is of no sum certain, nor what he shall recover in certainty, but only so much as shall be given by the jury; although he vary from the first valuation, it is not material; for he shall not recover according to his demand in the declaration, but according to the verdict: wherefore it was adjudged for the plaintiff.

Though the sum due for treble value be not exactly set out in the declaration it is immaterial, for the plaintiff shall recover according to the verdict, not the declaration.

M. 16 Ja. A. D. 1618. B. R. *Moore v. Bullock*. [Cro. Ja. 501.]

**P**ROHIBITION. The surmise was, that the abbot of Beauchiefe (2) in the county of Derby, was seised in fee of the rectory of Norton, which was appropriated to the said abbey, time whereof, &c. and was seised in fee of a close called the Medow-Close in Greenston, in the parish of Norton; and held the said close, and took the profits thereof in right of all tithes of hay

A surmise in a prohibition that an abbot to whom a rectory was appropriated, was

(2) *De bello copite*, valued at £26: 3s. 4d.

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seised in fee of a certain close, and took the profits thereof in lieu of the tithes of hay, is sufficient without saying it was given time immemorial in lieu of the tithes which shall be intended.

within the said hamlet of Groomston. The defendant pleaded, that the abbot was seised in fee of that close, as parcel of such a farm, and traversed, that he had it, and took the profits thereof in lieu of the tithes of hay in the said hamlet; and issue being joined thereupon, it was found for the plaintiff. And it was now moved in arrest of judgment, that the surmise was not good; for he shewing that he was seised in fee, that is, as parcel of his glebe, it cannot be in recompense of the tithes; but it ought to have been shewn, that it was given in ancient time in recompense of the tithes; or shewn, that he and his predecessors time whereof, &c. have had the occupation of that close, and the profits thereof, in lieu of tithes; and not to say that he was seised, which shall be intended as parcel of the glebe: *sed non allocatur*; for it is a better form to say, that he was seised in fee, for it is so ancient that it cannot be shewn when, or by whom it was given; but having had it always in lieu of tithes, it is good enough, and shall be intended to be given before time whereof, &c. in recompense of the tithes; and that in regard of that land the discharge of those tithes had its beginning: wherefore it was adjudged for the plaintiff. Vide 8 Ed. 4. (1) 14. Co. 2. Rep. fol. 45. *Pigot and Heron's case* (2); and a precedent was cited, Hil. 42 Eliz. *Austen and Pigot*, (3) where such a prescription was held to be good.

(1) *Ante*, 44.(2) *Ante*, 136.(3) *Pigot v. Symmeson, ante*, 148.

M. 16 Ja. (4) A. D. 1618. B. R.

*Britton v. Ward*. [Palm. 113. Turn. MS. Rep. 37.] Cro. Ja. 515. 2 Ro. 97. 127. Winch. 70. *Anon.* in Poph. 144. 1 Gw. 330.

**A**CTION of trover for two lambs, and special vendict; the prior of Daventry was seised of the rectory of Norton, wherein was a vicarage endowed time whereof memory runs not, until 30 H. 6. that the prior was also seised of the advowson of the said vicarage, and in 30 H. 6. the pope by his bulls ordained, that when the vicarage should become void, the church of Norton should not for the time to come be governed by perpetual vicars but by monks of the said priory, or other vicars ecclesiastical and secular to be placed and displaced at the will of the prior; that the prior and convent discharged the cure, &c. with a *non obstante* all constitution to the contrary; by reason of which the prior was seised of the vicarage appropriate, *prout lex postulat*: and afterwards the church of Norton was served by monks, and so continued to the dissolution 31 (5) H. 8. By mesne conveyances the priory was conveyed to Britton the plaintiff.

The stat. 4 H. 4. c. 12. is not retrospective, and it was competent to the pope to dissolve a vicarage founded in the time of King John, and to reannex it to the parsonage, notwithstanding that statute and 15 R. 2; besides 31 H. 8. and 35 Eliz. will supply any defects in the dissolution of a vicarage, by reputation, dissolved: the judges said there would otherwise be great inconvenience from these "sleeping" vicarages.

2. Tithes of wool and lamb may pass under the words alterage and small tithes, (where the usage was shewn in evidence.—Winch.)

3. Ecclesiastical instruments are to be expounded according to the ecclesiastical law.

4. A copy of a pope's bull is not evidence, the bull itself must be produced.—Winch.

5. Lambs are small tithes.

6. The nature of the thing and not the value makes it small tithes.

*Davenport* first considered the nature of a vicarage; and he said a vicar was so called *quia vicem alterius gerit*; and he is considered of ecclesiastical consequence, as appears by the Reg. 147. that he shall not be arrested: see 14 H. 8. 16. and *Lindwood lib. de Officiis Vicarii*, 35. At common law, there were no vicars perpetual, but temporary, placed by those who had the appropriation; and at common law no *juris utrum* laid for their possession; but they might be increased and diminished at the will of the ordinary; see as to the origin of them, *Flowed*, 497. that they were but deputies to those, who had the appropriation. And there was no endowment of vicars until the 8th John; see the ordinances therefore made in *Lindwood*, 36. and *J. Dithona*, 47. And there was no *quere impedit* for the advowson of a vicarage, until Westm. 2. c. 5. now any *juris utrum* for the possessions of a vicar, until 14 E. 3. c. 17. and inasmuch as impropriations had at that time much increased, an ecclesiastical or-

(4) I have adopted Broke as my authority for the term in which this case was argued, the various reporters differing extremely. The number of times it was argued may account for this. It appears to have excited great interest at the time, but the subject has

been so put to rest by the statute, that I conceive Palmer's Report will be thought quite sufficient by the lawyer.

(5) It appears from Speed that Daventry was valued at the dissolution at £136: 7s. 6d.

finance

dianet was made, that those who had appropriations should endow their vicar, as 21 H. 3. A.D. 1236. See J. Diathona, 47. and in *Juris Utrum*, 16. And then came the statutes, 15 R. 2. c. 6. and 4 H. 4. 12. which extend to appropriations made after those statutes, but this appropriation and vicarage were before, and so remain at common law, and at common law the bishop might endow, or increase and dissolve the vicarage at his will, as 40 E. 3. 28. by *Kirtles* and *Mowbray*, and 31 H. 6. 14. *YELVERTON*. (1) 20 E. 4. 6. by *Pigott*. And he cited *Perry* and *Banks* in the exchequer, where, upon *not guilty* pleaded, the jury found that the vicarage was endowed, and the parsonage appropriate to the dean and chapter of St. S. and that upon the suggestion of one *Fulke*, that the endowment and the possessions of the vicar were not sufficient to support him, the bishop, 24 H. 8. as ordinary, dissolved the vicarage, and the dean of St. S. enjoys it peaceably at this time.

*Noy*. Vicarages existed long before the time of King John; and in Oxfordshire are four vicarages which are much more ancient. In 4 H. 2. a vicarage was made by Alexander 3. and the successor of the parson could not remove the vicar, because he was a perpetual vicar. See *Decretals*, lib. 1. *De Officio Vicarii*, tit. 13. & 2 H. 3. *finis*, 81. A fine was levied of a parsonage, excepting the advowson of the vicarage, which proves there were vicarages at that time. But the pope made the appropriation in this case, which cannot be; for although he usurped much upon the bishop, yet in England he was never allowed to have jurisdiction in temporalities, although they were in *ordine ad spiritualia*; as was resolved 18 (E. 1.) in Parl. in the case of *Montague*, concerning bastardy, by reason of divorce carried before the pope: and it appears by the records, 13 E. 2. that one of his own chaplains said, that he claimed nothing in the temporalities of bishops. 2 E. 3. *Quare impedit*. 23. there appropriation is made by the patron and the pope, because at that time the patron might bestow his tithes where he pleased. 50 E. 3. 26. A prebend cannot be turned into a treasurership without the King's consent: so a vicarage may be at the pleasure and will of the parson; for by 2 H. 4. 24. he shall have his action against any other than the person at whose will he is vicar, and may maintain his action as well as a prior donative and removeable, who may bring his action 12 E. 4. 17. See for vicars temporal *Gregorius*, who says that mercenary vicars have no tithe, but temporal and perpetual have. 17 E. 3. 46. The King grants a deanery, and does not express what estate, it shall be at will: and there are vicars and masters of hospitals at will.

And in Easter Term, *George Croke* for the commencement of vicars cited also 40 E. 3. 27. 22 E. 4. 24. 18 Ass. 38. & *Brief*, 256. 31 H. 6. 14 *Ann*. 32. 16 E. 3. *Ann*. 24. & 152; for the power of the pope, 29 E. 3. *Earl of Salisbury's case*. 11 H. 4. 36. 17 E. 3. 39. 19 E. 3. *Juried*. 22. 2 Rep. 47. 11 Rep. 13. Also a monk may be vicar, 44 E. 3. 4. 14 H. 4. 16. for his profession continues, but his obedience is discharged, and he may have an action concerning his vicarage. 3 H. 6. 23. *Bridgeman*. And it was ordered by the court that he should only argue the point, whether the statute 4 H. 4. extended solely to vicarages and appropriations after 15 R. 2. and not to those before that statute; for in that case it follows that a vicarage made long before that statute, may be disposed, altered, and disallowed, at the will of the ordinary. He said that in the exposition of a statute it shall be construed to have no retrospect, unless there be express words in the statute, or unless it be made in suppression of fraud and covin, which were at all times odious. For if any other exposition should prevail, it would endanger by alteration the estates of men: so in this statute there is an express clause, that all vicarages "after" 15 R. 2. and also "from henceforth" declare as much: and this provision of the pope was held to be good, 30 H. 6. when it was made, until this time, by reason of the continual usage, especially as it is an ecclesiastical instrument; as M. 39 & 40 El. *Smith* and *Barkdale's case*, (2) the rectory was appropriated in the time of Hen. 3. and the vicar endowed *de omnibus decimis garbarum*, within a certain precinct, and it was alleged that to the time present he had ever been used to take tithe corn and tithe hay in the said place; and it was adjudged that it should so continue, although *ex termini* tithe hay be not in-

(1) *Antz*, 36.(2) *Barkdale v. Smith*, *antz*, 141.

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cluded in the words *decimis garbarum* at this day, yet by reason of the continual usage, it shall be taken, that at that time they used the words with such meaning. (1) Also, he said, that the pope might dissolve or alter the vicarage, for it belongs to the ordinary to endow the vicar, 40 E. 3. before cited, 22 E. 4. 24. 14 H. 6. 16. and he said that divers doctors of law had conferred upon the validity of this bull and instrument of the pope; and they held that it was sufficient in law, and that the vicarage was dissolved thereby, and the whole court agreed; and a rule was given, that judgment be entered for the plaintiff.

(1) *Vide Reynolds v. Green, antè, §13.*

### *Ward v. Britton.* In Error in Cam. Scacc.

**I**N an action of trover for two lambs, the jury found the defendant not guilty as to one, and as to the other a special verdict; viz. that the prior of Daventry was seised of the rectory of Norton, and that time whereof, &c. there was a vicarage endowed with alterages (2) and small tithes, and that the prior was seised of the advowson of the said vicarage; and that 30 H. 6. the pope published a bull to this effect, which the jury found *in hæc verba*. 1. He shewed his care of religion, and that the prior had petitioned him concerning the decay of his priory, wherefore the pope ordained upon this petition, and that of his son Henry VI. that whensoever the vicarage should become void, that for the future *non per perpetuos vicarios gubernetur, sed per monachos* of the said priory, *et alios vicarios ecclesiasticos et seculares ad natum prioris instituendos et amovendos*, without license of the ordinary or king; *et non obstante* the constitutions of Otho; but that he should pay episcopal dues, with a curse if, &c. By which the vicarage was appropriated *prout lex postulat*, and that ever after until the dissolution, the prior and his monks took the profits; and that after the surrender and dissolution, the King granted twenty-four manors, and all the hereditaments which belonged to the said priory, to Audley his chancellor: and after 6 Jac. the King granted to Phillips and Andrews the rectory of Norton, and the advowson of the vicarage of Norton (under whom *Britton*, the plaintiff, claims), and that the lamb was taken by the plaintiff; and whether upon the whole matter his title was good, &c. and judgment was given in B. R. against *Ward*, the vicar, and that the appropriation made by the pope was good, whereupon the vicar brought error in the Exchequer Chamber.

*Noy.* The 1st question is, whether a good title has been found for the vicar; for if not, then of common right it belongs to the parson; but I conceive that a good title has been found for the vicar; for it is found that the vicar was endowed with small tithes, and lambs are small tithes; for where [the vicar of] Saffron Waldon was endowed with small tithes, the saffron was held to be a small tithe, although of greater value than the corn; (3) so of garlick, for it is in its nature a small tithe: so wool, pot-herbs, &c. *Lindwood, tit. de tabidis decimis; Decima sunt ova, pulli*, and young sheep. And he there says that in England *lana, ova, lacticia, casei et agni, sunt minuta*. In many places hemp and flax are of great value, yet they are small tithes: so the nature of the thing, and not the value, makes it small tithe. 39 & 40 El. the vicarage of West Haddon, in Northamptonshire, was endowed with small tithe, and it was re-

(2) Note upon evidence to a jury, between *Bret* and *Ward*, upon the dissolution of a vicarage, in the county of Warwick, which was part of the priory of Dantrey, where the pope by his bull gave to the vicar *minutas decimas et alteragium*: and it was certified by the doctors, that *alteragium* will pass to the vicar tithe wool, &c. and the usage was shewn in evidence, and the copy of the pope's bull; and the court would not credit that, without seeing the bull itself; and so the plaintiff was nonsuit, and the jury was discharged. [*Winch.*]

*Wincoll* argued, the tithes of lambs are within the compass of the endowment, and within the word *alteragium*, for so the civilians agree: and in a case between *Turner* and *Andrews*, 2 El. it was resolved that the word *alteragium* extends to the tithe of wool and lamb, and to all other small tithes and offerings: and M. 13 Ja. between *Britton* and *Cartwright*, it was decreed accordingly in the Exchequer (which decree was produced and read in court). *MS. Calth.*

(3) *Vide Bedingfield v. Peak, antè, 118.*



solved in the Exchequer, upon conference with the civilians, that lambs are small tithes.

2. Whether this bull of the pope made it appropriate? And he argued that it did not, for the pope had no power in England but in things merely spiritual; and if a spiritual thing were mixed with a temporal, he had no power. 13 E. 2. in the Exchequer the bishop of Winchester was an alien, and collated by the pope; whereupon the King protested at Lambeth, that all the bishoprics in England belonged to him, and were of his patronage, and protested that he would not admit him; upon which the said alien renounced all title to the temporalties through the pope, and prayed that the King would admit him; and so it was done: therefore where a temporal fee is mixed, the pope has no jurisdiction. 34 E. 3. *Quare imp.* 197. Appropriation is not within the compass of the spiritual court: if a union of two churches is pleaded, it is sufficient to say *concurrentibus his*; but in pleading an appropriation, it must be shewn how it was made. And an appropriation might be made by the patron and pope before the council of Lateran; for till then, the patron might give his tithes to whom he pleased; but after the council, not without the consent of the King. 2 E. 3. 23. For the King had an interest in every parish before the popes, which might devolve to him as patron. *Grants*, 58. 21 E. 3. 6. The king ought to assent. Besides here it is not appropriate, for the words of the bull are, that the prior *should take the profits* without words of appropriation: it is also notwithstanding the constitutions of Otho, which were not against appropriations.

3. Whether there be a consolidation here? He argued that there was not, for in this case the vicarage could not be consolidated. If there be a parsonage and a vicarage derived out of it, the ordinary may join them: but here it is found that time whereof, &c. there was a vicarage, and also a parsonage, and perhaps the inhabitants agreed to have both a parsonage and a vicarage, and that the vicar should have the small tithes, and the parson the other tithes; and our books shew that a parsonage and a vicarage are two ecclesiastical benefices. 31 H. 6. 14. (1) Botreaux was patron of the rectory, and a parson had one moiety, and the patron the other, and the patron could not have an *indicavit*, for the parsonage and vicarage are distinct, and may be several benefices. N. B. 45 Acc. Besides this vicarage could not be consolidated without the king's consent. I admit that a vicarage not presentative may be dissolved without his leave, but not if it be presentative; for so a spiritual corporation would be dissolved. M. 6 R. 2. Rot. 8. Exch. The pope, upon complaint of the bishop of Coventry, of Moses, the prior there, ordained that he should no longer be prior, but should be *ad mensam episcopi*; whereupon the prior and convent assaulted the bishop, and beat him, and broke his head with a cross; and afterwards an assise was brought: and it was held that a dissolution by the pope was not good. The dissolution of the orders of Templars and Hospitallers by the pope was not good until it was confirmed by the king. *Walsingham*. 59, 40, 46 E. 3. 28. 31 H. 6. 13. A vicarage impoverished may be dissolved unless, &c. 22 E. 4. 24. Patron and ordinary. 9 E. 3. 11. Presentation to a chapel makes it a church. 11 H. 6. 18 & 3. Patron presents to the vicarage, for by these acts no patronage is altered, and the supreme patronage in the King is not altered thereby. In *Austin* and *Twine's* case, Tr. 37 El. Rot. 347. it was resolved that the ordinary might unite two churches, and held good; but it was also resolved that the ordinary and patron could not unite them to a dean and chapter; for so they would be altered. *Grants*. 104. Union to a priory could not be without consent of the King. 6 H. 7. 13. A vicarage may be appropriated to a parson, for the same patronage remains, but not to a priory or other house. Besides here it was not the intention of the pope to dissolve the vicarage, but to give ordinary jurisdiction to the prior to grant to his monks to be parsons there, and to take the profits. *Ayde*. 103. Patron of a donative need not present to it, but he himself may take the profits. 6 H. 7. 14. There shall be no lapse of a donative, but if he be disturbed, he shall have remedy at common law. 17 E. 3. 45. The King may give a donative at will.

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4. Whether this vicarage might be united or appropriated after the statute 4 H. 4. which says, that all vicarages united or appropriated shall be void. It was said that this statute extended to unions before, and not after: the French word is (*eues*), which extends to the future. 36 E. 3. c. 18. The words are "if lands seised into the hands of the King," which extend to the future. So *Westm. 2. Voluntas donatoris in charta expressa*. 21 H. 8. which prohibits false recoveries, the words are, "where many made long leases;" yet it extends to the future. 34 H. 8. which provides for tail *ex dono regis*, has words in *presenti*. 11 Co. 33. the words "such" refer to the matter; and so here the mischief extends this to the future. I have seen the roll of this statute, and it provides upon petition of the Commons to the King, upon which the act was made, that there should be no dissolution of vicarages. See *Beadle's case*. 2 Co. *Fridde and Napier's case*. (1) Besides the King grants the advowson of the vicarage to the plaintiff, wherefore the vicarage is not dissolved.

*Bridgeman*. 1. *Minute decima* do not include tithes of land, but only gardens, and hemp and hops. 2 E. 6. which gives a remedy for not setting out predial tithes, extends also to lamb, as was resolved 40 & 41 El. *Sherman and Beadle's case*, that debt upon this statute lies for tithe of lambs, and so they are not small tithes. I admit that saffron is a small tithe, for it is a flower. 38 El. the dean of Norwich was parson, and had great tithes, and the vicar the small tithe: arable land was converted into saffron ground, and the vicar had it.

2. The vicarage is of spiritual jurisdiction, therefore the ordinary, and consequently the pope, might dissolve it; and it shall be intended that it was derived out of the parsonage. 2 H. 3. *Grants*, 89. that of common right the parson should present to the vicarage. The dissolution of the order of Templars by the pope was good; and the statute 17 E. 2. did not dissolve the corporation, but provided that their lands and possessions should not go to the founders, but to *St. John of Jerusalem*. If a vicarage be dissolved, it reverts to the parson, 7 E. 4. 12. 11 H. 4. 4. If abbot and monks die, their possessions revert to the founder, 2 E. 2. 57. *Of Templars*, 40 E. 3. 28. 22 E. 4. 24. That the ordering of the vicar belongs to the ordinary, 10 E. 3. 1. per *STOUVE*, that there need not be a temporal vicar, 14 Ass. 8. If a manor belong to a prebend, which is dissolved, the land escheats. So the usage shews that the Pope intended it should be dissolved. 17 E. 3. 51. by *MOUSRAY*, if a thing be granted by obscure words, it shall be construed by the usage after, especially as this is an ecclesiastical instrument. As in *Beadle and Smith's case*, (2) M. 39 & 40 El. B. R. Rot. 209. Where a vicarage in time of H. 3. was endowed with *decimis garbarum*, and the vicar had been used to have tithe hay, it shall be so construed at the present day.

3. The statute of H. 4. does not extend to the future, it was solely to strengthen that of 5 R. 2. as may be collected from *YELVERTON* in 36 H. 6. 14 & 80 E. 46. by *CHOKER*. Wherefore he concluded that the dissolution was good.—[*Palmer*.]

By the court, if this vicarage were within the statute 4 H. 4. neither the pope nor ordinary could dissolve it, for by such a construction the statute would be evaded in its intent; for the statute has enacted, that upon any appropriation made, after such a time a vicarage shall be endowed, and a secular person be ordained vicar, and that no regular or religious person be made vicar (for the usage before was, that when a church was appropriated to a monastery, they did use to serve the cure by the monks of their house, which this stat. H. 4. intended to prevent) and appointed that there should be a vicar perpetual (who should be admitted and instituted, &c.) to serve the cure, and this vicar to be a secular man and not regular. Now if such a construction be made, that notwithstanding this statute the pope, or ordinary, might dissolve the vicarage, then they may serve the cure again by their monks and regular persons, as they did before, the whole intent and scope of the statute would be evaded and frustrated, which would be an unjust construction. But it appears that this vicarage was so ancient that they had need to fish with a very long hook, to bring this vicar within the statute H. 4. and it is not within this statute, for the statute is limited and bounded as to time, and this vicarage was created before that

(1) *Ante*, 205.(2) *Bairdale v. Smith, ante*, 141.

time. Also the judges ought, by their office, to endeavour to quiet the possessions of the King and others. And if they will now suffer all the ancient instruments of union, consolidations, &c. to be now questioned and examined by the rule of the common law, where time had settled and confirmed them, it will be to the great disquieting of many persons: and therefore they will not suffer the instrument of dissolution to be questioned, inasmuch as for all time since it had been taken as dissolved. Judgment was given for the plaintiff.—[Turnor].

Afterwards in Hil. 30 Ja. the judgment given in B. R. was reversed not for matter of law; but because the action was for two lambs; and as to one the jury found a special verdict, upon which judgment was given for the plaintiff: and as to the other the jury found the defendant not guilty: but in the judgment the defendant was not discharged of this lamb, nor was the judgment entered as to that, *quod querens cat inde sine die*; but only that the defendant should be in misericordiam for that lamb, upon which judgment was given against him. And for this error the judgment was reversed.—[Palmer.]

M. 16 Ja. A. D. 1618. B. R. *Anon.* [2 Ro. 55.]

IF there be a suit in the spiritual court between the parson and vicar concerning tithes, prohibition has at all times been denied, unless there be other matter which is to be determined by the common law.

In a suit in the spiritual court between parson and vicar, prohibition will not be granted.

M. 16 Ja. A. D. 1618. B. C.

*Farmer v. Sherman.* [Hob. 248.] Hetl. 133.

IN prohibition the case fell out, that an abbot having a privilege to be discharged of tithes *quandiu manibus propriis*, in the time of E. 4. made a gift in tail, and 31 H. 8. the abbey was dissolved. The question was, whether the donee and the issue should be discharged. It seems clear he shall not be discharged, for the statute discharges none, but as the abbot was discharged at the time of the dissolution, so they must claim the estate and discharge under the abbot, since the statute; so if by a common recovery the reversion had been barred before or after the statute; but if the land had returned to the abbot or King, before or after the statute, the case had been otherwise.

the donee should not be discharged under that statute, but if the reversion had returned to the abbot or King before or after the statute, it had been otherwise.

An abbot discharged of tithes *quandiu manibus propriis*, &c. temp. E. 4. made a gift in tail of the land, the abbey was dissolved 31 H. 8. held that the issue of the abbot or King

M. 16 Ja. A. D. 1618. C. B.

*Napper v. Seward.* [Hetl. 133.] Hob. 248. 1 Gw. 492.

THE parson had a prohibition against divers of his parishioners that libelled in the spiritual court to make proof by witnesses of divers manner of tithing in *perpetuum rei memoriam*. (A strange attempt.—*Hob.*) *Vide ante*, 296.

make proof in *perpetuum rei memoriam*.

Prohibition to a libel in the spiritual court by parishioners to

H. 16 Ja. A. D. 1619. B. R. *Cannon's Case.* [2 Ro. 78.]

IT was clearly agreed in this case that if a parishioner sever his hay and make it into reeks or cocks and afterwards sell it, the parson cannot sue the vendee for his tithes thereof, but him who severed, and upon this matter prohibition was granted.

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If a person sever his hay and afterwards sell it, the vendee and not the vendee shall pay tithes.

H. 16 Ja. A. D. 1619. C. B.

*Hide v. Ellis.* [Hob. 250.] Hetl. 133.

PROHIBITION for *Hide*, plaintiff, against *Ellis*, farmer of the rectory of Shinfield in Com. Berk. and prescribed that all tenants and occupiers of meadow, had used to cut the grass and strew it abroad called tedding, and

A custom to make grass into grass cocks, and set out the tenth then

1619.

NIXE v. ELLIS.

cock, for the person, in full satisfaction of the first and latter math, held good, in divers places they set out the tenth acre of wood standing, and so of grass.

then to gather it into windrows, and then to put it into grass cocks in equal parts without fraud, and then to set out every tenth cock, great or small, to the parson, in full satisfaction, as well of the first as of the latter math: Upon traverse of the custom, it was found for the plaintiff. And exception was taken that the custom was void, because it contained no more than every owner ought to do, and so no recompense for the second math; but the court gave judgment for the plaintiff. For tithe naturally is but the tenth of the revenue of my ground, not of my labour and industry, where it may be divided, as in grass it may, though not in corn: and in divers places they set (1) out the tenth acre of wood standing, and so of grass: and so here the jury having found this form of tithing to be the custom there, it is well. And the like judgment was given upon the like custom in the King's Bench, P. 2 Jac. Rot. 192. or 292. between *Hall and Simmonds*. (Vide *Johnson v. Awbrey*, ante, 147. *Hall v. Fettiplace*, ante, 157. *Parrey v. Chauncey*, ante, 159. *Portinger v. Johnson*, ante, 261. *Greene v. Austen*, ante, 164.)

(1) "Fell," Hob.

E. 17 Ja. 1619.

*Pangborne, Parson of, v. Sir John Davies*. [Hutt. Rep. MS. No. 46. fo. 78.]

If corn be severed from the nine parts, and set out for tithe; held that if the land be discharged by 31 H. 8. by such severance and setting out, no property is in the parson, but the owner may take it, and the parson may bring trespass, if the tithe of right belong to him: yet such setting out is covinous and does not excuse from treble damages by 2 E. 6.

THE first day of this term, in trespass brought by the parson of *Pangborne* against *Sir John Davies* for taking several loads of corn which *Sir John* had severed from the ninth part and set forth for tithe; it was resolved, that if no tithe be due, but the land discharged by the statute 31 H. 8. (this was parcel of the possessions of the abbey of Reading, in Berkshire), that by this severance and setting out of them as tithes, no property was in the parson, and *Sir John Davies* might take them, notwithstanding he once set them out and severed them from the ninth part; and the parson might have trespass, if, *de jure*, he might have the tithes; and yet this manner of setting out the tithes is not such a setting out as shall excuse him from treble damages, by the stat. 2 E. 6. for it is but covinous. *Quare*, if the parson had taken and converted them to his own use, where there was a *modus decimandi*, being set out by the owner of the land, whether he who had so set them out should have his action of trespass. But in this case the jury found for the plaintiff, for there had been a former verdict upon the special prescription pleaded, that until and at the time of the dissolution they were liable, and so he did not hold the land discharged of payment of tithes.

E. 17 Ja. A. D. 1619. B. R.

*Dandridge v. Johnson*. [2 Ro. 84.] Cro. Ja. 523. 1 Gw. 354. MS. Calth. (1)

No tithes are to be paid for fulling mills, tin mills, &c. for the reason (*inter alia*) that the civilians are not agreed whether such tithes should be prædial or personal.

THERE was a libel in the spiritual court for tithes of a grist mill and of a fulling mill. *George Croke* agreed, that for a grist mill tithes should be paid, but he said that the statute *de Articulis Cleri* [9 E. 2. c. 5.] which says, that there shall be no prohibition for mills, is not to be understood of a fulling mill, for the profit which arises from it, is by the labour of men, and therefore not intended but within general words of the statute, and therefore he prayed a prohibition. *Calthorpe* said, that it was the opinion of *Warrburton* and *Nicholls*, 12 Ja. that tithes should be paid for a fulling mill, viz. the tenth penny of the gain, but of a grist mill the tenth dish of corn shall be paid, for this is in the nature of a prædial tithe, and so it was held 5 Ja. *Ubi* and *Lace* case. See *Landwood* in his Provincial Constitutions.

At another day *Doppening* held, that unless a special custom was alleged for the payment of tithes of a fulling mill, that no tithes should be paid, for he had talked with the civilians, who held that tithes should be paid of such a

(1) The report of this case in *Gwillim* is from *Calthorpe's* MS. but as it does not contain the decision of the court, *Rolle's* is preferable.

mill, but they could not agree what kind of tithes, for some said it was a personal tithe, others that it was prædial, but he said it could not be a prædial tithe, for it arose solely from the labour of man, and if he should have this as a prædial tithe, then another tithe would be demanded of him who sheared the cloth, and also of the dyer of it, and so tithes should be paid several times for the same cloth. Besides the usage of the country is to be respected, for of tin mills, or lead mills, or plate mills, or rag mills, or edge paper mills, no tithes shall be paid, wherefore, &c. and DODDERIDGE, HOUGHTON, and CROKE, Justices, agreed to this; and therefore a consultation was granted as to the grist mill, and as to the fulling mill the prohibition stood.

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E. 17 Ja. A. D. 1619. B. R.  
*Wright v. Poule.* [2 Ro. 83.] 1 Gw. 357.

**N**OTE, that where the suit in the spiritual court was for tithes of cherry trees, and asp and beech trees, in Buckinghamshire. Prohibition was granted, for in that country timber is so scarce, that this kind of wood serves for timber; and asp trees serve for arrows, which are for the defence of the realm. (1)

Buckinghamshire, for in that county they serve for timber; and asp trees serve for arrows, which are the defence of the realm.

(1) Vide *Laphame's case*, ante, 255.

M. 17 Ja. A. D. 1619. B. R.  
*Dixon's Case.* [2 Ro. 118.] *Dickenson v. Reade.* MS. Calth.  
1 Gw. 358.

**E**DWARD 6. being seised of the rectory of Dale, in the county of Southampton, granted it to one Mills by these general words, "*totam illam rectoriam de Dale, ac omnes decimas, &c.*" and after that there was a clause in the grant "*Quæ quidem omnia et singula præmissa modo extenduntur ad verum valorem de £32 per ann.*" which value was contained in the particular of the King's auditor, to which the patent referred. At the time of the grant there was a grange in the parish, which with the tithes thereof was leased, in 16 H. 8. by the then abbot; which lease continued until the 16 El. a rent being reserved thereupon; and the question was, whether the grantee of the King should have the tithes thereof. And it was resolved by all the judges, that the tithes of the said grange passed to the grantee, although the words, "*quæ quidem omnia, &c.*" referred to the value of the tithes without the grange and did not extend to it, and perhaps the King did not intend to pass more than that value; inasmuch as the words are general, viz. *totam rectoriam*, and the tithes of the grange could not be valued, for that they were suspended by their being leased to the terre-tenant at the time the particular of the value was made by the King's auditor; and the rent which was reserved upon the lease of the grange, and the tithes thereof, never issued out of the grange, but out of the land of the grange; but if the words of the King's grant had been special, viz. the tithes of the grange, and also of such another farm, and also of a grant of tithes of such other farms particularly named, amounting to the value of £62, then nothing more should pass than according to the recited value.—And it was said by the judges, that it would be a hard construction to make the patent void for the whole of that which the *quæ quidem, &c.* not mentioned in the value of, &c. 2 Co. 33. *Doddington's case*; and by this case it is clear, as the judges said, that the patentee ought to pay to the King a new fine for these tithes of the grange, which are omitted in this particular of the value according to the rate described in the statute 1 E. 6. — DODDERIDGE, J. Although the tithes being leased with the grange cannot be valued, yet by reason of the rent reserved for them, for that the tithes have a being, see *Dobitoff* and *Curteene's case*. (2)

Where the tithes of certain lands belonging to a smaller monastery were in lease at the time of the dissolution, there is no discharge, for it appears there was only a personal discharge in respect of the unity, and no real discharge of the land.

The King granted "all that rectory of Dale and all tithes, &c. all which are now extended at the true value of £32 per ann." which did not include the value of certain tithes of a grange then in lease; it was held that those tithes passed under the general words of "all the rectory," though not included in the particular of the value, but if the words had been special; viz. the tithes of the grange, and also of such another farm, and also of such other farms particularly named, amounting to the value of £32, then nothing more should pass than according to the recited value.

(2) *Ante*, 262.

M. 17 Ja. A. D. 1619. B. R.

The Earl of *Clanrickard* v. Lady *Denton*. [MS. Hargr. N° 30. B. M. Turnor, p. 44.] 2 Ro. 122. Palm. 37. 1 Gw. 360.

1619.

Prohibition was granted to a libel for tithes of *silva cædua* in the Wyld of Kent, and issue being taken on the prescription, it was found for the plaintiff, as had been before the case with respect to the wyldes of Sussex and Surrey.

2. A prohibition is grantable after consultation, if there be any material addition to the libel.

3. If land of a monastery within 31 H. 8. were discharged in the hands of the prior, &c. constant payment ever since the statute does not make it chargeable.

4. A general prescription to be discharged of tithes, will not be supported by evidence of a discharge *dum propriis manibus*, &c.

5. Where a *modus* is laid for a whole district, though an action be between particular persons, none of those who claim under the same prescription shall be admitted to give evidence, for those within the district are parties in interest, though not in the action; so the evidence of any person who is owner, proprietor, or farmer of a parsonage, shall be rejected.

**T**HE Earl of *Clanrickard* was plaintiff in a prohibition, and Lady *Denton*, widow, defendant. The case was as follows: the said Lady *Denton* being proprietor of the impropriate parsonage of Tunbridge, which parsonage is within the ancient precinct well known and called by the name of the Wyld of Kent, and the said Earl of *Clanrickard* being seised in right of the Lady *Frances* his wife, of divers coppices within the above parish, and within the precinct of the said Wyld, he, the Earl, felled several of the said coppices, &c. and the said Lady *Denton* libelled against him the said Earl of *Clanrickard* in the spiritual court, for the tithe of fellable and saleable wood, to wit, for the underwood of these coppices. And the said Earl came into this court, and suggested that there is an ancient precinct called by the name of the Wyld, within which precinct there are divers parishes; and that within that precinct, the parish and the place where, &c. are situated; and that through all that precinct from time whereof memory, &c. there had been a custom that all owners and proprietors of any coppices or woods shall be discharged of tithe of all manner of wood, &c. and thereupon he prayed a prohibition, which was granted. And Lady *Denton* joined issue with him, that there was no such custom, and prays a consultation. And there was a trial at bar upon this issue or custom, in which the right of the custom was not to be debated, to wit, whether it was a good custom or not; but whether there were such a custom *de facto* or not: and on the part of the plaintiff to prove the custom, this evidence was given. Proof by witnesses, that through divers several parishes within this precinct, they had known several coppices fallen, and no tithe paid for them: for this the testimony of those who had, to wit, bought the wood of these coppices was most proper; for the buyer is to pay the tithe, and not the seller. And the general testimony of others, who said they had not known any tithe paid, was not material, being merely negative. Note, in this case the testimony of all (without respect to condition or reputation) who had, either as owners or farmers any underwood within the Wyld of Kent, was rejected: for the custom being alleged to be general through the whole Wyld, though they were not parties to the suit, yet, for that the custom concerned each of them in their private profit by this immunity, they were *quasi* parties, and their testimony *in propria causa*, and therefore refused. As in the case of common, if it be alleged in a whole vill, though the suit be between particular persons, yet none of those who claim common by the same prescription shall be admitted to give evidence. So, in the case of a *modus* alleged in a whole vill; for every one within the vill are parties in interest, though not parties to the action. So, to disprove the custom, the evidence of any person who was owner, proprietor, or farmer of a parsonage, was rejected. They also shewed, that upon a similar suggestion for the like custom for the whole Wyld of Sussex, which adjoins to this Wyld of Kent, a verdict had found the custom. And in Sir *Moyle Fynck's* case, where issue was taken upon the custom in the Wyld of Sussex, after full evidence, the custom was so strongly proved, that the plaintiff who would have destroyed it, was non-suited. But for aught that was shewn to the contrary, this was the first trial of this custom in the Wyld of Kent.

But for the inducement of this custom; that it was good *de jure*, the plaintiff's counsel offered these reasons. 1. It was said by them, that before the constitution made at a council held in 17 E. 3. under John Stratford, then Archbishop of Canterbury, no tithe was paid for any wood. And this canon or constitution is recited by Lindwood, in his third book, fol. 189, *cap. Decimæ de silvis cæduis*, where in the preamble of the canon it is recited, that it was the custom then to pay no tithe of *silva cædua*; but the canon only declares what shall be accounted and reputed *silva cædua*: and from the preamble they inferred, that it proved, that people were not in the custom, prior to that time, of paying any tithe of wood. They then cited the several petitions in parliament by the commons in the following year, cited by Selden, c. 8. 238. which

prove,

prove, that the commons conceived themselves to be aggrieved by being compelled to pay tithe of wood. And in Doctor and Student, c. 155. it seems that tithe of wood had not been anciently paid; but when parsons demanded the tithe of all wood afterwards, then the statute of 45 E. 3. was made, which, though not so large as the common law, yet does not restrain the common law; and therefore if a prescription at common law to be discharged of tithe of wood were good, it would still remain good, for there is no law against it, nor does the constitution, if it be received, enact the contrary. — DODDERIDGE, J. The intention of the constitution was only this: for as all wood consists of either timber or underwood, which is called *silva cædua*, and for timber, it seems, no tithe was paid, but for *silva cædua* it was paid, now the canon declares what wood shall be accounted *silva cædua*. But Selden told me, that before this constitution of 17 E. 3. by the canon law, without doubt tithe of wood was payable: but those canons were not received and incorporated into our law; and canons are of no power unless they are received and allowed by our law; so that it seems by the old common law, tithe was not paid of wood. And, as it seems to me, the several statutes made in the time of E. 3. recited in Selden, fo. 238, 9, &c. enact nothing for the payment of tithe of wood; but it is only enacted by them, that it should be as had been used before. And in divers places, as it seems, no tithe had been used to be paid for wood; so that if this usage continues in any place *de non decimando* for wood, that it will be discharged by law of that tithe at this day. And Selden thought that a prescription *de non decimando* might be good at this time: for the opinion of Choke in 8 E. 4. that a prescription in *non decimando* is not good, is the first authority in our law for that opinion, and from whence he had it, appears not; and since that time his opinion has been received and continued; but, perhaps, if it were examined, it would be found to be but an error.

But the particular reasons for this custom to be discharged of the tithe of wood in the Wylde of Kent were these: 1st. For that it is not a prescription of any particular man and private, but a custom through this whole precinct; and in Doctor and Student, fo. 174. a whole country may prescribe to be quit of tithe of wood. 2. As this precinct of the Wylde was formerly so overgrown with wood, that the parsonages were of little value, and their profits are much increased by cutting down the wood, and converting the land to arable, it may therefore be presumed, that there was a general agreement made by the clergy in respect of this, they should be discharged of the tithe of wood. 3. In ancient times, there was such plenty of wood within this precinct, that it was of no value, and the tithe not worth taking, and thence possibly might arise the custom of not paying any tithe for it. And this custom had continuance till of late years, when wood began there to be of value. And it is conceived that the value of it now has raised the question.

Note, in the said prohibition, another suggestion was, that such a meadow for which tithe hay had been demanded in the spiritual court, was parcel of the possessions of such a monastery, (1) (which was one of the smaller houses,) and that the prior and his predecessors always held it discharged of tithes, and that it was discharged at the dissolution, and ever since; and upon this he had a prohibition: and the plaintiff in the spiritual court traversed this, to wit, that the prior was not seised of this as is alleged, &c. And the plaintiff gave in evidence a bull of the Pope, by which the said prior was discharged (2) *quamdiu propriis manibus excolit*, and upon this the issue was found against the plaintiff: for as the plaintiff suggested a discharge generally in the prior, which intends an absolute discharge for himself, his farmer and tenants, and therefore the bull will not support this discharge, but the issue was found against the plaintiff: and the prescription in this case ought to have been made particularly, to wit, that the prior and his predecessors held it discharged *quamdiu propriis manibus excolunt*. And then it was moved, that a consultation should not be granted,

(1) Note, in this case the stat. 27 H. 8. by which this house was dissolved, was pleaded, and also the 31 H. 8. T.

(2) Note, where a general discharge is

supposed in the abbot, and after it appears to be only a particular one, to wit, *quamdiu propriis manibus*. T.

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but that this is of necessity. — But DODDERIDGE, J. advised the plaintiff to give no evidence upon this issue, and to make (1) a new and particular suggestion, according to his case, and so have a new prohibition. And in

M. 18 Ja. A. D. 1620. B. R. [Turnor's Rep. 97.] 2 Ro. 207.

LADY Denton, farmer of the rectory of Tunbridge, in Kent, libelled in the spiritual court against the Earl of Clanrickard, for tithe in kind of certain land within that parish. The said Earl comes and suggests that the land was parcel of the priory of Tunbridge, and that this priory and all its possessions, came to the King, and was vested in the King by the stat. 31 H. 8. and recited the discharge in the statute, and moreover alleged that the prior and his predecessors, from time whereof memory is not to the contrary, and at the time of the dissolution had held this land discharged from the payment of tithes; and made title to the land: and issue was taken upon the prescription of discharge in the priory; and upon the evidence it appeared, that the priory was of the order of Cistercians, and that they held their possessions discharged of tithes *dummodo propriis manibus aut sumptibus excolunt*: but that their farmers paid tithes. So that upon this issue of an absolute discharge, it was found against the plaintiff, and a consultation was awarded. And now in the spiritual court, *addendo* to the former libel, is an article, that though the prior and his predecessors from time whereof, &c. held this land discharged of the payment of tithes, (*quod non fatetur*,) yet for these sixty, fifty, forty, thirty, twenty, or ten years last past, tithes have been received and paid in kind for the land; and so by this trick, though this land were discharged in manner above-mentioned and by law; yet, by reason of this payment afterwards, they asked sentence in favour of the parson. And so here there is an enlargement or change of the libel; and therefore upon the statute 50 E. 3. c. 4. the defendants moved afterwards for a new prohibition; for the libel is in common form, and now in that which is styled an addition (as the canonists say, that that which is styled an addition is in truth but an illustration of the former libel) is a pretence of payment since the dissolution; and upon this payment, if it be proved, they pray sentence for the parson. And there was a great debate, whether this addition in the spiritual court after consultation granted was an enlargement, or alteration of the former libel; and for that this court was of opinion that it was, the counsel for the plaintiff in the spiritual court agreed to wave these additions, and to proceed solely upon the old libel: so no prohibition was granted. But DODDERIDGE, J. said, if this land were discharged of tithes in the hands of the prior, and the priory were vested in the King by the statute of 31 H. 8. so that such discharge as was in the priory ought by the law to remain, though tithes have been paid ever since the making of the statute, and they therefore pray sentence for the parson, yet a prohibition shall be granted after sentence: for by law this land was discharged of tithes; and this constant payment ever since the statute (admitting it to be so) does not make it chargeable by the laws of this realm; and, therefore, if their sentence be contrary to the law of the realm, a prohibition ought to be granted.

(2) Note, a new prohibition after consultation upon the same libel. T.

E. 17 Ja. A. D. 1619. B. R. *Willis v. Neilder*. [Cro. Ja. 526.]

A declaration in trespass for carrying away tithes must allege *vi et armis*.

TRESPASS: for that he took and carried away *apud* D. three loads of wheat, being severed for tithes *contra pacem*, &c. omitting the words *vi et armis*: after verdict for the plaintiff upon *not guilty* pleaded, it was moved in arrest of judgment, that the bill should therefore abate; for it is the essential part of the declaration, which induces to have a fine for the King; and it is not aided by the statute of *Jeofails*: and of that opinion was the whole court; wherefore judgment was given for the defendant. And a precedent was shewn, Hil. 13 Jac. betwixt *Welsted* and *Taylor*, where judgment was reversed for taking a bag of money, because *vi et armis* was omitted, being assigned for error.



Tr. 17 Ja. A.D. 1619. B. R. *Ensden v. Denny*s. [Palm. 104.]

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**D**OCTOR Dupont, precentor or chanter of St. Paul's, being seized of the parsonage of Stedford, in right of his chantry, leased a portion of tithes for twenty-one years, rendering £8 rent, and reserving pasturage of one colt in the land of the lessee: he died and the lease expired: Doctor Goad is made parson, who leased for twenty-one years the same portion of tithes to the plaintiff, rendering £8 rent, but omitting the pasturage of the colt, whether this be good by 32 H. 8.?

*Quære*, Whether rent may be reserved on a lease of a portion of tithes?

*Calthrop*, for the plaintiff, made three points: 1. If a precentor be a person within 32 H. 8. 2. If a portion of tithes be a thing demisable within the statute. 3. If this reservation be good without the running of a colt.

1. As to the first, a chanter is but a tenant for life, as a parson who had but a writ of *juris utrum*, which is not within the statute, 19 (k. 3.) 2: *Juris Utrum*, 17. 2 E. 6. B. *leases* 33. 3 Rep. 65. and this statute speaks of tenants in fee simple or in tail, and not of tenant for life: besides, a chanter is not a spiritual function, but *inter minores ordines*, who serve the church or chantry. And he said there was great doubt, whether a prebendary were within the 32, but admitted the better opinion to be, that he was; yet he is an ecclesiastical person instituted and inducted, and a chanter is not so.

2. Tithes in gross are not demisable within the statute, for they are not manurable, out of which a rent may be reserved, as is required by the statute; and a reservation is not good, but out of things to which recourse may be had to distrain, by Perkins, 9 E. 3. 13. 7 Rep. 23. *Butt's* case, 30 Ap. 5. Lease of land and hundred rendering rent. 5 Rep. 3. *Jewel's* case and *Mountjoy's* case, 5 Rep. 3. 5 E. 3. 68. Rent is not good from tithes. Tithes are not distrainable for rent, although severed from the nine parts. M. 15 Ja. *Dobitoff* and *Curtene's* case, (1) it was held, that rent cannot issue out of tithes. Besides, the statute says, the rent shall go to the heirs and successors who have the reversion; and this rent shall go to the executors, if it be founded on a personal contract. And express authority is cited before for it in *Jewel's* case; 9 E. 4. 47. Lease for years of a warren rendering rent. 21 H. 6. 11. 20 E. 4. 11, 12. Lease of a corody rendering rent, which enures but as a contract. 1 H. 6. 1. Stock of sheep rendering rent, this is but a contract; and law may be waged in action of debt; and he said, it was held by *Anderson*, 13 El. that a lease for years, by a bishop, of tithes, would enure as a personal contract, and held accordingly. 2 & 3 El. and 20 E. 4. 12. He cited besides one *Denton's* case, Tr. 13 Ja. Rot. 616. where a bishop made a lease of tithes for three years, rendering rent, and exception was made to the reservation, as not manurable, and judgment was arrested.

3. That the reservation is not good within the statute, as the running of the colt is omitted, which is part of the accustomed rent. See D. and Ch. of Worcester. 6 Rep. 37. 5 Rep. 4. H. 13 Ja. Rot. 874. *Smith* and *Boule's* case; a bishop leased a manor, reserving the wood growing thereupon at a certain rent; the term expired, and his successor made a lease for years, reserving the same rent as before, but omitted the reservation of the wood; and it was adjudged that the lease was void; see Perkins, 702.

*Bridgman*, on the other side, argued, and 1. As to the pasture of the colt, he said, it was a thing reserved solely to Dupont and his assigns, out of the land of the lessee, to whom the first lease was made solely; which lease was expired; and the successor could not reserve pasture out of the land of the first lessee, and such a reservation would be void, Perk. 79. It would perhaps be otherwise, if the reservation were general: to which the court agreed.

2. That a chanter is not within 32 H. 8. and here no confirmation is pleaded; He cited B. lease 62. which is express that a prebendary is within the statute. 14 H. 6. that it is a name of dignity; and he cited a case 36 & 37 El. *Watson* and *Major's* case, where it was adjudged, that prebendaries were within the 32. And it also appears from this, that a parson is excepted, and a prebendary is omitted in the exception. — And by *Donderdix* and the court, the precentor.

(1) *Ante*, 262.

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is a prebendary as to *locum in choro, et vocem in capella*, and has the ordering of the canons in the cathedral, and the canons are bound to reside, and the prebendary not. And that a prebendary is within 32 H. 8.

3. That a lease for years, reserving rent, is good; he said, that here the tithes were leased to the terre-tenant, and so he shall have them by way of suspension, as 43 E. 3. 9. Dy. 43. and yet the reservation is good, although suspended. 20 E. 4. 12, 13. An abbot grants a corody, which is leased, rendering rent, and good, although by way of reservation: besides, this rent shall go to the successor of the prebendary, and not to the executor of the predecessor; and this differs from the principal case of *Jewel*, for the lease was for three lives, and the successor could not have remedy, or the predecessor, for the reservation shews a personal contract, and the estate is freehold, for the personal contract gives no action till the determination. It is otherwise in an action of debt upon a personal contract in case of a lease for years; so in the case of 5 E. 3. 68. cited, the estate was one of inheritance in the tithes, out of which no remedy for rent; and so is *B. distress* 81. And that debt lies upon a lease for years of tithes, see 11 H. 4. 40. And he denied the opinion in *Jewel's* case, that it shall go to the executors, for the express words of 32 H. 8. shall aid this, which are, "that the successor shall have the same remedy," &c. And *Butt's* case, is where the rent is out of the freehold of a thing not manurable, and no remedy; but it is otherwise of an estate for years, as here, and is like a reservation by *cestuy que use* by deed, 5 H. 7. 5. See 10 H. 6. 12. Tenure of land and rent. 44 E. 3. 5. so 36 H. 6. 34. 21 E. 3. 5. 14 H. 6. 26. 1 H. 4. 1. 40 E. 3. 45. And he cited *Sir John Bolton's* case, that tithes were let by copy, and that rent issues out of tithes, and attends the reversion. See *Dyer*, 87. b. where the King made a lease for years of tithes rendering rent, and after granted the reversion, which supposed the rent reserved to be good and followed the reversion: so is the case in the Exchequer, that the King made a lease of the land and tithes rendering rent, that if the land be severed from the tithes, there shall be an apportionment which proves that tithes are chargeable with a rent. *Et adjournatur*.

The parties were at issue upon a custom *de non decimando* of wood within the weald of Sussex, which is no venue that the court can notice.

Tr. 17 Ja. A. D. 1619. C. B. *Fawkner v. Andrews*. [Hob. 266.]

**I**N prohibition the parties at issue upon a custom *de non decimando* of wood, *infra Wildam, Sussex*. It was moved by *Finch*, whence the *ven. fac.* should be, and the court directed that the best was *de corpore com. for wilde* is no *time*, whereof the court can take knowledge: unto this *Towse* for the defendant assented: this kind of assents would be entered upon record.

M. 17 Ja. A. D. 1619. B. R.

*Aldresh v. Ray*. [Palm. 36.] 2 Ro. 121.

Prohibition does not lie upon a covenant by deed by a parson, that a parishioner shall hold his land discharged from payment of tithes, the tithes having been assigned to a tenant at will.

**R**AY, parson of D. by deed indented between him and one Saier, promised and undertook upon receipt of eleven sheaves, to acquit the said Saier and his assigns, and that they should be discharged of all tithes so long as he should be parson. Saier covenanted by the same deed to pay the eleven sheaves afterwards. Saier assigned the tithes to Aldresh for a year, and from year to year so long as the parties pleased: afterwards the farmer of the parsonage sued in the spiritual court for the tithes. Aldresh had a prohibition. *Calthorpe*, counsel for the farmer, prayed a consultation, and argued, that by these words no interest passed to Saier; for he did not grant the tithes, but that he should pay no tithes; and he was to be discharged of tithes upon payment of eleven sheaves, which was a condition precedent. *Say's case, Com.* 271. Besides, this is but a covenant, and a covenant shall not be sufficient ground for a prohibition: and he cited *Tucker* and *Squire's case*, Tr. 4 Ja. A man, in consideration of his daughter's marriage, covenanted that she and her husband should eat and drink with him, and that he would allow them to have a chamber in his house for a certain time; and it was held that no interest in the chamber passed, although in the covenant were such words.

2. Admitting

2. Admitting that an interest in the tithes passed by these words, yet no prohibition lay. 10 Ja. *Booth and Ostler's case*. Contract that he should be discharged of tithes for life, no prohibition. The parson and another submit themselves to the award of T. S. who awards that the parson should discharge him of tithes: this was cited by COKE, as adjudged 10 Ja. (1) 8. 8. 413. A contract that he would not sue such a woman in court-christian to have her for wife, and suit notwithstanding, no prohibition. Also two executors, and one covenants that he would not interfere in the administration, and afterwards he interferes in the spiritual, and no prohibition.

3. Admitting that he himself should have prohibition, yet the assigns of part of his interest shall not have it; for after the year, Aldresh was but at will, which is not such an assign as was intended in this case. H. 44 El. Rot. 485. B. R. *Stradon and Clinche's case*. Lease for years of a house, and covenant that the lessee and his assigns upon notice should repair it, the lessee granted over part of the years; and rule that such lessee of the part should not repair. 5 Rep. 97. *Goodale's case*. 42 E. 3. 3. 2 E. 4. 6. And afterwards in the same term a consultation was granted by the court. And in a similar case *verbatim* it was adjudged in the same manner. E. 31 El. So one *Woodward's case*, the parson promised in consideration of ten sheaves to be paid annually, that one should be discharged of tithes, and no prohibition laid, but an action, and the assignee should not have it in the said case.

(1) *Lewellyn v. Morgan. Rolls.*

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M. 17 Ja. A. D. 1619.. B. R. *Reade v. Stonehouse*. [2 Ro. 119.]

ONE obtained sentence in the spiritual court, and costs were given him. The defendant had a prohibition. See *Fitz.* 41 H. Afterwards a consultation was granted; then the spiritual court gave costs to the defendant in the prohibition, for the delay and costs he had sustained in the temporal court: and *Whitlock* surmised this matter to the court for a prohibition as to these costs *de novo*, which was granted him; for the court said such a course would deter and frighten people from moving for prohibitions, although the court belonged to the temporal court. And Mr. *Noy*, of Lincoln's Inn, said, that a bill was brought into parliament 1 Ja. to have this usage confirmed to the spiritual, but they could not succeed.

After consultation awarded, the spiritual court cannot give costs of the proceedings in the temporal court.

M. 17 Ja. A. D. 1619. B. R.

[*Congley v. Hall.*] [2 Ro. Rep. 125.] Turn. MS. 54. b.

IT was surmised, in order to have a prohibition to a libel in the spiritual court for tithes, that the abbot and all his predecessors, before and at the time of the dissolution, held the land discharged of tithes by reason of unity of possession. *Calthorpe* moved that this surmise need not be proved within the statute of 2 & 3 E. 6. for by that statute the surmise need not be proved, unless the cause be determinable in the spiritual court for non-proof of it; and this case is not determinable there by the express words of the statute. [*Quare hoc*, for I do not understand him.] Besides, it is impossible to swear that the land was discharged of tithes, for the infinite search of records that must be made before that can be known, and also for the infinite compositions and other causes of discharge; and for that reason the general allegation of discharge by unity of possession shall be sufficient without shewing how it was, as appears from the archbishop of *Canterbury's case*, 2 Rep. (2) But the court were against him; for though precise proof need not be made, yet the party may swear that it has been ever since the statute of 31 H. 8. reputed to be discharged by unity, or that he has heard it commonly reported to be so, or the like. And *DONDERIDGE* said, that he had known several precedents in this court of proof made in that manner.

(1) *Aniè*, 113.

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In C. B. Where tithe is confessed to be due, but a *modus* is alleged, a suggestion must be proved within six months: but if it be alleged that no tithe is due by law, as of timber, &c. it need not.

M. 17 Ja. A. D. 1619. C. B. *Anon.* [MS. Turn. 54. b.]

NOTE, I had heard that the use in C. B. is, that if one suggest a *modus*, and have a prohibition, there proof of the *modus* ought to be made within six months. But this is, by reason that here is a recompense which was in lieu of the tithe confessed. But if the libel be for tithe of wood, and the suggestion be that it was timber, and of such an age as to be discharged by 50 E. 3. of tithes, such suggestion need not be proved within six months, by reason that this is a good discharge. So if it were suggested that they were felled for fuel, and spent in his house, therefore by law discharged of tithes; such suggestion need not be proved within the six months.

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Lands of the Cisterians (which were discharged *quandiu propriis manibus*, &c.) under lease, and consequently paying tithes at the time of the dissolution, shall be discharged when they return into the hands of the owner of the inheritance.

H. 17 Ja. A. D. 1620. B. R.

*Porter v. Bathurst.* [2 Ro. Rep. 142.] MS. Turn. 63. 1 Gw. 373.

IT was found by a special verdict in prohibition, that the abbey of Robertsbridge was of the order of Cisterians, who, by reason of their order, were discharged of all their lands *dum in propriis manibus existunt*: that the abbey was dissolved by the statute of 31 H. 8. and that at the time of the dissolution the land now in question was leased for years by the abbot, and that at that time the lessee paid tithes: that the lease afterwards expired: that the land was conveyed to Sir Henry Sidney, and from him descended to the earl of Leicester: that in the 7th of Ja. he sold it to Porter: that the rectory of L. in which vill the land is, is appropriated to the dean and chapter of Rochester, who leased it to Bathurst, who libelled in the court-christian against Porter for tithes, who upon the above matter had a prohibition.

*Ancombe* argued for the plaintiff, and said that this is a personal discharge in respect of the order of Cisterians, as was agreed in 11 Ja. in C. B. in *Boyer's* case: (1) and though a personal privilege shall not be transferred by the general words of a statute, as appears by *Inglefield's* case, 7 Co. and in the marquis of *Winchester's* case, 3 Co. yet it may be by special words, as here in our case; it is enacted by the statute of 31 H. 8. that "*the King shall have, hold, &c. the lands, &c. as free and absolute as the abbots, &c. had and held them*:" by reason of which words, though the privilege be not constant and continually in being, but only when the lands shall be in the hands of the abbey, yet the king and those who claim under him, shall be discharged of tithes. But it may be objected, that the words of the statute are, that "*the King shall have, as free, &c. as the abbot had and held them*;" and here in our case the abbot could not be said to have them, and hold them discharged of tithes, inasmuch as the lessee of the abbot paid tithes. I answer that the abbot held the inheritance discharged, although the lessee paid tithes; and the statute had consideration and respect to the inheritance, and not to the particular estate; and one may be said "to have and to hold," though he have only a right; as a disseisee shall be in ward by reason of his tenure. And as to the archbishop of *Canterbury's* case, 2 Co. (2) where it is holden, that if the lessee or the farmers paid tithes at the time of the dissolution, it shall not be said to be a unity of possession, which ought to be constant and perpetual, as 11 Co. *Pridle and Napier's* case; (3) but the present case is one of personal discharge. *Quod fuit concessum* by MONTAGUE, C. J. DODDERIDGE and HOUGHTON, J. And DODDERIDGE, J. said, that it was agreed in *Boyer's* case, before cited, that the lands which belonged to the Hospitallers should be discharged of tithes, though they were in lease at the time of their dissolution; and yet they were not dissolved by the statute of 31 H. 8. but by a special statute made in 32 H. 8. And MONTAGUE, C. J. said, that there are other words in the statute of 31 H. 8. viz. that the King, and all others claiming under him, shall hold "according to their title," and shall hold the land discharged of tithes; and here in our case, Porter's title is derived out of the inheritance, which the abbot had discharged of tithes, wherefore Porter shall have it discharged also.

(1) *Ante*, 214.(2) *Ante*, 113.(3) *Ante*, 205.

H. 17 Ja. A. D. 1620. B. R.  
*Grubham v. Grate.* [2 Ro. 150. Palm. 94.]

**T**RESPASS for entering his close and taking his hay. The defendant entitled himself to the land where the hay grew, for that there was a chapel dissolved in the time of E. 6. and the possession thereof, of which this is parcel, &c. descended to Queen Elizabeth, who in the thirty-second year of her reign leased this, by name of *totam illam capellam de Asherton fundatam in ecclesiâ de Barwicke, cum pertinentiis, necnon unum claustrum continens 100 acras terræ eidem adjacent, necnon omnes terras dominicales*(1) *decimas in A. nuper in terrâ*(2) *W. eidem capellæ pertinentes et spectantes.* The defendant claimed under the said lease as tithes; and thereupon the plaintiff demurred.

*George Croke* argued that the plea was not good, inasmuch as he had not averred that he tithes were growing upon the demesne lands in A. according to the words of the lease. *Dyer*, 83. 2 E. 4. 20. Ass. pl. 8. but it is otherwise where he claims by special grant as *black acre*, or *green acre* close, as *Plowd.* 150. *Dyer*, 2. 92. *Bridgeman contrâ.* He admitted the authorities cited by *Croke*, but said that in the present case such averment was not necessary; for although the tithes in question should not have arisen upon the demesne lands in A. but other lands, yet the defendant should have them; for the lease is of the chapel *cum pertinentiis*, and thereby tithes appendant to the chapel pass; for tithes pass notwithstanding the statute *de prerogativo Regis*, which restrains but three things; viz. knights fees, advowsons, and dower of widows; and all other cases are out of the statute, wherefore, if the king had common appendant to his manor, by grant of the manor the common would pass. 26 Ass. pl. 16. The King had a forest appendant to the honor of Pickering, the forest passed by grant of the honor.

*George Croke.* The words of the grant of "*the chapel cum pertinentiis*," do not convey all the tithes appendant to the chapel, by reason that the Queen had particularly enumerated what she intended to grant: so 9 El. the King had a manor which extended into three villis; if the King grant his manor in one of the villis, then nothing would pass.

*MONTAGUE, C. J.* If more should pass than the Queen specially recites, then the interest of the Queen in her grant would not be observed. — *HOUGHTON.* If the King grant his manor of Dale, and also two closes by name, yet all the manor passes: so if he grant a rectory *necnon decimas* in such a place, within the rectory, yet the whole rectory passes, and also all the tithes; but it is otherwise in the case at bar, for tithes are not properly appendant to a chapel.

And *HOUGHTON, J. MONTAGUE, Ch. J. and DODDERIDGE, J.* agreed.

*Bridgman.* We have averred that the tithes which, &c. were appurtenant to a chapel. And by *DODDERIDGE*, it is true, but the intent of the Queen appears to pass no more than the site of the chapel by these words, *cum pertinentiis*; for she grants *capellam illam fundatam, &c. cum pertinentiis*, so that the word *fundatam* includes solely the site of the chapel, and this word explains the other *cum pertinentiis*. But perhaps it would have been otherwise if this word *fundatam* had been omitted; and all the judges thought that if the King granted *capellam cum pertinentiis*, that all the tithes appendant thereto would pass. But for the reasons aforesaid, judgment was given for the plaintiff. *Rolle.*

*HOUGHTON.* If the King grant a manor, and such a close which is appurtenant to the manor, this particularisation of the close shall not hurt, for all closes parcel pass well enough. So if there be a grant of the rectory and tithes of such and such a place, yet the whole rectory passes, for these are natural parts of the manor and rectory; but tithes are not natural parts of a chapel, although they be appurtenant by usage.

*MONTAGUE.* A manor and a rectory are *nomina collectiva*, which have their natural parts, but it is otherwise here. Besides, the King has expressed his intention in the grant, and confirms his grant by nomination of the parts. *Palmer.*

Tithes are not natural parts of a chapel, although they be appurtenant by usage.

A manor and a rectory are *nomina collectiva*, which have their natural parts; but it is otherwise with a chapel. The King expresses his intent by the particulars of his grant, and confirms it by naming the parts.

(1) *Qu. omnium terrarum dominicalium.*

(2) *Qu. tenuræ.*

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E. 18 Ja. A. D. 1620. B. R.

Sir Edward Coke's case. [2 Ro. Rep. 161.] 1 Gw. 375.

A portion of tithes will not be extinct by a union of the rectory, for (Houghton said) the portion might be more ancient than the rectory, and so the rector of ancient time have no title to the tithes; for before the council of Lateran, one might pay his tithes to whom he would.

Montague, Ch. J. said it was a position in the time of King John, that one ecclesiastical man ought not

to pay tithes to another ecclesiastic. Where a vicar was endowed *de decimis garbarum*, and had tithes of hay; held that it was by reason of a custom that he had always taken it.

(1) *Anté*, 141.

M. 18 Ja. A. D. 1620. C. B.

Slade v. Drake. [Hob. 295.] MS. Calth. 2 Ro. 250. W. Jo. 6.

Noy, 97. 1 Gw. 385.

1. In a declaration on a prohibition, the question was, whether it were sufficient for the patentee of lands of a greater monastery (but founded within time of memory, and therefore not capable of a discharge by prescription, nor consequently by unity) to allege that the abbot held the lands discharged of tithes at the time of the dissolution, without shewing how.

2. If a temporal man succeed a spiritual body in discharge, as upon 31 H. 8. it is to be reckoned in a spiritual person or body, not temporal.

3. Laymen may be discharged of tithes in kind by paying compositions for them in money: so land held or enjoyed by parsons or vicars in lieu of them, by grant of the parson, patron, and ordinary.

4. Though unity by prescription be good *prima facie*, and be now used for a discharge, yet it is not so for itself, but for a more perfect discharge that shall be presumed, though it cannot be found for the infiniteness and impossibility of search of things beyond memory.

5. Discharge in abbots must now be proved *a posteriori*, for no man living can now speak to the time of the abbots, &c.

6. If the prohibition be faulty, yet no consultation shall go, if it appear to the court that the suit in the spiritual court was not well founded, as it was there heard, though he might have had a suit in another manner.

**B**ETWEEN the lessees of Sir Edward Coke and the Earl of Warwick, it was agreed by the court and the counsel for both parties, that if one have a portion of tithes out of a rectory, and afterwards purchase the rectory, that by this the portion of tithes is not extinct, but remains grantable. And Houghton, J. gave this reason for it; viz. for that the portion of tithes might be more ancient than the rectory, and that the rector of ancient time had no title to the tithes; for before the council of Lateran, every one might pay his tithes to whom he would. And Montague, C. J. said, that it was a position in the time of King John, that one ecclesiastical and spiritual man ought not to pay tithes to another ecclesiastical man, for *ecclesia ecclesie decimas solvere non debet*; and the case at bar was the case of an ecclesiastical person, viz. of a prior who had the portion of tithes, and also the rectory. And in this case a fine was levied in the time of King John, upon an assise of *darrein presentment*; and Dondridge, J. said, that he had seen divers fines of the same kind of such ancient time; and in this case also there was great debate among the counsel, where a bishop makes a lease, &c.

Coventry said, that it was affirmed in *Barsdale and Smith's case*, (1) that where a vicarage was endowed *de omnibus decimis garbarum*, that that includes hay also: and all the judges said, that that case was aided by a custom, viz. that the vicar had always after the endowment used to have tithe-hay, and that was the true case.

**R**OGER SLADE brings a prohibition against John Drake, Esq. farmer of the rectory of Axminster, and declared, that whereas Richard Gill, late abbot of the monastery of Newham, in the county of Devon, was seised of a messuage and divers lands, (meadow and pasture) parcel of the possessions of that monastery, to the time of the dissolution in fee: and whereas also the same abbot, by himself and his farmers, at the time of the same dissolution, did hold and enjoy the same, acquitted and discharged of all manner of tithes, and so seised surrendered the same 30 H. 8. and then recites the clause of discharge of tithes, in the statute of 31 H. 8. and then brings down the land by descent to Queen Elizabeth, and from her to the Duke of Norfolk, and from him to the Lord William Howard: And that he, by indenture enrolled in the chancery, within six months, did bargain and sell the same unto the Lord Petre and his son, 3 Jac. and they demised it unto Slade, the plaintiff, and then Drake, the defendant, did sue him in the consistory court of the bishop of Exeter, for tithes of wheat and other grain, against the form of the said statute.

Whereupon the defendant demurs in law generally, and prays a consultation.

Upon

Upon this case, after solemn argument, judgment was given for the defendant, and a consultation awarded; WARBURTON dissenting.

In the argument of this case, I made two great points.

The first, whether the declaration were good or no, and I held it not good.

The second, whether the fault of declaration were in the substance, so that advantage might be taken of it upon a general demurrer: and I held the fault substantial. I first professed, if my judgment should take counsel of my interest or affection, I should be of another mind; but I was bound within former rules of justice, precedents, religion, and prudence. Justice, *sum cuique tribuere*, tithes to whom tithes belong. Precedent, *stare super semitas antiquas*. Religion, *meritò summa habetur ratio, quæ pro religione facit*. Prudence, *quod dubitas ne feceris*. De non apparentibus et non existentibus eadem est ratio.

Now to the first point. Littleton says, that the pleading is the honourable, commendable and profitable part of the law, and by good desert it is so. For cases arise by chance, and are many times intricate, confused, and obscured, and are cast into form, and made evident, clear, and easy, both to judge and jury, (which are the arbitrators of all causes) by good and fair pleading. So that this is the principal art of law, for pleading is not talking; and therefore it is required that pleading be true; that is the goodness and virtue of pleading; and that it be certain and single, and that is the beauty and grace of pleading.

Therefore the law refuses double pleading, and negative pregnant, though they be true, because they do inveigle, and do not settle the judgment upon one point.

Therefore first general pleading is disallowed though it be in matters of fact, as a covenant to make estate by the advice of J. S. he must shew what advice he gave, 26 H. 8. 1. 16 E. 4. 9.

Condition that the obligee shall enjoy an office according to a grant of letters patents, he must not plead in *hæc verba*, but he must shew the effect of the letters patents, and the enjoying accordingly.

But because it has been said, this is a spiritual act (which yet I grant not to be so) he that pleads deposition of an abbot, he shall plead before what ordinary, 9 E. 4. 24.

So debt upon lease of a vicarage, the defendant pleading a sequestration, must shew by what ordinary, for what causes, as for non-residence or the like, and legal process of sequestration, 5 E. 4. 29.

So union of chapel must be shewed, by whom; *scil.* the pope or bishop, not generally, *concurrentibus iis*, &c. 11 H. 7. 8.

In pleading a divorce, you must shew before whom it was, and set forth the cause of divorce, 11 H. 7. 27. but all the proceedings you shall not need, as you should of a recovery at the common law, 21 E. 4. And therefore in *Specot's* case, 5 Co. 57. the bishop cannot plead cause of refusal, *schismaticus inveteratus*: nor upon the statute 4 H. 4. that a man was defamed of heresy. But they must specify the schism and heresy, though they may be matters of mere spiritual cognizance. See *Dyer*, 8 Eliz. 154. Haunter of taverns, player at unlawful games, *et ob alia diversa crimina criminosus*.

For this is regular for difference between the King's courts and the courts ecclesiastical, that though a spiritual cause cannot originally and primitively fall into the King's court;

As for calling of a man heretic he shall not have an action of the case, 20 H. 8. yet if a civil action be well commenced, as in the case cited, a *quare impedit*. or an action of false imprisonment, if any thing fall incidentally, that is spiritual, the King's court shall continue the plea upon it, either by jury or demurrer, except in case where the law has provided trial by ecclesiastics; as by the issue upon bastardy, *n' unques accouple*, &c. literature, and the like. In which case the bishops are not judges, but ministers of the King's courts, as other kind of triers are; whereupon the court proceeds to judgment, according to their certificates and trials. But on the contrary, if a case begin well in the spiritual court as being spiritual, and a point fall incidentally, that is of temporal

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temporal consueance, it is clean contrary ; for the trial is called from them as in daily experience, in prescription and limits of parishes, in suits of tithes.

Now if it be a point of discharge, that is to be pleaded as this case is, it must ever be pleaded specially, and shewed to the court how the discharge is ; for it is no discharge if it be not sufficient, and the sufficiency is matter of law, and therefore must be seen and judged by the court. As is 22 F. 4. fol. 40. and *Mansel's case*, 2 Co. 3.

Now touching the discharging of tithes themselves, and the pleading of them at the common law ; it is to be observed, that they are things of common right, and do of right belong unto the church. And therefore, though it be true, that before the council of Lateran, there were no parishes, nor parish priests that could claim them, but a man might give them to what spiritual person he would, yet to the church he must give them. Yet since parishes were erected, they are due to the parson, (except in spiritual regular cases) or vicar of the parish ; and therefore, when you have a prohibition of discharge of tithes, you must consider it is a plea in bar against common right, to a demand of tithes, which is a common right, though they be in several courts, as by a release either in deed or law.

Now then if you will discharge a just demand, you must satisfy the court of your discharge ; consider then the kinds of discharge of tithes, the persons capable of them, and the means how.

The persons or bodies capable of them, are either spiritual or temporal.

Temporal, I say, when they were temporal, when the discharge did first vest in them ; for otherwise if the temporal man succeed a spiritual body in discharge, as upon the statute 31 H. 8. it is to be reckoned in a spiritual person or body, not in temporal.

The spiritual person had four ordinary ways of discharge ; that is, first, bull of the pope ; secondly, composition ; thirdly, prescription ; and these were absolute.

Fourthly, order ; and that was limited so long as land remained in the maintenance of the religious persons themselves ; and these were the Cisterians, the Templars, and the Hospitallers or Hierusalomitans ; but unity of possession of the parsonage appropriate, and the land titheable was no discharge, nor so holden at the common law ; but how that came into use, and upon what reasons, and with what cautions, and how deduced in pleading, I shall speak after when I come to the statute of 31 Hen. 8.

Now clearly at the common law, the spiritual person could not claim his discharge by bull, composition, or order ; but he must plead it with his ground and reason specially ; but his discharge by prescription was allowed him without any other reason, because he was a person capable of such discharge. And so the original was probable, and therefore the prescription was allowed him as in other cases immemorial whereof the original cannot be found, but is ever presumed just.

Now temporal persons, (not to speak of the King which was a special case, 22 Ass.) had two ways to obtain tithes, or to discharge tithes ; the first was by grant of the parson, patron, or ordinary ; the other was by a prescription ; but that was ever, not *prescriptio simplex*, but *composita*, not a prescription single but compounded, differing from the case of the spiritual persons. And so is *Piggot and Heron's case*. (1)

And so are the common cases where men have the discharge of tithes in kind by paying compositions for them in money, or land, or pension, held or enjoyed by parsons and vicars in lieu of them, 8 E. 4. F. N. B. &c.

But now note a strange *anomalum* in this case, tithes differing from all other cases in law.

For whereas prescription and antiquity of time fortifies all other titles and supposes the best beginning that law can give them ; in this case it works clean contrary. For whereas a grant of a parson, patron, and ordinary, is good of itself, without any recompense or consideration, when it runs out to prescription, it dies and perishes ; whereof no other reason is given but that our

(1) *Ant*, 135.



books say that a man may prescribe in *modo decimandi* but not in *non decimando*: and this is in *favorem ecclesie*, lest laymen should spoil the church.

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But I will make another reason not dissonant from law.

There are presumptions of law so violent, as though they be false, a man should not be received to aver against them as in a *præcipe*. The tenant pleaded himself villein to T. S. and that he has nothing but his villenage; the defendant had no reply though it were false, but his writ must needs abate till the statute of 37 E. 3. did admit the counterplea; *Mansel's case*, and 16 H. 7. So in replevin, if upon advowry the tenant disclaim, he shall have judgment, though it be false; for the law believes, that these parties will not do themselves wrong in so high a degree.

The like reason moves in this case; the law presumes violently that a layman cannot be absolutely discharged of tithes; and therefore will not allow a prescription of such discharge, holding it more reasonable that some one man should suffer a mischief to lose such a privilege, being so improbable and of so dangerous consequence, than for this particular to admit a spoil of the church and a decay of religion, according to the rule, *omne magnum exemplum aliquod habet ex iniquo, quod publicâ utilitate compensatur*.

So though you shall be allowed your discharge by grant when it appears, yet when it appears not, *stabitur præsumptioni donec probetur in contrarium*.

Now the common law, as touching the discharge of tithes, and the forms of pleading of it, stands thus. The next question is, what change the statute of 31 H. 8. of monasteries has made in that behalf.

And I am of opinion that it has made two main changes:

The first, that it has by force of the clause of discharge preserved and continued certain discharges that were before the statute, that is by bull, composition and order, and conveyed them over to the King and lay persons, which else would have vanished and dissolved with the spiritual bodies themselves whereunto they were annexed.

The next is, that it has created and made one new discharge which was not before at the common law, that is the unity of the possession of the parsonage and the land titheable in one hand.

And this was long controverted and now is a received opinion, by the determination of the King's courts to be *de lege*, a discharge within the meaning of the law, as the divines say that articles are made *de fide* by the determination of the church.

But in this case of unity four things are to be observed:

First, that it is no discharge of tithes but (as it is well observed) a discharge of the payment of tithes; and therefore if it be pleaded by way of discharge, generally, and the jury find nothing but a perpetual unity, it is found against the pleader, and so much is agreed in *Priddle and Napier's case*. (1)

It is no discharge except it be by prescription.

If it be perpetual, yet if it be alleged that the abbot, or his farmer, paid tithes, that destroys the prescription, because that proves that there was no real discharge, but a non-payment by unity only: yet a unity by prescription is good *prima facie*, but not of itself, but in contemplation of a perfect discharge, that shall be supposed though it cannot be found for the infiniteness and impossibility of search of things beyond memory.

Lastly, though unity perpetual be allowed, yet it is not well pleaded except you add that *ratione inde* they held discharged of payment of tithes time out of mind; for though the unity shall be traversed, and not that conclusion or consequent, yet that conclusion fixes it to the statute, and answers the real and perfect discharge that is presumed under the unity, to which the unity itself is but augmentative; but yet I am of opinion, it is but a fault in form, which will be cured by a verdict or general demurrer.

This discharge by unity, being the only discharge that is created and made of new by this statute, all other discharges are not otherwise preserved but by these words, ["That the King, his heirs and successors, and such persons, their heirs and assigns, which, &c. shall have and hold them according to

(1) *Ant.*, 205.

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"their estates and titles, discharged and acquitted of payment of tithes, as freely, and in as large and ample manner as the said abbot, &c. had or held the same at the day of the dissolution of the same." s. 21.

So first, it is plain that this cause gives neither new discharges nor enlarges the old, but continues and bounds them within the limits of those that were enjoyed by the abbot, both by word and meaning, according to the cases, *tot, tanta, &c.* For though unity (as has been said) be now used for a discharge, yet it is not so for itself, but for a more perfect, which is presumed though it appear not.

Now this being the substance and body of this clause in word and meaning, it is strange it should be moved, that out of this clause may be drawn a conceit of a liberty given to the possessors of abbey lands, to plead their discharges in other form, and with more generality and favour, than the abbots themselves had in those cases; against which the reasons were many.

First, the word is expressly touching the having and holding of them, not a touch nor a glance of the pleading of them, which is merely *heterogeneousum*.

Secondly, if these words should be extended to pleading, it would turn expressly against them; for then it must be understood, that they shall have the benefit of pleading, in as large and ample manner as the abbot had. Which implies a negative, that it shall be in no other nor larger manner; for the rule is, that affirmatives in statutes that introduce new laws, do imply a negative of all that is not in the purview.

And therefore, in *Amy Townsend's* case, Plow. 111. it is adjudged, as it has been since, that where one comes to a possession by a use out of a state discontinued, so that the entry was not lawful to the *cestui que use*, such a possession works no remitter; because the statute appoints the possession in the same manner and form (which imports a negative, and no other) as are in use.

So the statute *Westm. 2.* appoints that the demandant in a *quod si deforceat* may vouch *ac si esset tenens*; if in the first action he could not vouch as if it were *scire fac.* then cannot he vouch in the *quod si deforceat*, being demandant, 14 H. 7. 18.

Thirdly, if you shall admit this exposition upon this clause, you must admit it also upon the body of the law, upon the like words, which are thus: the King shall have and hold, to him, his heirs and successors, all monasteries, and all their lands, tenements, rents, and in as large and ample manner as the abbots had the same, at the time of the dissolution; so then it shall suffice to plead that the abbot was seised of a rent charge out of my land at the time of the dissolution, &c. without shewing any other title. And so of other statutes; and this kind of pleading has the same pretence of loss of writings, of grants, of rents, reversions, and the like, and infiniteness of search, and more than the case of bulls and the like.

4. This form of pleading, that lies so open and obvious in words of the statute, and was so easy and pleasing to them that sought discharge, was never to this day amongst so many busy wits ever offered in any authentical pleading, much less received the least allowance, by the opinion of any learned or grave man; but the contrary by the specification of the discharges, except in the case of prescription; and yet in the case of unity, though it be by prescription, it is also specified.

5. Lastly, this were to take a statute contrary to the common law, which trusted not laymen with their prescriptions; and yet now you will trust them without prescription, with that that belongs to the court to judge. And this is against a main rule in expounding statutes, especially in *Odious*.

So no man but can see what absurdities would follow by admitting a change of regular forms of pleading, to vulgar speech used in acts of parliament, to express the meanings which are every day by the judges extended, restrained, and changed, according to a better rule of reason and justice than the words bear. And if the words rule not in substance, much less in the forms of pleading, which is the act of law, as has been said: and this precedent of irregularity of pleading, is as ill in consequence as the principle.

So

So the statute of 4 H. 4. of heresy before mentioned, was not pleaded as the statute went in general, but the heresy specially assigned.

Now take the statute 34 H. 8. cap. 20. that provides, that if the tenant in tail of the gift and provision of the King, suffer a common recovery, the reversion or remainder then being in the King, that such recovery shall not bind the heirs in tail, but that they may enter after the death of the tenant in tail; will any man say that the heir may plead, that his ancestor was tenant in tail of the King's provision and reversion or remainder in the crown, when he suffered the recovery?

So in the case of 11 H. 7. cap. 20. if any woman (being tenant in tail of the gift of any the ancestors of the husband) discontinued, the same shall be void, and that it shall be lawful to the parson to whom the interest after the death of the woman shall appertain to enter: will any man say that it were well pleaded in these words, without shewing how the estate grew, or how the discontinuance was made? and yet he that is to take the benefit, may be a stranger to the conveyance; as upon a covenant to raise the use.

So upon the statute 32 Hen. 8. of conditions, these are no mischiefs to the discharges that were before time of memory of all sorts; for they must be maintained and pleaded by prescription, even unity itself may be so. Neither is there any mischief in effect to those discharges, which were created since memory, if they be true, and the original unknown; for they may be both supposed and pleaded by prescription: for they had their effect of discharge, and the prescription cannot be impeached, but by shewing a late original of such discharge, which if the adversary can shew, the party himself may much better: so then there remains no prejudice but in one case, where there can be no reasonable presumption of a lawful discharge, which is where there cannot possibly be a discharge by prescription, that is, where either the abbey was founded, or the lands purchased to the abbey since memory; in which case to presume a discharge even to the last times, where there is no appearance of it, is as much as to say all abbies have discharges for all their lands, which may be extended even to orders that had discharges thereby for their own manurance; for they might also obtain by bull or otherwise, general and absolute discharges; and this may be concluded, that if this form of pleading be once received, you shall have all others left, and this only used; which is one of the weightiest reasons that makes me explode it, considering the busy wits, that have used all means to win discharges and forms of pleading to that purpose, and yet never took boldness to offer this; and what needed all the labour about unity by prescription, or without prescription, if they might have pleaded discharges at the time of the dissolution? for it is easy to prove a non-payment, by reason of a unity for any time; and non-payment is the common evidence for the proof of a discharge sufficient, which may be proved when a perpetual unity cannot be.

Discharge in abbots must now be proved *à posteriori*, for no man living can now speak to the time of abbots. As to the case of *Wimbish* and *Talboyes*; it is no authority; for the judges are divided two to two. Secondly, both parties pleaded there, viz. covin and deceit were matter of fact.

And as to the case of *Strata Marcella*; that is no authority at all; for no judge speaks a word to that point, and the judgment passes against him that pleaded so. But that indeed was upon another reason and point. And as to *Coke's* opinion in this case of the Bishop of *Canterbury*, 2. 48. (1) I answer, First, that the opinion makes not at all to the judgment of the case, to say that by the statute 31 such a discharge may be pleaded.

Next, it is no part of the resolution of the court, but an addition of his own, and that sudden and interposed.

Thirdly, it is so imperfectly set down, that the prior, &c. so it may be the prior and his predecessors.

And that such an allegation is commonly used in prohibitions, which argues plainly, that either he mistook the practice, or the book mistook him, which I rather believe, which is made the ground of his opinion; for there is no authentic precedent, much less judgment or grave opinion to that purpose.

(1) *Ante*, 113.

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And again that case of *Winchester*, in the same book, 44. (1) being both 38 Eliz. Priddle's case, coming after, 10 Ja. in his 11 book, 44. (2) he makes these questions, that if an abbey have been time out of mind, and an appropriation since, yet they may prescribe in a general discharge; for that may be, though a unity come after. But says he, if the abbey itself were founded since memory, then he cannot prescribe at all in the general discharge; and so leaves it as a case desperate, where the abbey was founded since memory; which yet he might easily have relieved, if he might plead a discharge, time of the dissolution, without shewing how; which is either a retraction or an explanation of his former report.

Now to that which was well moved and objected by my brother *Hutton*, that the plaintiff has not well conveyed himself to the land charged with tithes, I hold that the defendant, notwithstanding that defect, cannot upon the whole matter have a consultation, if the discharge had been well pleaded: for the title of the land is not in question, but whether the land be discharged or no; which any man that is answerable for the tithes, may plead whether he have good title to the land or no; and since the parson in this case has sued him for the tithe, he has enabled him to make his defence, either by plea of discharge in the ecclesiastical court, where he needs no title, or by prohibition to the same effect in the King's court, which is in lieu of it, and supposes that he offered his plea there.

And this is regularly true, that if the prohibition be faulty, yet the defendant shall never have a consultation, if it appear to the court that the suit in the ecclesiastical court was not well founded, as it was there heard, though he might have had a suit in another manner.

And therefore M. 1 and 2 Eliz. Dyer, 170, (3) one sued for tithe corn on sixty acres of ground; the defendant in his prohibition said that all was barren ground, and paid no tithes; whereupon issue was taken, and the jury found that thirty acres were so, and that the other thirty acres were barren, but yet had paid tithe wool and lamb. The whole court thought at first a consultation ought to be awarded for that part; but yet upon better advisement, they resolved the contrary; for he had no right to pursue his suit for corn; and by the same reason, if the land be discharged, he ought not to sue for the tithes of it any man, whether he has title to the land or no.

I hold the declaration grossly faulty in another point, that he has laid no estate of the discharge of tithes; for he has not said that *Gill*, the abbot, was seised of the land in his demesne as of fee discharged of tithes, but has made it two sentences, that he was seised of the land in fee, at the time of the dissolution discharged of tithes, which may be true, if it were but for that year by grant of parson, patron, or ordinary.

The second great question is, whether the demandant in this case ought to have demurred specially; for the plaintiff has laid, that the land was discharged, which the defendant by his demurrer may have seemed to have confessed.

But I am of clear opinion, that the general demurrer notwithstanding, the defendant may still take advantage of the fault.

The words of the statute are, that the judges shall proceed, and give judgment according as to the very right of the cause and matter in law shall appear unto them: so right is as no right, if it appear not to the court, as we proved in the case of *Heard* and *Baskerville*, that not shewing of a deed, or not producing the letters testamentary, or of administration, or not laying a place of *vine*, is not remedied by general demurrer. (4)

(1) *Ante*, 119.(2) *Ante*, 205.(3) *Ante*, 57.(4) It appears from Noy's argument, in *Dickinson v. Greenhall*, *post*, that though a writ of error was brought upon this "judg-

ment, it would have been affirmed, if the parties had not previously agreed."

M. 18 Ja. A. D. 1620. C. B.

*Barker v. Cocker.* [Hob. 329.] 1 Gw. 385.

1620.

**P****PETER** Barker, vicar of Stower Payne, libelled in the spiritual court for tithe-lambs against Robert Cocker, and laid that there was a custom there, that all lambs ingendered, fallen, and bred upon any one tenement or living in the same parish, although they belonged to several owners, have been cast and reckoned together as if they were but one man's, and the tenth or tithe-lamb of them so counted together have been paid for tithe.

Whereupon *Henden* prayed a prohibition, because all customs against common right are triable at the common law. Which was granted. And the court was further of opinion, that the pretended custom was unreasonable and against law, for by these means it might fall out that some one might have but one lamb, and that might be taken for tithe, and he that had more should pay nothing at all.

In a libel, the parson alleged a custom that all the lambs of all owners in the parish should be reckoned together, and the tenth lamb paid for tithe; held, that all customs were to be tried at common law, and that such a custom was unreasonable.

M. 18 Ja. A. D. 1620. C. B.

*Anon.* [Dy. in M. 277. b.] 1 Gw. 132. n. B. N. P. 189.

**I****T** was said by the court, that the council of *Lateran* made in 17 John, [See 2 Inst. 652.] discharged the friars of the order of *Cisterians*; and that this only discharges all possessions then in their hands, and not others. discharged the *Cisterians*, was held 17 John, and only discharged the possessions then in no others.

It was said by the court that the council of *Lateran*, which their hands and

Hil. 18 Ja. A. D. 1621. B. R.

*Johnson v. Parker.* [Cro. Ja. 575. 2 Ro. 191.]

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**P****ROHIBITION**: surmising that he was seised in fee of a messuage, one hundred acres of land, twenty acres of meadow, sixty acres of pasture, and upon them kept husbandry, and maintained a family to employ in husbandry, and to maintain the plough to manure and till the said land; and used to rear annually colts and young beasts to supply the stock of horses and oxen for the plough; and used to keep upon the said tenements milch-kine, bullocks, heifers, and sheep, for increase of stock, and maintenance of the family; by the labour of which the parson had the greater tithes: and he alleges a custom that they used to clip the wool from the necks of their sheep for the preservation of the sheep; and at the shearing of the sheep they used to pay the tenth fleece; and in consideration thereof used to be discharged of the neck-wool: as also, that every parishioner and inhabitant within the parish, who kept any oxen, steers, or bullocks of his own, or by way of agistment, which are to be employed for tilling the land, used to be discharged from the payment of tithes for them. As also, that if any keep any dry heifers *pro supplemento stauri vaccarum*; in consideration that the greater number of calves, and quantity of milk and dairy is thereby increased, to be discharged from the payment of tithes for such dry heifers, &c. And issue was joined upon the several prescriptions, and found against the plaintiff: and now moved in arrest of judgment, that notwithstanding this verdict, no consultation should be granted; for as to the first, for the wool, the issue is ill joined: for the traverse is, *absque hoc quod in consideratione inde*; that they are discharged, &c. *Sed non allocatur*; for although it be not a good and apt issue, yet verdict being given, it is sided by the statute. For the second and third issues, it was moved, that they are no more than the law appoints, *viz.* to be free from the agistment of cattle, being dry cattle, whereof no tithes by law are payable, as Fitz. N. B. 53 E. And then issue being taken of that whereof by law no tithes are payable, no consultation shall be granted. *Sed non allocatur*; for the prohibition is grounded upon the prescription, and being found against it, that they have used within the parish to pay for agisted cattle; it is not good: also he does not claim to be free for cattle agisted of his own proper cattle, but generally for all cattle agisted; which is not reasonable, nor stands with law: and it

Though no agistment tithe be due for a man's own husbandry cattle; yet a prescription to be discharged thereof, for such cattle belonging to others, is bad.

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was afterwards held, that these prescriptions being found against the plaintiff, consultation should be granted; and so it was adjudged for the defendant.

(Johnson libelled in the spiritual court for the profits arising from the herbage of pasture land; and upon prohibition Parker suggests that he fed this pasture with his own plough cattle, and such cattle of other men in the same vill. — *Noy*. Consultation shall be granted; for although a man shall not pay tithes for the beasts of his plough, yet he shall pay tithes for the land upon which they feed. — *DODDERIDGE, J.* Where I agist cattle, and take the beasts of other men to eat up my pasture, there I shall pay tithes for my grass; but it is otherwise with the grass of the land upon which I depasture my own working cattle. *George Croke* cited *Shervington* and *Fleetwood's* case, (1) where a man agisted the beasts of others in his meadow ground, for which he had paid hay before, it was resolved that he should not pay tithes for such meadow ground now fed with other men's cattle after harvest, any more than if he had depastured the land with his own beasts. *Et adjournatur. Rolle.*)

(1) *Ansé, 132.*

E. 19 Ja. A. D. 1621. B. R. *Swadling v. Piers.* [Cro. Ja. 613.]

Tithes cannot  
pass without  
deed.

**EJECTIONE** firmæ of a lease of tithes; and does not shew that it was by deed; and because tithes cannot pass without deed: after verdict for the plaintiff, exception being taken for this cause, it was ruled to be ill, and adjudged for the defendant.

M. 19 Ja. A. D. 1621. C. B.

*Poole v. Reynolds.* [Hutt. 57. Winch. 1. 44.]

In prohibition to a libel by a rector, for tithes of lands formerly a park, payment of a *modus* of a buck and a doe to the vicar, upon request, in lieu of all tithes, was held good after the disparking. But if the prescription had been to pay a buck and doe out of the park, it would alter the case.

*Park* is only an appellation or name of land, and this name or appellation does not pay tithes, but the land itself.

A vicar may have by prescription tithes of the herbage of the rector's glebe.

**JOHN POOLE** brought a prohibition against *Richard Reynolds*, farmer of the moiety of the rectory of Colleton, with the chapel of Shute annexed to the said rectory: and the surmise was, that of time whereof memory, within the parish of Colleton there was a rectory appropriate, and the chapel of Shute annexed thereto, *Et una vicaria perpetua ejusdem Ecclesiae de Colleton dotata*.

And whereas the said *John Poole*, for six years last past, had occupied one house, a hundred acres of land, twenty acres of meadow, forty acres of pasture, called Shute Park, in Shute aforesaid, within the parish of Colleton; which said tenements were anciently a park, and now disparked; which park *de temps d'ont memory*, &c. until the disparking thereof was used and filled with deer, and severed from other land, and was disparked an. 10 Eliz. and converted into arable; a hundred acres, &c. And that all the occupiers of the said park called Shute Park, *de temps d'ont memory*, &c. until the disparking, had paid the vicar there, his farmer or deputy, one buck of the summer season, within that time upon request, and one doe of the winter season, within that time, &c. in discharge of all tithes of the said park, until the disparking; and after the disparking in discharge of all tithes of the said tenements; which they had accepted for all the time aforesaid, until the disparking and after, or otherwise agreed with the vicar for them; and traversed this prescription: and found for the plaintiff.

And now in arrest of judgment it was moved by *Hendon*, that this prescription extends to the land *quatenus* it is a park, and that being destroyed, the prescription is gone; for a tenure to cover a wall, or thatch a house, if the party destroy or pull it down, the tenure is extinct. 32 E. 4. *Avowry*. And it shall be presumed that this was by grant when it was a park, which is collected by the thing which is to be paid; and if it be to be paid or delivered out of the park, then it is determined. Vide *Luttrel's* case, 4 Co. Also this prescription is against the benefit of the church, and shall not be enlarged; and the wood which is sold out of the park shall not be discharged. 14 Ja. in *Cowyer's* case in this court. Prescription that the parson had two acres of meadow given in discharge of all tithes of hay ground, viz. of all the meadow in the parish: if any arable land be converted into meadow, it extends not to discharge that. Vide *Luttrel's* case, 4 Co. 86. That an alteration in prejudice of the

the party determines the prescription: but *vide* the principal case there adjudged, that building of new mills in the same place, and converting of fulling mills into corn mills, alter not the prescription. *Vide Terringham's case*, lib. 4. He which has common purchased part of the land; all is extinct, for it is his own act. And he cited a case which was in this court argued at bar, and afterwards at bench, between *Cooper and Andrews*, M. 10 Ja. Rot. 1023. for the park of Cowthurst. (1) See 32 E. 1. *Fitz. Avowry*, 240. 5 E. 2. *Fitz. Annuity*, 44. 20 E. 4. 14. 14 E. 4. 4. But this case was adjudged for the plaintiff, *Quod stet prohibitio*, and that which is by the name of park is for the land, and is annexed to the land by the name of park: if the prescription had been to pay a buck or a doe out of the park, then it would alter the case; but it is general, and had been paid also after the park disparted, viz. the tenth of Eliz. And the case of *Cooper and Andrews* was the third shoulder of every deer which is killed in the park, and two shillings in money, and that case was never adjudged. [Hutton.]

Reynolds libelled in the spiritual court against Poole for the tithes of a park, and Poole prayed to have a prohibition; and he shewed that he and all those whose estate he had in the park, had held this as a park till the 11th of Eliz. at which time it was disparted; and time beyond memory, &c. the occupiers had used to pay to the vicar of the parish a buck in summer, and a doe in winter, in lieu and satisfaction of all tithes due to the vicar. And it was argued by Serjt. *Hendon*, that this is not a sufficient cause to grant a prohibition, because that now the park is destroyed, and sowed; and so the prescription fails; for it was annexed to the park. Secondly, the question is for the tithes of corn; and those do appertain to the parson, and not to the vicar. And he cited a case between *Hawk and Collins*, in this court: there the prescription was, that he and all those whose estate he had, had used to pay to the vicar a certain thing in lieu and satisfaction of all tithes due to the parson; and for this a prohibition was denied.

*Shirley*. He has prescribed that he used to pay this to the vicar; and this shall be intended for tithes due to the vicar, and not to the parson. Serjt. *Ashley* to the contrary, and that the prescription is good; for this extends to the soil, and not to the park. HOBART said, that tithes of corn are sometimes payable to the vicar, and not always to the parson; for put the case that at the time of the derivation of the vicarage out of the parsonage, the composition was, that the vicar shall have the tithes of that park; in this case, by reason of such general terms, he shall have the tithe of hay, corn, deer, or any other thing which grows in that. And the composition being made before time of memory, no man can say but that it was made in such manner: and the case of *Okenden Cooper* in this court, in which the court was divided, differed from this case; for there the prescription was to pay a buck arising and coming out of the park, and there was no deer left in the park. And HUTTON agreed, for there he destroyed his own prescription; and he agreed with *Bracie's* put after, for there was a contrariety in the prescription. WARBURTON. The case of *Bracie* in this court was, that the parson libelled against him for the tithe of corn, where this was due to the vicar, and not to the parson; and denied him for that reason; for he may not plead the title of another man; and the parson and the vicar ought to agree among themselves; but in our case no tithes are to be set out, and for that reason he may plead this; but it seems to me that the prescription shall go to the soil, and not to the park; and when it is destroyed, he shall pay tithes in kind. As a garden or an orchard, so long as it is used as a garden or an orchard, that the occupier of that shall pay a penny: now, if this be ploughed, and converted to other use, he shall pay tithes in kind. And HOBART agreed to the case of the garden or orchard; for the penny is paid for the herbs or fruit. WINCH was absent. And HUTTON said, that the prescription shall go to the soil, and the vicar by prescription may have [the tithes of] the herbs of the glebe of the parson. — HOBART. The park is only an appellation or name of land, and this name or appellation may not pay tithes, but the land itself. And put the case that a man had always paid ten shillings for the tithes of a meadow, and after he sowed that with corn; here for the payment

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of this ten shillings he is discharged. — WARBURTON. I deny the case of the meadow: and so it was adjourned.

Now the case between Poole and Reynolds was moved again by *Ashley* for the plaintiff in the prohibition, and the case was, that he was owner of a park, and the park had been, time beyond memory, replenished with deer till the 10th of Eliz. at which time that was disparked; and that the owners had used, before the disparking, to pay a buck in summer, and a doe in winter, in full satisfaction of all tithes due, to the vicar; and the parson had libelled in the ecclesiastical court for tithes in kind, and also traversed the prescription; and it was found for the plaintiff in the prohibition: and it had been moved in arrest of judgment, that notwithstanding this prescription is found for the plaintiff, yet he shall not have judgment for two causes: first, because gross tithes belong to the parson, and not to the vicar, for the vicarage is derived out of the parsonage. To this he answered, that for the most part, every vicarage is derived out of the parsonage; but it is a mere *non sequitur* that this does, for the vicarage and the parsonage may have several patrons. *Fitzh. 45.* Also a vicarage may be time beyond memory, as in our case, 40 E. 3. 2. 7. and *Fitz. juris utrum.* A vicar may have a *juris utrum.* And also he said, that in some parts the vicar shall have tithe corn and hay, and not the parson: and so he concluded this to be a good prescription by the common law. And then for the second point he argued, that though the park be disparked, yet the *modus decimandi* continued: and he vouched *Beddingfield's* and *Peak's* case, P. 38 Eliz. B. R. (1) prescribed to pay ten shillings for a park; this *modus* had a continuance notwithstanding the disparking: and 18 Ja. upon a motion, a prohibition was granted in such a case.

*Hendon* to the contrary; and yet for the first point he agreed, that a prescription to pay tithes to the vicar was good; for here it appears that the vicarage is as ancient as the parsonage, both being time beyond memory; and it was the opinion of all this court, when the case was first opened; and so he said he would not insist upon that, but agree the law to be against him: but then for the second point, he held the *modus* to be gone by the disparking, for the prescription is annexed to the park, and not to the land; for the prescription is to pay a buck and a doe for all manner of tithes of that park, and then the prescription is in some sort annexed to that merely as land, but *quatenus* a park; and for this he held, if a man will prescribe to pay ten shillings for the tithes of such land, and it be given in evidence to be a park, this will not maintain the issue; for a park is devisable one way or other; and so are of several natures; and so 4 Co. *Lutterel's* case, a tenure to cover the hall of the lord, if the hall be thrown down, the tenure is gone: and here, when the park is destroyed, the *modus* is also destroyed; but it has been objected here, that the prescription is general, and therefore, though the park were disparked, yet the *modus* had continued: to this he answered that this prescription shall have such construction as a grant shall have; and though it be general, yet it is *sub modo* subject to this limitation, that this always continue and remain a park: and it was resolved 43 Eliz. that the commoner may not grant over his common, except he grant over his tenement, for they may not be severed: and so indeed is *Nevil's* case, in the commentaries: a man prescribed to have estovers to burn in his house; if the owner destroy the house, the estovers are gone, for the prescription is annexed to the house; and so in our case the prescription is annexed to the park, and not to the land; for 18 H. 6. 21. a park may not be without the grant of the King: and the common law says, if a man prescribe to have tithes in a vineyard, if the vineyard be converted to another use, the tithes are gone; for it is said, *tantum est prescriptio, quantum est possessio*, and vouched *Coney's* case, 14 Ja. who prescribed to be discharged of paying tithes for a meadow, and afterwards this was converted to arable; and the opinion of the court was, that the prescription is gone; and the rather in our case, because it is by the act of the party himself that the park is destroyed; and yet he agreed the principal case in *Lutterel's* case, 4 Co. for there a new mill is only a translation of the old, and no destruction of the thing which was before: but in our case the park itself is destroyed by the act of the

(1) *Ante*, 118.



party himself, and therefore the prescription which was annexed to this is gone for ever.

Also this prescription is against common right, and therefore shall be taken strictly, as *Terringham's case*, 4 Co. a man had common appurtenant in another man's land, and he purchased parcel of the same land; the common is gone, because the common is against common right; but otherwise of a common appendant: and he cited *Wild's case*, 4 Co. according to our case, that a prescription to pay a buck and a doe for the tithes of a park, is against common right; for though tithes are not due *jure divino*, yet they are due *jure humano* and *communi*; and therefore the prescription is not founded in law, and it shall not be intended to the park, when that is destroyed and converted to arable; as if a man make a feoffment of land with warranty, and afterwards the land be improved and made of greater value than it was at the time of the feoffment; if in this case the feoffee be evicted and lease that, and recover in value upon the warranty, he shall recover in this case only the value that this was (of) at the time of the feoffment made, and not according to the value that the land is of at this day by the improvement. 32 E. 3. *Entry*, 81. And in our case it shall be intended that by composition at the first this prescription had beginning, and the composition only extended to the park, and not to a new thing: and for that reason the prescription is gone in this case; and he cited a case in this court, M. 10 Ja. Rot. 1223. in a prohibition between *Rous*, C. D. (1) the plaintiff suggested that such land was parcel of a park, as in our case, and that the owner had used to pay the shoulder of every doe which was killed, and two shillings annually for all tithes: the defendant pleaded that this was disparked; and the first opinion of the court was, that the defendant ought to plead in certain how that was disparked. Secondly, this was doubted whether the *modus*, as to the two shillings, was gone in regard that the shoulder of the doe is gone by the disparking; out of which he collected that the *modus* is annexed to the park, and not to the land: and so he concluded, and prayed a consultation.

WINCH said to him, the prescription is found against you, and therefore you ought to have demurred. — *Hendon*. If the prescription be gone, the plaintiff shall not have a prohibition: and at another day judgment was commanded to be entered for the plaintiff, if no other matter is shewn by such a day. HOBART and WINCH being only present. [*Winch*.]

(1) *Couper v. Andrews*, ante, 118.

M. 19 Ja. A. D. 1621. C. B. *Mabie's Case*. [*Winch*, 23.]

HOBART, in parson *Mabie's case*. If I let my rectory, excepting my glebe, the exception is void, for no rectory may be without glebe: and the same law of a manor, excepting the demesnes; but he may except parcel of the glebe, and good; but in pleading the lease of a rectory, this shall be taken for the whole rectory, and not for parcel.

If a rectory be let, excepting the glebe, the exception is void, for no rectory may be without glebe.

Tr. 20 Ja. A. D. 1622. C. B. *Anon.* [*Winch*, 33.]

IN the case of a prohibition. In the case of a libel in the ecclesiastical court for the tithes of cattle, the plaintiff alleged that those cattle of which tithes were demanded, are for his dairy, and for the plough. And WINCH, being only present, said, that the parson shall not have tithes of such cattle; but if he bred up cattle to sell, it is otherwise. Secondly, the plaintiff in the prohibition alleged, that time beyond memory the parishioners had paid a half-penny for the tithe of a calf, and a penny for a cow; and that upon a day limited, they used to bring this to the church, and to pay this to the vicar; and now the vicar had libelled in the spiritual court against them to compel them to bring it home to his house. And WINCH said, that this is no occasion of a prohibition, for they agree in the *modus*, but vary in the place of payment; and this is no matter of substance, and for that reason no prohibition will lie.

No tithe is due for cattle bred for the pail or plough; but those for sale are titheable.

Where a *modus* is confessed, and the only question is, as to the place where it is to be paid, no prohibition will lie to a suit in the spiritual court.

1623.

LEY, Ch. J. said that whatever is allowed for divine service, or is in lieu of tithes and offerings, is become a thing ecclesiastical.

E. 21 Ja. A. D. 1623. B. R. *Williams v. Gibbs*. [Godb. 285.]

**N**OTE, in this case it was said by LEY, Ch. J. that whatsoever is allowed for divine service, or whatsoever comes in lieu of tithes and offerings, the same is now become a thing ecclesiastical. And DODDERIDGE, J. also said, that no law appoints that the vicar or parson should read divine service in two several parish churches, but only the ecclesiastical law.

E. 21 Ja. A. D. 1623. B. R. *Stonehouse v. Read*. [N. Bendl. 143.]

The pope by his bull might discharge abbots, &c. from payment of tithes, while in their own hands, and although when leased, it should pay tithes, yet upon its expiration the privilege would revive to the patentee.

**T**HE court agreed that the pope might by bull discharge an abbot, &c. of the payment of tithes of their lands, and where the bull, &c. was, that they should be discharged while in their own hands; if it were in the hands of a farmer, he should pay tithes; but when the lease had expired, the patentee should have the same benefit as the abbot had. 10 El. Dy.(1) And DODDERIDGE said, that the Cisterians were so called from the town of Cisteux, in France.

(1) *Anté*, 59.

E. 21 Ja. A. D. 1623. B. R. *Anon.* [2 Ro. 294.]

Forty years is a good time of prescription by the spiritual law. If a man prescribe according to the usage of the spiritual court, no prohibition lies upon any suggestion respecting it, if the thing be merely spiritual.

**N**OTE, that a vicar libelled in the spiritual court for eight-pence, being the assessment of a parishioner towards a pension, and claimed it for forty years; and no prohibition shall be granted upon this alone; for their prescription differs from ours, and such prescription is good for the church there; but if one would have a prohibition out of this court, he ought to suggest that the vicar had no prescription but for a time certain, or not beyond memory, according to our prescription; for he shall not have a prohibition by reason that the vicar does not prescribe there out of time, for a prescription for forty years is good there; but he ought to suggest that he had it not for time whereof, &c. but if a man prescribe according to the usage of the spiritual court, no prohibition lies upon any suggestion that you can make, if the thing be merely spiritual.

E. 21 Ja. A. D. 1623. B. R. *Code v. Hulmed*. [2 Ro. 304.]

The choice of a vicar belongs of right to the parson, but the parishioners may prescribe to elect.

**T**HE appointment of a vicar of right belongs to the priest, viz. to the parson; but if the parishioners have a prescription to elect, it belongs to them. In prohibition.

E. 21 Ja. A. D. 1623. C. R. *Brigs's Case*. [Winch, 65.]

A dean and chapter are a body spiritual, who may prescribe in *non decimando* for them and their tenants.

**B**RIGS brought a prohibition against another, and alleged that the dean and chapter of D. were seised of the manor, and the defendant being vicar, sued to have tithe in court-christian; and shewed that time beyond memory, &c. they had held that discharged of tithes for them and their tenants, and that they let that to the plaintiff: and it was moved by *Hendon*, Serjt. that the dean and the chapter are a body politic and temporal, which are not capable of this prescription in *non decimando*. 2 Co. the bishop of *Winchester's* case.(2) *HOBART* said, that the dean and chapter are a body spiritual, and are annexed to the bishop throughout all England; and if the bishop be capable of that, as it is plain he is, then the dean and chapter is also capable of that, which was granted by *HURTON*; but *WINCH* doubted, for *WINCH* said he may be a layman; and for that the plaintiff ought to aver that he is a spiritual person. *HURTON* confessed that the dean may be a layman, as was the dean of *Durham*, by special license and dispensation of the King; but that is rare,

(2) *Anté*, 119.

and a special case, and is not common and general, and therefore not to be brought as an example; which was also granted by HOBART, Ch. J. and upon that, day was given over to the defendant to shew cause why the prohibition should not be granted.

1623.  
BUTLER'S CASE.

Tr. 21 Ja. A. D. 1623. B. R. *Honycomb v. Swete*. [Cro. Ja. 668.]

**A** PROHIBITION was granted upon this surmise, that one Bond, lessee for years of such lands, agreed with the parson that he should retain the land free from the payment of tithes, in consideration of ten shillings per ann. and of ten loads of wood; and alleges that he always paid the said ten shillings and ten loads of wood, and the other had accepted it, and that he assigned this lease to the plaintiff in prohibition. It was now moved, that this surmise, being parcel of the agreement, and for rent arrear discharged during the parson's life, could not be good; wherefore it was prayed that a consultation should be granted. But the court held that the surmise is good, being by way of retainer, and that the assignee may take advantage thereof, although it were by parol. Wherefore they then directed him to appear, and the other to declare, and that then the defendant should plead to the issue, or demur, as he would.

An agreement to retain land free from payment of tithe, was held good, although by parol, and that an assignee might take advantage of it.

Tr. 21 Ja. A. D. 1623. B. R.

*Bennet v. Snell*. [Palm. 377. 1 Godb. 333.] 2 Ro. 327. 331.

**S**NELL, parson, contracted with Bennet, his parishioner, that in consideration of twenty shillings and ten loads of wood, to be paid to him yearly, Bennet, his executors and assigns, should be discharged of tithes of a wood during the life of Snell. Bennet made his executor, and died. The administrator *durante minori etate* of the executor made a lease at will, and the parson sued the tenant at will, in the spiritual court, for tithes; and LEY, Ch. J. DODDERIDGE and HOUGHTON, *und voce*, granted a prohibition, for that the parson had his remedy for the composition by action on the case against the executor of Bennet, although he had no remedy against the tenant at will: and the lessee shall have the benefit thereof as assignee, although the agreement were by parol, in regard of the consideration, for which the parson has his remedy. Yet they held that the tithes did not pass in interest by the agreement, because it was by parol. But LEY, Ch. J. said, that for tithes due, and to be paid, if the contract be executed, it is good without deed.

An agreement by parol does not pass tithes in point of interest; but LEY, Ch. J. said, that for tithes due and to be paid, a contract executed is good without deed.

Afterwards, at another day, *Noy* moved, that by the stat. 2 E. 6. suggestion ought to be made upon proof, and that the plaintiff in the prohibition had not made sufficient proof: but *per curiam*, precise proof is not required upon this statute; and although there be an agreement by parol, reference to a writing is sufficient. Wherefore the plaintiff had prohibition. [*Palmer*.]

A parson contracted with A. his executors and assigns, that for ten shillings paid to him every year by A. his executors and assigns, that he, his executors, or assigns, should be quit from the payment of tithes for such lands during his life, viz. the life of the parson. A. paid unto the parson ten shillings, which the parson accepted, and made B. an infant, his executor, and died. The mother of the infant took letters of administration *durante minori etate* of the infant, and made a lease at will of the lands. The parson libelled in the ecclesiastical court for tithes of the same lands against the tenant at will; who thereupon moved for a prohibition. — DODDERIDGE. During the life of the parson the contract is on foot; but the assignee cannot sue the parson upon this contract, yet he may have a prohibition to stay the suit in the ecclesiastical court, and put the parson to his right remedy, and that is, to sue here. This agreement is not by deed, and so no lease of the tithes. The parson shall have his remedy against the executor for the ten shillings, but not against the tenant at will: and the executor has his remedy against the tenant at will. — CROOK. 21 H. 6. A lease of tithes without deed is good for one, but not for more years. v. 16 H. 7. And afterwards a prohibition was granted. [*Godbold*.]

Tr. 21

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Tr. 21 Ja. A. D. 1623. B. R. *Pagett's Case.* [2 Ro. 434.]

Proof of a suggestion is sufficient, if it be probable, and not that strict and conclusive proof which is necessary upon the trial before a jury.

**P**AGETT sued in the spiritual court for tithes of hay, and the defendant there suggested here, that the land where, &c. is parcel of Hackney, in Hackney marsh, and that time whereof, there was a *modus decimandi* of eighteen shillings for the tithe thereof, and had a prohibition. A consultation was prayed for that he had not proved his suggestion within six months according to the statute, for they brought two witnesses, the one of whom proved that for forty years, and the other for fifty years, no tithe in kind had been paid for this marsh, but that they had heard that a certain sum of money had been paid for this marsh and (it was said) that this was not good proof, for it is hearsay only, and what is false may have been heard. — LEY, Ch. J. In many cases, and in general, proof is to be understood as concluding proof, which would convince a jury, &c. : but he and DODDERIDGE said, that the mischief of the statute was, that parsons were delayed by false suggestions, and therefore provided that all suggestions should be proved ; but that is with probability, not strict and concluding proof. — DODDERIDGE. The strict proof shall be after the traverse before the jury : and consultation was not granted.

Tr. 21 Ja. A. D. 1623. B. R.

*Wiseman v. Denham.* [Godb. 329. Ley, 69.] 2 Ro. 328.  
Palm. 340. 381.

In an action upon the case, a custom was stated to pay so many cheeses, which the plaintiff tendered at Landone, but the defendant refused to take them away, but suffered them to continue in plaintiff's house, *per quod*, &c. Upon demurrer, two judges held against Ley, Ch. J. that the particular place of the tender ought to have been stated in the declaration: the case was now adjourned, and said by Godbold to have been afterwards determined for the plaintiff.

The tender ought to be where, by the ordinary course, the thing has its being; as at the place of shearing

the sheep, the parson is to demand his tithe wool ; things which are ordinarily in the house, as butter, cheese, &c. are to be tendered there ; and there they are to be demanded, and thereof notice is to be given to the parson ; and the party is not bound to carry them to the parson's house.

If a man set out his tithe hay or corn, and the parson refuse to take it away, an action on the case lies ; but no action on the case lies for suing in the spiritual court without cause.

If a man speak generally of a town, it is to be understood as the hamlet where the church stands.

**W**ISEMAN brought an action upon the case against Denham, parson, and declared that there is a custom within the town and parish of Landone, of which the defendant is the parson, that every parishioner who keeps so many kine within the said parish, should give and pay to the parson, for his tithe milk, so many cheeses at Michaelmas ; and shewed how that he kept so many kine, viz. twenty, &c. within the said parish, and that he tendered *apud* Landone so many cheeses at Michaelmas to Denham the defendant, being parson, who refused them, and to take them away, but suffered them to be and continue in the plaintiff's house, for which cause he brought the action : the defendant demurred upon the declaration. — *George Croke*. The action will lie ; for the plaintiff has a damage, by reason that the parson does not take away his tithe cheese. And it is like unto the case in 13 H. 4. *action sur le case* 48. where a man sold unto another hay, and because that the vendee took not away his hay, an action upon the case did lie ; for it was a damage to the plaintiff to let it stand upon his ground ; for he durst not put his cattle into his ground to feed, lest they should eat the hay and spoil it, and so he should be liable to an action to be brought by the vendee : so if tithe be lawfully set forth, and the parson refuse the tithe, but will sue in the spiritual court for the tithe, an action upon the case will lie : *a fortiori* in this case, for the cheeses may be cumbersome and troublesome to the party, so as he cannot make the best use or benefit of his house. — *Paul Croke* contrary : and he took exception because the tender is alleged to be *apud* Landone, and it is not shewed that it was at his house at Landone, or in any place certain ; and he said that the action will not lie, because here is no damage to the plaintiff : and it is like the case when a man makes a lease rendering rent, cheese, or corn, and the tenant renders it, and the lessor refuses it ; the lessee cannot have an action upon the case against his lessor, but he may plead the matter in bar, in an action brought by the lessor. And the case of 13 H. 4. before put, is not to the purpose ; for there it was part of the bargain to take it away by such a time. And in our case the plaintiff may plead the matter in bar to the plaint.

plaint. 43 Eliz. between *Cripe* and *Jackson*, (1) an action upon the case was brought for suing in the ecclesiastical court for tithes which were due, and he recovered damages.

Secondly, admit that the action does lie, then it is because it is a damage unto him that they remain in his house; but it does not appear that the tender was made at his house, but *apud Landone*, which might be a mile from the house; and so because it was his own fault, the action will not lie as in this case, by reason of the tender. — *George Croke*. It was adjudged in a Cornish case, that an action upon the case lies against a parson who does not take away his tithe corn, or hay, because it spoils the ground upon which it stands, and because the party cannot have the free use of his land: so in our case, he cannot have the free use of his house, the cheeses cumbering his house, and offending him with their smell. — *Houghton, J.* If the action were well laid, it would lie for the cause; but in this case it is not well laid: if any thing makes the action to lie, it is the damage which the plaintiff sustains by the cheeses being in his house; but here it is laid to be tendered *apud Landone*, and it is not said at his house, and *non constat* how the cheeses came to his house; for if they were brought back by the plaintiff, or by his commandment, then the action will not lie; but if he had laid his action that he gave notice to the parson that he had so many cheeses ready for him for his tithe, and had required him to send for them; then if the parson had not carried them away, the action would have laid; but for the reason before, the action as it is laid is not maintainable. — *Dodderidge, J.* There are two matters in this case: first, if the action will not lie for the matter: secondly, if the action will lie by reason of the tender: as to the first, I put this difference, that in some case it will lie, and in some case it will not lie; in this case the action is not maintainable. Where a tender is of a thing which the party ought to have, by the tender the property is changed; and there a damage may arise by reason that he will not take it away, as in the case of 13 H. 4. put before; there the plaintiff had damage by the standing of the hay upon the ground, for he could not put in his cattle, for then he might be in danger of an action, because the cattle might eat the hay.

If one set forth his tithes, and the parson having notice thereof will not take it away, an action lies, because it is a damage to the land: but in our case, admit the tender were at his house, yet this tender does not alter the property in the person, and they being his own cheeses, he has no loss; so the difference is, where the party has damage and loss, and where he has none; and here in our case he has no damage; the tender of the rent saves from the penalty, but does not discharge the duty; but admit that the action will lie, yet in this case the declaration is insufficient; for the tender is not alleged to be at any place certain in the village, for it may be that he tendered them to the parson in the churchyard of Landone, and then by the carrying of them home to his house again, he has lost the action which he might have had if he had tendered them at his house. *Ley, C. J.* There is a difference in the case of tenders: if I tender such a thing which is due, and the other refuse it, and I must pay the same thing in kind, if by the keeping of it I be damaged, I may have an action upon the case: and that is our case. If a man set out his tithe hay, or corn (the tender in our case is setting forth of the tithe cheese) and the parson refuse to take it away, and it perish in keeping, I am excused for the perishing of it; but I may have an action against the parson, for letting it stay upon my land to my annoyance. So if A. commit goods to me to keep in my house, and I require him to take them away, and he refuse to do it, I may have an action upon the case against him, for it is a trouble to me to remove them for him: and so in our case; but it is otherwise where I pay rent-corn, and the lessor refuses it, I may pay him in other corn. If one be to pay so much corn, and the other will not receive it being

(1) 43 Eliz. between *Cross* and *Jackson*. A parishioner shall not have an action on the case against the parson for suing him in the

spiritual court without cause; for if it be without cause he shall have the costs there. — (Palmer.)

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tendered to him, until it be clearer, an action upon the case will lie, for he is thereby damaged. In our case the party is damaged, for his house is annoyed by the smell, and also encumbered therewith; and the rooms of his house are valuable, and he cannot make use of them at his pleasure: the tender ought to be, where by the ordinary course the thing has its being: as to the place of the shearing of the sheep, the parson is to demand his tithes wool, and there it is to be paid, if there be a person who has power to deliver it; the things which are ordinarily in the house, as butter, cheese, &c. are to be tendered there, and there they are to be demanded, and thereof notice is to be given to the parson; and the party is not bound to carry them to the parson's house. The cheeses which are to be paid by this custom, are to be paid of cheeses made upon that land, and not of cheeses which the parishioner shall buy elsewhere. The tender is alleged to be in the town of Landone, and the law intends the cheeses to be in the parishioner's house, and this general tender is to be understood at the place where the cheeses by intendment of law are to be; and on the other side it ought to be alleged, that the tender was not at the house: so as I conceive that the tender is good. — DODDERIDGE. The intendment is not good in this case; for in every declaration there ought to be certainty and verity; but in a plea in bar, there, if it be a common intendment, it is sufficient. If a man speak generally of a town, it is to be meant at the hamlet where the church stands. — LEY. When a tender is pleaded, it is supposed to be at the place where the tender ought to be by the law. As a man is bound to pay money, if he plead that he tendered it at D. it shall be intended that D. is the place where it ought to be paid. If the party go to the parson's house, and tell the parson that he has at his house such tithes cheeses for him, and require the parson to send for them, here the notification is at the parson's house, but the real tender is at the party's own house: and the party plaintiff in our case cannot plead it otherwise than at Landone. — HOUGHTON. In this case the law requires a special place of tender expressed, or else he shews no cause of action: for if it were at any place out of his house, the action will not lie, and the cheeses ought to be personally tendered. — LEY, C. J. That would be inconvenient, for then he must carry them to him, and so he should be forced to wait upon the parson. — DODDERIDGE. 40 E. 3. If I tender to one a marriage, or a ward, the woman, or ward ought to be present at the time of the tender. Tender of money in a bag, as to say, I have money for you, is no good tender: so it is of cheeses; to say I have cheeses for you, is but a verbal tender, and it is not good; but it ought to be tendered personally and in kind. You will intend that the parson was at the plaintiff's house at the time of this tender, and here is nothing in the case to direct you so to think. — LEY. The place is but circumstance, for the parson is tied to demand them at the house, being the proper place of tender, by reason of their being there. — DODDERIDGE. The cheese must be shewed the parson, and that proves that he must be present. — LEY. If he were present, then the tender is good: but if he be not there, but at another place, the notice is sufficient. — DODDERIDGE. The law requires certainty in a declaration, and the matter cannot be taken by intendment; so we ought to have a certainty set forth, otherwise no certain judgment can be given. It was adjourned, for DODDERIDGE and HOUGHTON, Justices, were against LEY, C. J. but as I have heard, the case was afterwards adjudged for the plaintiff: therefore *quære* the record of the judgment.

**T**HE plaintiff being parishioner in Launder in Essex, brought an action of the case against the defendant, being parson of the same parish, and counts that he at the parish of Launder, had laid out for the parson, fifteen cheeses for his tithes, and the defendant suffered them to remain in the house of the plaintiff for such a time, and did not fetch them away, to his damage. At this court, two exceptions were taken by *Bridgeman*: first, that an action upon the case does not lie, for refusing to receive tithes: secondly, admitting that it did, that then the count was insufficient, inasmuch that the setting forth was in the parish of Launder, and it does not appear that there was any tender

tender at the house of the plaintiff; and HOWARD, J. conceived that for the matter action lies very well: as if an occupier of land set forth tithe corn or hay, and the parson do not carry that away in convenient time, but suffers that to remain upon the land, action lies; but for the second, it seems, it does not appear that tender was made in the house of the plaintiff, nor that he was damaged; but DOWNHAM, J. conceived, that when an occupier of land sets forth tithe corn or hay for tithe, that by this, the property is altered, and by that the grain or hay is become the grain or hay of the parson, and then if he suffer that to remain upon the land of the parishioner, action on the case lies, but it is not so in the case of tender of cheese, nor of other personal or mixt tithe; for that after the tender, the property remains in the first owner, as in the case of tender of rent of money, rent corn, or other such thing: and for the second, he conceived, that the tender ought to be made at the church, or to the parson or rector, and for that, the tender not being alleged to be at his house, the parson being there, it was not sufficient; and LEY, C. J. conceived that the tender was very good, and shall be intended to be made at his house, and by consequence, that both for the matter and manner action lies. See 13 H. 4. Action upon the Case.

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Tr. 21 Ja. A. D. 1623. B. R. *Anon.* [Godb. 354.]

**NOTE.** It was vouched by *George Croke*, and so was also the opinion of the whole court, that by way of agreement, tithes may pass for years without deed, but not by way of lease without a deed. But a lease for one year may be of tithes without deed.

Tithes may pass for years by agreement; but not by lease, without deed, except for one year.

Tr. 21 Ja. A. D. 1623. B. R. *Anon.* [Palm. 380.]

**I**T was agreed by the court, that by the canon law, tithes are not payable for houses of common right, as 10 Co. *Grant's* case; (1) but if there be a custom that tithes shall be paid for them, such a custom is of ecclesiastical jurisdiction, and the parson may sue them as for customary tithes.

(1) *Ante*, 222.

No tithes are due for houses but by custom; if any be so due they may be recovered in spiritual court.

E. 22 Ja. A. D. 1624. C. B.

*Bone v. Bishop of Norwich.* [Winch. 72.]

**I**T was agreed between Michael Bone, and the Bishop of Norwich in trespass, that by the lease of a grange, and all houses and buildings thereupon, and belonging or let heretofore to one Edward Garrard; that in this case, if it may not be proved, that the tithes were not let to Garrard, then they will not pass by this lease, for it is not possible that tithes shall pass as appurtenances to a grange, because they are of several natures: except, as WINCH said, that the grange is the glebe, for if it be, then the rectory may pass by this name.

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Tithes cannot pass as appurtenances to a grange, for they are of several natures; except, as Winch said, that the grange be the glebe, for if it be, then

the rectory may pass by that name.

E. 22 A. D. 1624. C. B. *Summers v. Dugs.* [Winch. 80.]

**S**UMMERS brought an action upon the case upon a promise against Dugs; and he shewed in his declaration, that the defendant was rector of the rectory of D. and that he and all his predecessors had used to have all manner of tithes; and said that the plaintiff occupied 100 acres of land in the same parish, and shewed that the defendant promised to the plaintiff, that in consideration that he would plant his land with hops, and so make the tithes to be the better, the defendant promised to the plaintiff to allow him towards every acre, which he should so plant, forty shillings, towards the charge in planting it: and he shewed that he had planted an acre at the request of the

defendant, *Quere*, whether an action will lie upon a promise, that if the plaintiff would plant his lands with hops the defendant would allow 40 shillings an acre towards the expenses, it being alleged that defendant had planted an acre.

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defendant, and so upon the promise brought the action: and now it was moved whether this was a good consideration to ground an action, because the tithes are not bettered by the planting of that with hops, but by the growing of them, and the increase of them; and he had not averred, that the tithes were of better value than they were before: and it was also moved, that he may not have an action for the rood, &c. but this afterwards was referred to arbitration; but the court said, if the plaintiff had shewed in his declaration, that he might have made more benefit of that by other means, than by the planting of it with hops, the tithes also being bettered, then it had been more clear.

Prohibition in a suit for tithe of beasts employed in carrying goods and in husbandry.

Tr. 22 Ja. A. D. 1624. B. R. *Anon.* [2 Ro. 456.]

ONE sued for tithes of beasts, and the fact was, that a carrier used them one week to carry goods to London, and the other week employed them in husbandry, and a prohibition was granted.

Tr. 22 Ja. A. D. 1624. B. R.  
*Haie's or Hawe's Case.* [2 Ro. 458.]

Tithes shall not be paid of old rabbits in a warren. But *quere* whether tithes shall be paid of the young, as of pigeons.

ONE sued for the tithes of rabbits in a warren; and *Jermyn* took a distinction that for rabbits in a warren tithes should be paid, otherwise not.—*HOUGHTON*. Shall you have tithe deer in a park? — *Jermyn*. No.—*DODDERIDGE*. What difference is there between the cases? and you shall not have tithes of a coal mine.—*LEV*, C. J. He could not say *cuniculos suos*, and it is not felony to take them, for he has no property in the old rabbits: but the better question is, whether he shall have the tithes of suckers, as of the young of pigeons: wherefore the court granted prohibition.

M. 22 Ja. A. D. 1624. B. R.  
*Dickinson v. Greenhall.* [2 Ro. 479. *Anon.* in Poph. 156.]  
N. Bendl. 168. 1 Gw. 405.

Two questions were made:

1st. Whether lands of the order of *Præmonstratenses* were discharged *quandiu propriis manibus aut sumptibus excolebantur*; 2d. Whether it were sufficient in pleading such discharge, for the patentee to say that *habuit et habet in propria manu*, without alleging that *propriis sumptibus excolebat*.

*GREENHALL* is sued in the spiritual court for tithes; and to have a prohibition he suggests, that Robert the late abbot of, &c. was seised of the land in fee, as parcel of the monastery, and at the time of the dissolution; and that he and his predecessors from time whereof, &c. from their foundation to their dissolution, were of the order of the *Præmonstratenses*; and that all the abbots, and all the religious of that order (from time whereof, &c.) *immanes, liberi, privilegiati et exonerati fuerunt, et esse debuerunt, à solutione omnium decimarum quarumcunque de et super* their lands, &c. *quandocunque manibus aut sumptibus propriis eas aut ea excolebant*: and that Robert and his predecessors from time whereof, &c. had enjoyed their lands, &c. free *de solutione decimarum quandocunque manibus et sumptibus propriis excolebant*: and shews the dissolution of the abbey, and the statute of 32 (31) H. 8. and conveys title to himself, and that he was and yet is seised in fee, *et habuit et habet in propria manu ex colatione*, and so ought to be discharged of tithes; and sets forth the statute of 2 E. 6. that no one shall be compelled to pay tithes, who has a lawful discharge; and that notwithstanding the defendant sued him in the spiritual court for tithes, &c.

*Noy*, for the defendant.—Here are two discharges pleaded; the one by order; the other by prescription; the one is *manibus aut sumptibus*; the other is *sumptibus*; and here is a double application of these discharges. 1. As to the discharge by order, it is to be considered, what discharge those of the order of *Præmonstratenses* had, and whether it be here well set forth. At first all monks paid tithes as well as other people, until Pope Paschal in the council of Mentz ordained, that they should not pay tithes *de laboribus suis*; and this continued a general discharge until the time of H. 2. when Adrian restrained it to three orders, the Cisterians, Templars, and Hospitalers, and as to the others they should not pay tithes *de animalibus nutrimentis annuatim et gratis*; but for other things they should pay tithes of animals. The discharge of the

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Præmonstratensian order was made by a bull of Innocent III. which is in the third book of the Decretals; the words of which bull are more ample and large than the discharge which the Templars, &c. had; but I say that this bull never was allowed, nor is it mentioned in any of the expositions, neither is it in the Gregorian compilation. And afterwards in the council of Lateran, *ne ecclesia nimium gravaretur*, it was provided, that the privilege of the Templars, &c. should not extend to their farmers; and, if the Præmonstratenses had had any such privilege, they would have provided against them also; for the church would be aggrieved by them. In 34 H. 3. 2. Mem. 1. there is a clause, that there were several abbots of the order of the Præmonstratenses, who asked for the privilege of the Cisterians; and this they would not have done if they had had any privilege, especially a greater: and there are divers other privileges in this bull which never have been allowed; as, that no one should take a palfrey from them; yet when an abbot of this order did homage, the marshal would take his horse. So, that they *provocentur ad judic'*, and that they should not be cited before an ecclesiastical judge, but of their own order. And the parliament roll of the statute of 2 H. 4. c. 4. proves this: the occasion of making that statute appears to have been, that the clergy exhibited a bull to the commons, which was a new bull of the pope for certain orders to be discharged of tithes of their lands though taken to farm; and this they said was against the law, and to the prejudice of the patron; and that the examination of the bull belonged to the King, and that therefore it might be avoided; and the clergy would not have done this, if the Præmonstratenses had had such a discharge. (1) But it is objected, that though this bull has not been allowed, yet, it is good. I answer, *Negando quia non obiret quatenus habeat vim legis, et quatenus habeat vim rationis*; and there is a difference between a general law, and a common and particular sentence, as of a divorce, 11 H. 7. 12. And this is proved by M. 5 E. 1. or H. 1. Rot. 100. in B. R. where Queen Eleanor brought a *quare impedit*, and had a writ to the bishop; and in a *quare incumbravit* against the bishop stated, that she had recovered in a *quare impedit*, and had a writ to the bishop *ad admittendum clericum*; to which the bishop said, that it was ordained in the council of Lyons, that the six months should be computed according to weeks, and not according to the months of the year, and that according to weeks the six months were elapsed before the writ was delivered to him, and he collated: the Queen replied, that the writ came to the bishop within the six months of the year, and that she was a lay person, and was not bound by the council; and recovered. And this is also proved by the statute of 21 H. 8. c. 21. and 10 H. 7. 18. It appears too by Ordericus Vitalis, fo. 111. that in the beginning of the Cisterians, their governor persuaded them to labour, and they cultivated their own lands; but that the white monks would not labour; and therefore there was greater reason, that the black monks who did labour should be discharged of tithes, than that the idle white monks should. And by their institution the black monks were not capable of appropriations, because they thought the tithes did of right belong to the vicars. In the Chronicles of Normandy, fo. 187. the number of black monks and of their abbeyes was certain; but there was no certain number of white monks; so that it was a greater grievance to the church that the white monks should be discharged, than that the black monks should.

2. The plaintiff in this case does not shew how he is discharged, but states it generally. In 22 E. 4. 46. where one pleads there that he has a sufficient discharge, and does not shew how, it is not good. It is objected, that this is an ecclesiastical matter; as in a divorce. I answer, that such matters ought to be pleaded *concurrentibus iis, &c.*; it was adjudged in *Slade and Drake's* case, in C. B. (1) that it is not good to say, that the abbey was discharged, without shewing how; which case was determined by the chief justice: and though a writ of error was brought upon that judgment, yet it would have been affirmed in this court if the parties had not previously agreed. 3. The particular discharge is not well alleged: for it is, that the abbot, *ratione præ-*

(1) The original is very confused here.

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mind, shall be discharged; and here are two discharges shewn, and therefore it is uncertain, 30 H. 6. 2. 7 H. 7. And it is *quandocumque*, which is a condition, and the plaintiff does not shew that he has performed it, 37 H. 6. 3. 4. and 9 H. 6. 4. The particular discharge is not well applied: for the discharge is, when he cultivates with his own labour, and at his own expense; if then there be not both, namely, 1st. his labour, and 2d. his expense, there shall not be any discharge of tithes; as, if the lessee cultivate it, and the lessor afterwards enter for a forfeiture: so, where it is let out by halves, as, if it be *colonus*, *partienus*; there shall not be a discharge in that case. So, those who had their gardens discharged, were not discharged for *hortis conductis*. For privileges of this nature were *stricti juris*; and the plaintiff has not shewn here that he cultivated it with his own labour, and at his own expense.

The Case was argued again, H. 1 Car.

**I**N an attachment upon a prohibition, the plaintiff declared that where Robert, the last abbot of Cokersham, in Lancashire, was seised in fee of three acres of land, parcel of his monastery, and that the abbot and his commons; and all the predecessors of the abbot were time out of mind of the order and rule of *Præmonstratenses*, and that the order of *Præmonstratenses*, and all monks thereof, were time out of mind discharged of payment of tithes for their lands and tenements, *quandiu manibus propriis aut sumptibus excolebant*. And that the said abbot and all his predecessors time out of mind had holden the said three acres discharged of payment of tithes, *quandiu*, &c. and so held them until the dissolution of the monastery, and shew the surrender to H. 8. and the statute of 31 H. 8. by force whereof H. 8. was seised, and held them discharged, and from him derive them to E. 6. and from E. 6. to Queen Mary, and from her to Queen Elizabeth, and from her in the forty-second year of her reign to Wagstaff, and from him by mean conveyances to Dickenson, the plaintiff, *quorum prætextu* he was seised, and enjoyed them in *proprâ manutentione*, and shew the statute of 2 E. 6. cap. 15. whereby it is enacted that tithes shall be paid as usually they were, &c. *Quorum prætextu*, the plaintiff held the three acres discharged of tithes, and that notwithstanding, and against the prohibition, the defendant did draw him into ples for them in court-christian, and the judge there held plea, and the defendant did there prosecute him to the dishonour of the crown: and upon this the defendant demurred; and prayed a consultation. And Sir John Davies, the King's serjeant, argued for the defendant, that a consultation should be granted, because that his matter of discharge is double.

1. His privilege. 2. The prescription: and if either of them will not help him, then he ought to be charged. For the privilege, he took it that the *Præmonstratenses* never had such a privilege. It is a maxim in law, that all persons ought to pay tithes; and all lands shall be charged with them of common right; but also there are divers discharges of them and allowed by our law (as is manifest by the orders of Templars, Hospitallars, and Cistercians, which discharges our law allows) and these are, 1. By prescription. 2. By real composition. 3. By privilege obtained, and that by two ways:

1. Either by the bull of the Pope, for he taking upon himself to be the great dispenser and steward of the church, took upon him to discharge them; but this (as it is holden by the canon) he could not absolutely do; but might divert them to a cheryman, or grant to another to hold them by way of retainer, and this ought to be to a cheryman also. Or,

2. By a general council, for some orders were discharged by general councils: So some obtained privileges by the Pope's bulls, which are his patents; some by councils, which are his statutes, and decrees were as judgments; but yet none of them had ever any force in our law, nor did bind us in England more than voluntarily retained and approved by usage and custom: for as it is said in 11 H. 4. the Pope cannot alter the law of England; and this is evident, for in all

all cases where the bulls or constitutions of the Pope cross the law of the land, they have always been rejected; as for instance,

1. In the bulls which are of four sorts.

1. Of provision.
2. Of citation.
3. Of exemption.

And 4. Of excommunication. And as for those of excommunication, it appears that it was treason at common law, and that the treasurer did kneel to E. 2. for one who brought them in, and in the perpetual course of the books afterwards, they have always been disallowed in pleas. So his bulls of citation, before the statute of provision, were an heinous offence, and so are bulls of provision and exemption. For his canons, where they were against the law, they were neglected. It appears by the canon, *quod nullus capit beneficium à laico*, and yet notwithstanding continued long after for benefices, and does yet for bishoprics, that the clergy shall take them from the King and a lay-hand: and also there is a canon for exemption of clerks out of temporal jurisdiction: but yet as Brian says, 10 H. 7. 18. it was never observed here. So that canon saith, that the time of the lapse shall be accounted, *per septimanas*, but our law not regarding this, says, that it shall be accounted *per menses* in the calendar, as it is expressly adjudged in 5 E. 3. Rot. 100. Rot. *claus. in turri*. And there is a great reason for it, as it is in 29 H. 3. *memb. 5. in turri*. It is not necessary for bishops of England to go to general councils; so as in parliament those that do not send knights or burgesses shall not be bound by statutes. And the councils of Lyons, of *Bigamie*, &c. are expounded by statutes how they shall be taken; so that if they have a privilege (as in truth they have) by the Pope's bulls, if it were not allowed in England, they are not of force to privilege them against the common law of the land for payment of tithes; but this was never here allowed.

And now for the prescription: this cannot help them, for monks are not of evangelical priesthood, to wit, capable of tithes in the *permanency*, but merely laymen, and then as the Bishop of Winchester's case is, they cannot prescribe in *non decimando*; and Bede says of them, that they are *mere laici*, so that if their privilege were allowed, the prescription would not help them. The privilege of *Præmonstratenses* was by the council general of Mentz for their discharge, which denies that all religious persons should be discharged of tithes of lands in their own hands, *quandiu*, &c. But afterwards Adrian restrained it to the Templars, Hospitallers, and Cisterrians, omitting the *Præmonstratenses*; and the decree of Adrian was received also, whereby the law took notice of the discharge of the said three orders. True it is, that the *Præmonstratenses* have a bull of Pope Innocent the Third, of discharge, and as large liberties as the Cisterrians, but they never put this in use. And it seems, 1. That there were of them twenty-nine abbots and abbess, and yet their privilege is not mentioned in all the books as the Cisterrians is, 2. They complained to Gregory the Ninth, that they were not suffered to put it in use; and notwithstanding this complaint and command of the Pope to the clergy to allow them this privilege, yet 24 H. 3. complaint was made against them in parliament for claiming this privilege. But the statute of 2 H. 4. cap. 4. put this out of doubt, for this put the Cisterrians in a *præsumptio*, for purchasing and putting in execution bulls of exemption of their lands purchased afterwards.

Now if the *Præmonstratenses* had the same privilege they should not have been omitted out of this statute; then comes the statute of 7 H. 4. cap. 6. which terrifies all from putting in execution bulls of exemption of their lands not put in execution before, upon which it is not to be presumed that it was put in execution afterwards.

But admit that the *Præmonstratenses* had this privilege: I say, that the plaintiff has not applied this privilege to himself, for he has not averred in fact that at the time, &c. *propriis manibus excolebat, nec ad firmam demittebat*; and this he ought to have done if he would take advantage of the privilege, as in Dickinson's case, *novel lib. intr. 542.* there it is expressly alleged in the like case,

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case, as ours is here, and where the same privilege as here is claimed, *quod manibus propriis excolebat*.

True it is that it is said here, that after the feoffment to him made, he was seized *et gavius fuit in propriâ manu ten'*, but he does not say, that at the time of the tithes due, *gavius fuit*, &c. as he ought expressly to have done, as appears by other cases.

If one prescribe to have common in arable land when the corn is reaped, or in meadow when the hay is carried away, and justify by reason thereof, he ought to aver that the corn or hay was carried away when he put in his cattle, otherwise he has not applied the prescription to himself.

So if one justify for common *quandocunque averia sua venerint*, he ought to aver that his cattle then went in the place where, &c. as 17 Ass. 7. So if the King pardon all but those who adhere to M. he who pleads it ought to aver that he did not adhere to M. so here the privilege is *quandiu propriis manibus*, &c. and therefore at the time he ought to aver that he had it *propriis manibus*, &c.

Also where upon the surrender to H. 8. and the statute, they conclude that the Queen held it discharged, this cannot be, for this ought to be in such manner as the abbot held it discharged, but this was *quandiu*, &c. and the King cannot be bound to such an unbecoming condition, and therefore he shall hold it discharged. Like to the case where the abbey has the presentation, and another the nomination, the abbey surrenders, he who has the nomination shall have all, for the King shall not present for him, it being a thing indecent for his Majesty: and so he concluded for the defendant.

*Banks contra*. 1. That it is a good cause of prohibition. 2. That it is well applied to us.

1. That the order of *Præmonstratenses* is discharged of tithes, that they had once this privilege, has been allowed by the other party, by the bulls of the Pope; and that it was allowed and taken notice of, he proved by this, that this bull was confirmed by King John, in the twenty-fourth year of his reign, the charter whereof he said he had under seal, and 22 E. 1. *membran*. 5. there were twenty-six abbeys of this order, and the King took them all into his protection with their immunities, and 22 R. 3. John de Gaunt having *jura regalia* in Lancashire (where the abbey is), confirmed to them this bull: and also this has been divers times allowed and decreed to them in court-christian for suit of tithes, as in the case of the abbey of Bigham, which was of the same order.

And as to that which was objected, that if the *Præmonstratenses* had such a privilege as the Cisterrians in 2 H. 4. that the like provisions would have been against them.

As to this I answer, that such a provision is not against the Templars nor Hospitallers, and yet they have such a privilege.

2. It may be that they never enlarged their privileges above their grant. And for the statute of 7 H. 4. our privilege was not then new, and it was afterwards allowed in 22 R. 2. And also I conceive, that if the abbey were discharged at the time of the dissolution, although not *de jure*, yet this is a sufficient discharge within the statute of 31 H. 8. as it is taken, Coke, lib. 11. 14.

2. I hold that they may here prescribe to be discharged of tithes, because they are spiritual persons, and capable of cure of souls, and capable of tithes in *pernancy*, as if an appropriation be made to them.

3. It is not now to be argued, whether they have such a privilege, for they have demurred, which is a confession of all matters in fait, &c.

4. If there be a matter whereupon the prohibition may be grounded it will serve, *vide* Dyer, 170, 171. Co. lib. 10, 11.

And 5. The privilege is well applied, because it is shewn that they were once discharged.

6. He needs not to shew how he is discharged, 22 E. 4. 4. 5 E. 4. 8. 20 E. 4. 15. Also the discharges are *temps dont*, &c. and therefore not pleadable; so he prayed that the prohibition might stand.

Hil. 22 Ja. B. R. *Scott v. Eyre*. [2 Ro. 495.]

**S**cott libelled in the spiritual court for tithes of old rotten trees cut down for fuel, and also for tithes of loppings of trees, which loppings were not of twenty years growth, and prohibition was granted.

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Prohibition to a suit for tithes of old rotten trees cut for fuel.

E. 1 Car. B. R.

*Bowry v. Wallington*. [Anon. in Poph. 159. Latch. 6.] Latch. 75.  
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**N**OTE that in this case upon the statute of 50 E. 3. 4. it was agreed by the court, that if there be a suit in the ecclesiastical court and a prohibition awarded, and afterwards consultation granted, that upon the same libel no prohibition shall be granted again; but if there be an appeal in this case, then a prohibition may be granted, but with these differences.

1. If he who appeals pray the prohibition, there he shall not have it; for then suits shall be deferred in *infinitum*, in the ecclesiastical courts.

2. If the prohibition and consultation were upon the body of the matter, and the substance of it; for otherwise he shall be put many times to try the same matter, which is full of vexation. And the case was moved again, and argued by Noy.—(Anon. in Poph.)

A prohibition was granted against Wallington, a parson, who libelled in the spiritual court for tithes; and after pleading in this court, the parties went to issue, and the plaintiff was nonsuited; whereupon a consultation was granted to the spiritual court, and sentence was given there for the parson; and the other appealed to the court of Arches, and then moved for a fresh prohibition to that court, and Noy argued that prohibition did not lie; he said, it had been objected, that the stat. 50 E. 3. c. 4. enacts, "that after a prohibition, if a consultation have been awarded to the court-christian, that then the same judge in the court-christian shall proceed, notwithstanding any prohibition proved afterwards," and that the words "the same judge," meant the judge personally in the spiritual court; and therefore in this case, it having been removed from the court of the ordinary to which the first prohibition was granted, that prohibition shall be granted to this court, notwithstanding the consultation before granted: But it ought not to be granted, for whereas the statute says that "the same judge" shall proceed, notwithstanding a prohibition granted after consultation, these words "the same judge," ought to be understood to mean the judge of the same jurisdiction, and not the judge personally. 5 R. 2. Tryal, 54. All the spiritual courts in England and at Rome are but one court, as to the consance of our courts of common law. The stat. 27 Eliz. enacts, that "the party, plaintiff or defendant, bringing his writ of error," yet if one of them die, his executor shall have a writ of error, as was adjudged in the *Lord Morant's* case, yet only "that party" is named in the act; so in this statute 50 E. 3. these words "the same judge," shall be construed the judge of the same jurisdiction. And inasmuch as the other side rely much upon these words "the same judge" in the statute, I have seen the Parliament Rolls in the Tower, 50 E. 3. Rot. 199. there in the petition upon which the statute is grounded, the words are express, *liceatque judici ecclesie*, which denote the jurisdiction, and not the same judge, as the printed statute says. And, in truth, if the statute should not be expounded of the jurisdiction, but of the individual person of the judge, there would be infinite delay in these suits; for in such case, if one libelled for tithes before an official, and the other brought prohibition, and were nonsuited, and a consultation granted; if the official were dead or removed, then a prohibition might be granted to the new official, notwithstanding the prohibition granted before. So if one sue before an official, and afterwards appeal to the ordinary, and from the ordinary to the Arches, and thence to the court of Audience before the archbishop, and from him to the court of Delegates; if "the same judge" in the statute shall be expounded to mean the person of the judge, and not the jurisdiction, then upon all these

If there be an appeal after consultation, another prohibition may be granted, unless it be upon the prayer of the appellant, or the consultation were upon the matter and substance of the suit: but *quere*, the construction to be put upon the words "the same judge," in the 50 E. 3. c. 4.

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several appeals the party might have several prohibitions, notwithstanding the consultation before granted; which would be a great vexation and trouble, and so against the intention of the statute. See Reg. 50 & 56. So, if in the spiritual court the judge should appoint a surrogate (viz. a deputy) as he well may, (although a judge of this court or the Common Pleas cannot appoint a deputy,) in such case a prohibition might be granted after consultation, inasmuch as the surrogate is not the same judge in person, to whom the consultation was granted before. And to conclude, there was *Davies's* case in this court last term (H. 22 Ja.); one prayed a prohibition, and did not prove his surmise within six months, as the course of the court requires, and therefore a consultation was granted; and after that the party moved for another prohibition, and as he shewed several precedents of prohibitions granted in like cases, the court granted it. But the court then said they would be sparing of granting prohibitions in such cases: and they said, that if a prohibition should be granted, and afterwards consultation, and sentence given in the spiritual court, if the party appealed to the court of Arches, they would not grant prohibition in such case upon plaintiff's request, for he should not have advantage of his own act, (viz. the appeal,) which is in truth our case. 1 H. 7. 12. Dyer, 105.—(*Latch.*)

*Palmer*, at the end of his report of this case, says, *quære finem*, but *Latch.* in a report of the case distinct from that given above, says, that "no consultation was granted."

E. 1 Car. B. R. *Anon.* [Latch. 48.]

A custom admitted in the spiritual court may be tried there; but if it be denied, prohibition shall go.

**JONES** said, where a custom is alleged in a plea in the spiritual court, the custom may be traversed there, if the parties agree and consent to it; but if the custom be denied, then a prohibition shall be granted, and the spiritual court ousted of jurisdiction.

M. 1 Car. B. R. *Wrothmeal v. Gill.* [3 Bulstr. 310.]

A curate libelled for tithes, as curate rightfully and lawfully admitted and *legitimè investitus*; the court held that *investitus* in the canon law means the same as *inductus*, which implies institution; and if the case be that he is a mere stipendiary curate, it is to be pleaded in the spiritual court, and if they refuse the plea, prohibition shall go.

**BANKS** moved the court, for a prohibition to the ecclesiastical court. The ground and suggestion to have a prohibition, he gathered and collected out of the body of the libel; because there the parson libelling for tithes, sets forth no title at all to enable him to have the tithes, being only laid, that he was the curate of such a church; and does not lay that he was admitted, instituted, and inducted: for that before induction, no freehold vests in him to entitle him to have the tithes, for *curatus non habet titulum*, and by 32 H. 6. fol. 28. and 33 H. 6. fol. 24. he can have and maintain no action, neither a spoliation, nor trespass before his induction; for before this, he is not entitled to the tithes, and a release by him made before this, is not good, as appears by 11 H. 4. fol. 3. Commentaries, in *Hare* and *Bickley's* case.

**DODDERIDGE, J.** By institution, *habet curam animarum*, the words of institution being, *institulo te habere curam animarum, curam tuam, et meam*, so that *curatus* is a vicar, admitted and instituted: and the law takes notice of a curate, as appears by the statute of 35 Eliz. upon a motion there made by the curate, as mention is made in the said statute for matter of recusancy and abjuration; and so *curatus*, this implies a parson instituted; here by the libel it appears, that the parish's name is *Burton Cutberd*, and it is mentioned that he is *curatus ecclesie, ritè et legitimè admissus, et legitimè investitus*, and so good and sufficient; and by the canon law, *investitus* is taken for *inductus*, and makes all the matter plain, and as if he had said, *curatus, admissus, et inductus*, and this is good.

**WHITLOCK, J.** agreed herein, if he had said, *ritè et legitimè inductus*, this is good; here it is *investitus*, and this is all one, *et curatus investitus, et inductus*, implies *institutus*: *curatus* implies this, *quia ad curam animarum*, and so this is good and sufficient.

**CRAW, C. J.** agreed with them herein, that the suggestion is good.

**DODDERIDGE.** You have not the word, *persona*, nor *rector*.

The whole court agreed in this, that if the truth of the case be so, that he

is but *stipendiarius*, a mere stipendiary parson, then this is to be pleaded there, and if they refuse this plea, then this shall be a good cause to move for a prohibition.

*Banks* made answer, that the truth of the case is, that this is an impropriation, and that there is neither parson, nor yet vicar there, and so the suggestion is.

*DODDERIDGE*. This is not to be, for then this suggestion shall be contrary to the libel; but plead your matter there, as the truth of the case is, and then upon their refusal there to give an allowance of this, you may move for a prohibition.

And so without any further debate of this matter, the same rested upon this former direction given by the court unto the plaintiff in the prohibition to be by him pursued: no prohibition granted, but that they may there proceed.

H. 1 Car. C. B.

*Udall v. Tindall*. [Cro. Car. 28. Hutt. 77.] N. Bendl. 139. 159.

**T**RESPASS, for taking two loads of woad: upon *not guilty* pleaded, a special verdict was found, that if woad be *minuta decima*, then the jury found that the defendant is not guilty; if it be not *minuta decima*, then they find for the plaintiff: and it was argued by *Henden*, Serjeant, for the plaintiff, and by *Bridgeman* for the defendant; and on the behalf of the plaintiff it was said, that inasmuch as it is so found, without more circumstances, it shall not be intended to be *minuta decima*, for it may be that a great quantity of woad may be sown, and the greatest part of the commodity of the parish may consist in woad, and then it cannot be reputed *minuta decima*: for although in their own nature they be *minuta*, yet they now become *maiores*, if the greatest part of the profits of the parish consist therein. For *minuta decima* are properly intended such, which are but of small consideration in a parish, as herbs in a garden, and such like; therefore, he said, that woad sown in the field is not *minuta decima*: and that in 3 Ja. upon a special verdict, in Essex, betwixt *Hertman* and *Bosley*, it was resolved, that tithe of weld (which is a kind of grass growing amongst other grain, and commonly sown therewith) were not *minuta decima*. But *Bridgeman*, for the defendant, vouched the Dean and Chapter of *Norwich's* case, E. 43 Eliz. where it was adjudged upon a special verdict, that the tithes of forty acres of land planted with saffron, appertained to the vicar, and not to the parson. But *Henden* answered, that was not because they were *minuta decima*, but for that upon the endowment found, the allegation was that the parson should have tithe of corn and hay only: but *YELVINGTON* said, that was not the reason, but because they were accounted as *minuta decima*, and appertained to the vicar: and all the justices resolved, that woad growing in nature of an herb, the tithe thereof ought to be reputed for *minuta decima*: and judgment was given for the defendant.—(*Croke*.)

Sir Richard Uvedall brought an action of trespass against William Tindall, clerk, vicar of Alton, in Hampshire, and John Loveland, for taking *bona et catalla*, and count for the taking of two *carectac. glasti*, *Anglice* woad: and upon *not guilty* pleaded, the jury gave this special verdict: *viz.* for the moiety of a load of woad, *si videbitur curia quod decimae glasti ne sint minuta decima*, then the defendants not guilty; but *si sunt minuta decima*, then they are guilty.

And this case was argued at bar by Serjeant *Bridgeman* and Serjeant *Henden*: and the court *invenit* agreed, that for aught that here appears, this verdict being found without any circumstance, that this woad shall be taken to be *minuta decima*.

It was agreed by *Henden*, that if it had been found woad growing in a garden, then *minuta decima*.

And it was agreed by the court, that it might have been so found, that it should be *maiores decima*, and *prædial*; as if all the profits of the parsonage consist of such tithes. And so of other things, which in their own nature are *minuta*, may become *maiores*, if all the profit of the parish consist therein: as

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Woad growing in nature of a herb, the tithe thereof ought to be reputed among small tithes. Things which in their own nature are small tithes may become great, if all the profit of the parish consist therein. *Quære tamen.*

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in some countries, a great part of the land within the parish is hemp, or lime; or hops, there they are great tithes; and so it may be of wool and lambs.

E. 3 Jac. in K. B. *Beddingfeild's* case, (1) farmer to the Dean and Chapter of Norwich, who had the personage inappropriate, and had used to have tithes of grain and hay, and the vicar had the small tithes; and a field was planted with saffron, which contained forty acres: and it was adjudged that the tithes thereof belong to the vicar.

There was a case in this court as it was vouched by *Henden*, 3 Jac. between *Potman*, a knight; and another: and the question was for hops in Kent; and adjudged that they were great tithes; but as for hops in orchards or gardens, these were resolved to belong to the vicar as *minuta decima*.

There was a case in this court for tithe of weild, which is used for dying, and that was in Kent, and it was sown with the corn, and after the corn is reaped, the next year without any other manurance, the said land brings forth and produces weld: and that was a special verdict, whether the vicar should have the tithe of it, or the parson, but one of the parties died before any judgment. And if tobacco be planted here, yet the tithes thereof are *minuta decima*: and all these new things, viz. saffron, hops, woad, &c. if it do not appear by material circumstances to the contrary, shall be taken as *minuta decima*: and so this case was adjudged for the defendant.

(1) *Ant.*

Tr. 1 Car. B. R.

*Whitton v. Weston.* [Lath. 89. Wi. Ent. 342. Godb. 392. W. Jo. 182.]  
N. Bendl. 168. 185. 1 Gw. 410.

Lands of the  
Hospitallers are  
discharged in  
the hands of the  
patentees of the  
crown, *quandiu  
propriis manibus  
excolunt.* Hyde,  
C. J. held, that  
the discharge  
was by 32 H. 8.  
and not by 31.  
Dodderidge and  
Jones held, that  
they were dis-  
charged by 31  
H. 8. but if not,  
yet they were so  
by 32 H. 8.  
Whitlock, con-  
tra.

**I**N debt on 2 E. 6. c. 13. for not setting out tithes, the plaintiff declared that he was parson of the rectory of Merrowe, in the county of Surrey, and that Sir Richard Weston, knight, was possessed of certain land, and that 30 May, 21 Ja. the lands were sown with corn, and the lands so sown the said Sir Robert held in his own occupation, and that the tithes ought to have been paid to Whitton, the plaintiff, but the defendant did not sever them, but carried away the corn.

The defendant as to part, pleaded, *nil debet*; and as to the residue, he pleaded specially, that William Weston, late prior of St. John's of Jerusalem, in England, was seised in fee, in right of his hospital, of parcel of the lands in question, and that he and his predecessors by reason of their order, time out of memory, held the said lands discharged of the payment of tithes, *quandiu propriis manibus suis excolebant*: that by a clause in the statute of 31 H. 8. c. 13. the King and his assigns shall hold the lands of monasteries, as freely as the abbots themselves held them: that by a clause in the statute of 32 H. 8. c. 7. none shall pay tithes, who by law, statute, or privilege, ought to be discharged: that by the statute of 32 H. 8. c. 24. the Hospitallers were dissolved, and all their possessions vested in the King: that by virtue of that statute, the King was seised thereof, and held the same discharged from the payment of tithes; and that they descended to Queen Elizabeth, who granted the lands in question to the defendant's grandfather, to hold as amply as the late prior held them; that the defendant is now seised thereof by virtue of the said grant, and at the time for which the tithes are demanded, and continually thence until the commencement of the suit *propriis manibus et sumptibus excolebat*: that by the statute of 2 & 3 E. 6. no man shall be compelled to pay tithes for any manors, lands, &c. discharged thereof by any law, prescription, or composition real: and that therefore he sowed the land, and carried away the corn, without setting forth the tithes, as it was lawful for him to do, *quandiu manibus suis excolebat*. Upon this plea the plaintiff demurred in law. *Noy* argued for the plaintiff: there are three points in the case. First, If these lands, the possessions of the Hospitallers of St. John, which they held in their own hands, were discharged of tithes. Secondly, If there be any thing in the statute of 32 H. 8. by which the purchaser of the King should be discharged. Thirdly, Admitting that it shall be a discharge, if the defendant have well entitled himself to such dis-



charge or privilege. First, it is not within the statute of 31 H. 8. c. 13. for that statute did not extend to the order of St. John. Secondly, the statute of 31 H. 8. cap. 13. does not discharge any but what was then dissolved. Thirdly, the statute of 32 H. 8. c. 24. gives the possessions of the Hospitallers of St. John's to the King, and not the statute of 31 H. 8. Note, that the defendant recited the branch of the statute of 31 H. 8. c. 13. "That as well the King, his heirs and successors, as all and every such person and persons, their heirs and assigns, which have or hereafter shall have any monastery, &c. or other religious or ecclesiastical houses or places shall hold, &c. according to their estates and titles discharged and acquitted of the payment of tithes, as freely and in as large and ample manner as the said abbots, &c. had or used:" also he recited the statute of 32 H. 8. c. 7. which enacts that "none shall pay tithes, who by law, statute, or privilege, ought to be discharged." The statute of 31 H. 8. recites that divers abbeyes, &c. and other religious and ecclesiastical houses and places have been granted and given up to the King: the statute enacts that the King shall have in possession for ever all such late monasteries, &c. and other religious houses and places, &c. And also enacts that the King shall have not only the said monasteries, &c. but also all other monasteries, &c. and all other religious and ecclesiastical houses which hereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, or by any other means come to the King, shall be deemed, adjudged, vested by authority of this present parliament, in the very actual possession and seisin of the King for ever, in the state and condition they now be. See the statute. And shall have all privileges, &c. in as ample manner and form as the late abbots, &c. had, held, or occupied, &c. The question then is, whether the men of the hospital of St. John of Jerusalem, are intended to be within the said statute of 31 H. 8. and I conceive that they are not. It does not appear in the pleading, that the priory of St. John was an ecclesiastical house, therefore it ought to have been averred. It is true, to plead that such a man has entered into religion, is intended that he is a person dead in law. They were never ecclesiastical, nor so accounted; they must be both religious and ecclesiastical, who are within the statute of 31 H. 8. For the said statute does not extend to religious houses unless they be ecclesiastical. 31 E. 1. Tryal, 99. proves that they were religious, 21 H. 7. 7. And the statute of Templars, 17 E. 2. shews that they were canonized, (which is) admitted unto a rule of their own law, and not that they were made saints, or that they were ecclesiastical, 1 E. 3. 7. Nonability, 4. They were dead persons in law. Feoffments, 68. proves that they were religious; but whether they were lay or ecclesiastical, I have not read. In the difference of summons to parliaments: unto the Templars, the summons is, *vobis mandamus in fide et ligeantia*; but the summons to a spiritual lord is, *in fide et electione*; and so was the summons to the prior of St. John's of Jerusalem; but that was because he held in *frankalmoin*; but that does not prove him to be ecclesiastical; for first they exercised themselves in arms, it was part of their order, *armis se exercere*; and that is against the rule of the common law, to meddle with blood. Secondly, they used no imposition of hands, but only a robe, nor had they so much ceremony as a Knight of the Bath; and yet the Knights of the Bath are not ecclesiastical. So there is nothing in their creation or order that makes them ecclesiastical; for they were lay-monks of the order of St. Anthony. The jesuits have lay-brethren, and not ecclesiastical. 44 Ass. 9. There the defendant pleaded in bar, that the prior was a lay-man, and so not under any rule; and it is there admitted that he was a lay-man, and yet that he might be prior, and bring the action in his own name, and not as prior with his brethren; which proves that the residue were dead persons in law. If there be professions alleged in one of the hospitals of St. John of Jerusalem, how shall it be tried? By the country. Tryal, 99. Profession was alleged in the plaintiff, who was a knight of the order of the Templars, and it was commanded to certify it; and the bishop could not inquire of it, because the order of a knight Templar was exempted by the pope. But Tryal, 98. there it was certified by the bishop, yet all other books are contrary to it. 2 R. 3. 4. Si

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*professio allegata sit in quodam milite sancti Johannis Jerusalem, quis immediatè sub papâ sunt, non habent cui scribere possunt, &c.* 21 H. 7. 7. Selden, 121. in his History of Tithes, that they were accounted no part of the clergy, but merely lay. With us they were accounted lay; and therefore it is not material what they were accounted of in other places. A college is a lay corporation; if they be dissolved, an assise must be brought. The statute of 1 & 2 Philip & Mary is, that men might devise to spiritual corporations, notwithstanding the statute *de terris ad manum mortuam non ponendis*, or any other statute to the contrary. Dyer, 254. There a devise was unto a college and grammar school, and holden a good devise, because the statute of Philip & Mary ought to be favourably expounded, being for the benefit of the corporation. I take another reason from the manner of payment of tithes: ecclesiastical persons paid tithes, but no tithes were paid by the Hospitallers of St. John's of Jerusalem. The stat. 27 H. 8. dissolves abbeyes, &c. but does not relate to any formerly given up, &c. and the reason was, because they were but petty abbeyes. The stat. of 31 H. 8. dissolves none; but recites, that whereas divers have given up, &c. or were to be given up, &c. but shews no reason; for divers inquisitions issued forth to inquire of their lands; but the statute of 32 H. 8. does not shew any such reasons, but other reasons; because that Rhodes was taken away, and that they held of the pope. And if they were dissolved by the statute of 31 H. 8. then what need a statute the next year after, viz. 32 H. 8. to dissolve the corporation? By the statute of 26 H. 8. c. 3. the King has the first fruits and tenths of all that shall be promoted to any benefice or promotion spiritual; this does not extend to St. John of Jerusalem: and therefore afterwards, in the same statute, it is enacted, that every one which shall be elected, or by other means appointed to the dignity of the prior of St. John's of Jerusalem, shall, before their real and actual entry into the dignity, or meddling with the profits, satisfy the King, &c. Now if they were intended in the words spiritual promotion, it was in vain anew to enact for them. The act of 32 H. 8. extends to Ireland, and so does not the statute of 31 H. 8.: the statute of 31 H. 8. extends only to ecclesiastical and religious; so they were not intended within the statute of 31 H. 8. Next, if they were intended within the statute of 31 H. 8. then the statute of 32 H. 8. gives them absolutely by the name to the King. The statute of 31 H. 8. gives nothing to the King, but those that are or were to be given up, forfeited, surrendered, or otherwise given up; but gives nothing to the King, but by the help of some other acts, viz. forfeiture, surrender, or otherwise given up. The word (otherwise) never intended dissolution by act of parliament; for that is paramount the particulars recited. The statute of Marlebridge, c. 30. n. *Provisum est quod si depredationes vel rapini aliqui fiant abbatibus, &c. vel aliis prelatibus ecclesiasticis, &c.* That statute never intended to extend to bishops, who are paramount and superior to abbots; the word (*aliis*) will bear no such sense, to make the superior to be intended, whereas the inferior is recited. The statute of 13 Eliz. recites, that no college, dean and chapter, parsons, vicars, &c. may make a new lease, unless within a year of the end of the lease in being. Now a bishop is superior and above these particularly named, and may make concurrent leases; so here the word (otherwise) does not intend that (otherwise) to be by act of parliament, and to extend to greater than the particulars recited. The statute of 32 H. 8. says that the corporation shall be dissolved and void; but the statute of 31 H. 8. does not say that the corporation shall be dissolved and void. The statute of 32 H. 8. says that the corporation and possessions shall be in the King, by virtue of that act; then not in the King by virtue of the act of 31 H. 8. A feoffment in fee is made unto the use of A. in tail; he has the use by the statute of West. 2. c. 1. Now when the statute of 27 H. 8. c. 10. came, he has the possession by force of that act, viz. of 27 H. 8. and not by force of the statute of West. 2. if the King be not in by the statute of 31 H. 8. then he shall not have every of the privileges which the act of 31 H. 8. gives. Co. 2. part. The bishop of Canterbury's case. (1) The college of Maidstone was religious but not ecclesiastical; and it was adjudged that the purchasers of

(1) Anté, 113.

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the lands of the said college were not discharged from the payment of tithes; because the college was not ecclesiastical, but religious only; and the religious and not ecclesiastical, came not to the King by the statute of 31 H. 8. 18 Jac. in C. P. *Wright's case*. (1) The priory of Hatfield being of small value, viz. not having lands of the value of 200*l.* per annum, was dissolved by the statute of 27 H. 8. and the lands were not tithe-free in the hands of the purchasers, because the priory came not to the King by the statute of 31 H. 8. and yet they were tithe-free in the hands of the prior himself.

The second point upon the statute of 32 H. 8. The words are, that the King shall have all rights, interests, and privileges, as it was in the hands of the abbots, priors, &c. It is objected, to be free from payment of tithes is a privilege; I answer, that neither right, interest, nor privilege, do free him from the payment of tithes. First, there is no discharge of tithes by the word (interest) in the statute, for that is plain. Then the question is, if the word privilege will discharge the lands from the payment of tithes; and if that word would have sufficed to have discharged the tithe, what need was there of the special clause to discharge tithes? The statute of 27 H. 8. dissolves chantries, and there it is said, that the King shall have and enjoy, &c. and there also all privileges are given; then the statute of 1 E. 6. came, and gave all chantries to the King, and there the word (privilege) was not in the act; yet by those words the lands were not discharged from the payment of tithes. The statute 31 H. 8. is, conditions and rights of entry: yet there was another act made to give conditions to the King. But admit that the King himself be discharged, yet his patentees are not discharged. The privilege was personal, and personal privileges are not transferable. 35 H. 6. 56. A statute dissolves the Templars, and gives the lands to the Hospitallers, to hold by the same service as the Templars did, which was *frankalmoin*; yet the grantee held by fealty, for that *frankalmoin* is a personal privilege, and cannot be transferred by general words. The King (it is true) shall have the privilege, for he is a privileged person; for of his goods he shall not pay tithes, if he do not grant them over; and the grants prove, that unless he had granted them, he should have paid no tithes. The statute of 31 H. 8. says, all conditions which the abbots, &c. have; yet until the statute of 32 H. 8. no purchaser could take advantage of a condition. H. 44 Eliz. in C. P. Rot. 1994. *Spurling's case*. (2) The purchasers of lands of the hospital of St. John's of Jerusalem were not privileged from the payment of tithes. E. 8 Jac. in the C. P. *Urry and Bowyer's case*. (3) In a prohibition it was holden, by COKE and NICHOLS, that the purchasers of St. John's of Jerusalem should pay tithes; but WINCH and WARBURTON, *contra*. 18 Jac. in C. P. all the judges but WARBURTON, held that the purchaser should pay tithes. 10 Eliz. Dyer. (4) There it does not appear whether they were of the order of Templars or Cisterians.

The third point in this case. The defendant makes no title to the discharge, for he has not averred that the priors were ecclesiastical persons. If a man plead that A. is professed, the court cannot take notice of it that he is a dead person in law; but if he say that he was of such an order, he ought to set forth of what rule the order is. Secondly, the manner of their discharge was, when they did till and sow their lands, *propriis sumptibus et manibus*. If they grab up roots, and make the lands fit for tillage; but if their tenants sow the lands, they shall pay tithes, for they had the privilege in respect they should not be idle; unless all these do concur, they shall pay tithes, viz. plough, sow, reap, and carry the corn. These privileges are to be taken strictly, because they are to defeat the church of her endowments; and therefore in this case the defendant does not well entitle himself to the discharge, unless he shews that he occupied the land for one whole year before, and that he ploughed, sowed, and reaped the corn; but he ought to have shewn, that such time he ploughed the land, such a time he sowed it, and such a time he reaped the corn; otherwise the court will intend that another man ploughed and sowed the land, and that he only reaped it. For if the lessee of the hospital plough the land, and sow it, and afterwards surrender to the prior of the hospital, who reaps the same; he shall pay tithes of the same, for the privilege was granted

(1) *Ante*, 119.(2) *Ante*, 157.(3) *Ante*, 214.(4) *Ante*, 59.

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unto them who were labourers. (1) And the defendant perhaps might have the lands to halves, that is to say, to have half the corn growing upon the lands. The pleading is not good. When you plead two bars, each bar must stand of itself, and the surplusage of the one bar shall not help the defect of the other bar. The word (privilege) in the act of 32 H. 8. does not extend to tithes; if it do, yet the purchaser shall not have the privilege. — *DONDERIDGE, J.* The statute of 32 H. 8. was made, because that they of St. John's of Jerusalem said, that they could not surrender their hospital, because they had a supreme head over them, viz. their great master the pope.

*Crawley*, Serjeant, argued for Weston, the defendant. The pleading was ruled to be good, the last day the case was argued. We have well entitled ourselves to the discharge: for we have pleaded that we had the occupation of the lands for one whole year; and that Weston the defendant ploughed, sowed, and reaped the corn upon the lands at his own costs and charges; and the plaintiff has not shewed that any other ploughed, sowed, or reaped the same. Our title is by prescription, which is confessed. This society was erected in the time of King Henry I. and it continued until 32 Hen. 8. 44 Eliz. in *Spurling's* (2) case, there were two reasons for the judgment. 1. There the statute of 31 H. 8. was not found, and so the King was not entitled to rights and privileges, and by consequence so was not his patentee. 2. It did not appear that the council of *Lateran* (15 Joh.) extended to this order, which was said to have been created 17 E. 3. whereas indeed it was created in the time of Henry I. Regularly this privilege is not transferable, for it is *ratione ordinis*: as when the King makes a duke, and gives to him possessions, those possessions annexed to the dukedom are not transferable over but by special act of parliament. 35 H. 6. 36. Moile, there if there had been special words in the act of parliament, it had been *Frankalmoign*. This privilege is transferred to the King by the act of 32 H. 8. and that statute requires no aid of regular or ecclesiastical persons. Secondly, the words are special, "and all other things of theirs." This case opposes not the Bishop of *Canterbury's* case, Co. 2. part. (3) For that refers to the statute of 1 E. 6. which had not so large words. The intent of an act shall be taken largely and beneficially to enlarge the King's possessions; as the grants of the King shall be taken largely and beneficially for the King. There is a difference betwixt this statute of 32 H. 8. and the statute of 27 H. 8. The copulative words of the statute of 27 H. 8. are, "to have all rights and interests, and hereditaments." Co. 11. part 13. *pro omnibus demandis, &c.* there the demand shall extend to temporal demand; so, all rights and interests, and inheritance, shall be construed, all temporal rights, &c. But the statute of 32 H. 8. is larger, viz. "of what name and nature soever."

If by the words of the statute of 31 H. 8. (Privileges) tithes had been given to the King without special provision after made, then what needed the special clause after? was the objection which has been made. I answer, the special clause was necessary: for otherwise in pleading he ought to have shewn what privilege and discharge it was in particular; and so the clause was added for the ease of pleading, Co. 9. part, the abbot of *Strata Marcella's* case; there it is said, that if a man plead to have such privileges as such a one had, he ought to shew in particular what those privileges were: but this provision in the statute of 31 H. 8. was made for the benefit of pleading. The statute of 17 E. 2. which gave the tithes to the Hospitallers, gave them by the word privileges, for they had their possessions as it were by a new purchase. Coke, *Entries*, 450. there the case much differs from this: so then the general word (privileges) does extend to tithes. 14 H. 8. 2. By a grant of all trees, apple-trees will not

(1) *Noy*, "If the prior himself had been seised of this land, and another out of charity cultivated it, tithes should be paid, for it is not *propriis sumptibus et manibus*, and the reason of the discharge was to induce them to labour." *Bridgeman* said, "He denied that, for when it is cultivated by the party himself, or by his servants or friends, it is *propriis manibus*." — [*Latch.*]

(2) *Calthorpe* says, that *Crawley* stated, "That however the case of *Quarles* and *Spurling* was adjudged, yet the lands at this day are discharged of the payment of tithes, and no tithes are in fact paid."

(3) *Ante*, 113.

pass; yet if it be of all trees *cujuscunque generis, nature, nominis aut qualitatis*, then they will pass. Co. 3. part 81. By grant of all goods, apparel will not pass. Here are special words in the statute, *cujuscunque nature, nominis, &c. Nomina sunt symbola rerum*: and then call them what you will, they are given to the King, and intended to be transferred to the King; and so there needs no special provision for the discharge of the tithes; for to say, that the priory was of the order of the Cisterians, is sufficient.

Admit then that the King shall have the tithes, as I have argued he shall; then his patentee shall have them. It is a real discharge in the King, and not a discharge in respect of his person only. Privileges of discharge may be transferred as well as privileges of profit. Then the question further is, whether they of St. John's of Jerusalem were ecclesiastical? They were regular, as appears by the statute of 32 H. 8. for that says that they shall be free from obedience. Trin. 8 Ja. in C. P. *Bowyer's case*, (1) where COKE, NICHOLS, WARBURTON, and WINCH agreed that they were ecclesiastical priests. The prior had parsonages; but none could have parsonages but ecclesiastical persons. 3 E. 3. 11. They had appropriations, which could not be unto laymen. 22 E. 4. 42. There a writ of annuity was brought against the prior of St. John's of Jerusalem; and it was ruled there, that he ought to be named person, which proves that he was ecclesiastical. 26 H. 8. c. 2. there it is said, that he shall pay first-fruits as other parsons; which proves that he was parson. 42 E. 3. 22. there they are called ecclesiastical. 35 H. 6. 56. they were seised in the right of the church. Lindwood, lib. 2. cap. 47. *de justiciis*, that they were ecclesiastical. It was objected, that knighthood cannot be given to ecclesiastical persons; and they were knights. POPHAM, once chief justice of this court, said, that he had seen a commission directed unto a bishop to knight all the parsons within his diocese; and that was the cause that they were called Sir John, Sir Thomas; and so they continued to be called until the reign of Queen Elizabeth. JONES and DODDERIDGE, Justices, they were ecclesiastical persons, although they were divided from the jurisdiction of the bishop. The case was adjourned to be further argued; and it was argued at the bar several times, and afterwards in Trin. 4 Car. by the four judges, on two days. The main question upon the matter in law was, whether these lands were discharged from the payment of tithes, either by the statute of 31 H. 8. or by the statute of 32 H. 8. or by both together, or not?

WHITLOCK held, that the lands were not discharged of tithes, either the one way, or the other. — HYDE, C. J. held, that they were discharged by 32 H. 8. and not by 31 H. 8. — DODDERIDGE and JONES held, that they were discharged by the statute of 31 H. 8. and admitting that the statute of 31 H. 8. did not discharge them, yet the statute of 32 H. 8. did. So that upon the matter, three judges were of opinion for the defendant, and WHITLOCK only for the plaintiff.

They all agreed, that the case, though it was not great in the particular in question, yet, in the general, it was a question of great consequence, and concerned all the possessions of the Hospitallers, which were very large. Therefore it was requisite that it should be discussed with great deliberation and advice, which they had done.

The questions were four. 1. Upon the statute of 31 H. 8. 2. Upon the statute of 32 H. 8. The two questions on the statute of 31 H. 8. were, 1. whether this corporation was a religious and ecclesiastical corporation, and so in regard of its nature as a corporation within the statute of 31 H. 8.? and 2d. (which was the greatest question) whether the clause of exoneration from tithes, which was given by the statute of 31 H. 8. should be extended to these lands, which were given to the King by the statute of 32 H. 8. and not by 31 H. 8.?

The two questions upon the statute of 32 H. 8. were, 1. As the corporation of Hospitallers was dissolved by 32 H. 8. and all their possessions, hereditaments, and privileges given to the King, whether this privilege which the corporation had, of being discharged from tithes, was given to the King or not?

2d. Admitting that it was given to the King, whether it extended to the

(1) *Antt.* 214.

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King's patents and assigns, or not? the words of the statute being, that the possessions and privileges were given to the King, his *heirs and successors*, and not to his assigns by special name.

DODDARIDGE, JONES, and WHITLOCK, argued that this corporation was a religious and ecclesiastical corporation within the words of the 31 H. 8. DODDARIDGE and WHITLOCK spoke at large and very well, from history, the canon law, and the constitution of the church, of the origin, nature, and condition of this corporation, and according to them it was first introduced into this kingdom about 1140. See the case of *Sutton's Hospital*, *Matthew Paris*, and *Camden's Britannia*, in the description of Middlesex. (1) The three judges agreed, that it was at first a religious order; that they were professed, bound to obedience, chastity, and poverty, assumed a religious habit, and were disabled from purchasing lands, 1 E. 3. 9. unless in their politic capacity. To plead that the party was professed, and of the order of Templars, was a good plea. In 31 E. 1. Fitz. Trial, 98. 99. it was pleaded that the party was professed in the order of St. John's of Jerusalem; and a good plea: and 12 R. 2. Fitz. Nonability, 4. such plea holden good; and there it appears, that there was a woman of this order. In 19 E. 3. Fitzh. Feoffment, 68. and 19 Ass. pl. 9. a commander (who was under the obedience of the prior) could not make a feoffment, because a dead person in law. And 22 R. 2. Fitz. Trespass, 33. it appears, that there was an abbot of this order, who was a person dead in law, and religious. And the profession shall be tried by the country; for they were exempted by the Pope from the visitation of the ordinary; and the court cannot write to the Pope; so that it must be tried by the country. 2 R. 3. 4. 22 H. 7. 7. 31 E. 1. Fitzh. Trial, 99. See the case of *Martyn Docwra*, 27 H. 8. 14 b. which proves that they are dead persons in law. And the statute of their dissolution, 32 H. 8. makes this clear; for there they are several times called religious, and are discharged of their order, and made capable of suing at common law, and of purchasing. But, though the brothers could not sue at common law, because they were persons dead in law; yet the prior could sue, which see in 32 H. 8. 5. and F. N. B. tit. *sine assensu capituli*. 42 E. 3. 22. and 44 E. 3. 16. and in many other books.

It is also ecclesiastical, for that is the genus; and the species are either regular, religious or secular, and though they were not in orders, and clerks, yet they were ecclesiastical; for they were under the visitation of the Pope, and derived their original foundation from him, as it appears in the said statute of 32 H. 8.; they are therefore ecclesiastical, for he never claimed any power but over ecclesiastics. In F. N. B. 194 K. there is a writ *de sine assensu capituli* brought by the prior *quod clemat esse jus ecclesie*: therefore they are ecclesiastical. And by JONES, no one can claim a discharge of tithes, but an ecclesiastical person, 2 Co. *Wright's case*; (2) and no one is capable of an impropriation, but an ecclesiastical person, *Grendon's case in Comm.* (3) and this corporation was capable of both, and therefore must have been an ecclesiastical corporation: and by 26 H. 8. it shall pay first fruits, and tenths, as an ecclesiastical person. And by JONES, though this order were founded by the Pope, and had their rules and habits from him; yet they were not capable of taking land, or to sue, or be sued, but by prescription, the King's patent, or by act of parliament; for that was a temporal power, and could not be derived from the Pope, nor could he (when he usurped power here) enable any corporation to sue or be sued. This is evident from 9 H. 6. 16. where the King licensed one to found a chantry, and exception was taken, that there was no license from the ordinary; & *non allocatur*. And these three judges concluded, that it was a religious and ecclesiastical corporation within the statute of 31 H. 8. and that it must be both; for if it were ecclesiastical only, and not religious, it was out of the statute, as appears from the *Archbishop of Canterbury's case*, in 2 Rep. But HYNES said nothing, nor did he deliver any opinion upon this point, because he held upon the second point, that the statute of 31 H. 8. did not give any discharge.

(1) The best and most recent history is that of the Abbé Vertot. See also Helyot's *Hist. des Ordres*, tom. iii. p. 72.

(2) *Antè*, 119.

(3) *Antè*, 67.

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As to the 2d point upon the statute of 31 H. 8. Warrlock and the Other Justices argued, that the lands were not discharged by the 31 H. 8. They said, that that statute did not give any lands or monasteries, but settled in the King the lands of monasteries dissolved or to be dissolved, as is holden in 1 Mar. 111. and in the *Archbishop of Canterbury's case*, 2 Rep. (1) And as Warrlock said, this statute was *deffrons*; it had relation to monasteries dissolved before the act, and to those to be dissolved afterwards, and their possessions: *quod fuit concessum* by all. But they said further, that the intent and words of the statute were merely to give a discharge to those lands only that came to the King by virtue of that act, and not by virtue of any other act: that it does not therefore extend to lands which came to the King by the statute of 27 H. 6. for the dissolution of the lesser monasteries, as was resolved in *Wright and Gerrard's case*, in C. B. 18 Ja. (2) nor to lands which came to the King by the statute of 1 E. 6. of chantries, as was resolved in the *Archbishop of Canterbury's case*, 2 Co.; nor to lands which came to the King by the statute of 32 H. 8. as was adjudged, (as Warrlock said) Hil. 44 Eliz. in the case of *Quarles and Spurling*, Rot. 994. which commenced in that term, and was so adjudged in 2 Ja. (3) And the words in the clause of discharge in the preamble, and also in the conclusion are, "late monasteries," and not generally. And though the purview be general, yet it is qualified by the preamble, and shall have relation to the preamble. And it is clear, as they said, that these lands did not come to the King by force of the statute of 31 H. 8. but by the statute of 32 H. 8. solely, and that for two reasons. The first reason was, that they must be lands which came to the King by dissolution, surrender, renouncing, or by any other means: but these lands did not come by relinquishment, by renouncing, or surrender, but by act of parliament; and other means do not include an act of parliament, but must be lower means than an act of parliament. And upon this they cited the statute of Marlbridge, which gives remedy to the successors of abbots, or other prelates, for the goods of the church taken in time of lapses or vacation, this does not extend to a bishop. [But note, the successor of a bishop has nothing to do with the goods of the bishop, for they belong to the executors of the bishop.] They also cited the case of 2 Mar. in Lord Dyer, 109. upon the statute of West. 2. which gives the *contra formam donationis* against abbots and other religious men, that that does not extend to a bishop, because he is more high. So the statute of 13 Eliz. "of leases made by dean and chapter and other ecclesiastical persons," does not extend to a bishop: which cases are put in the *Archbishop of Canterbury's case*. 2. They said, that supposing that other means include an act of parliament; yet, as the succeeding statute of 32 H. 8. says, that the lands shall be vested in the King by that statute, that controls the preceding statute of 31 H. 8. for *leges posteriores abrogant priores*, where they are directly contrary; wherefore they concluded, that the statute of 31 H. 8. does not give this discharge.

DONDERIDGE and JONES *de contrâ*.—They said in the first place, that this point never was adjudged, as they found by inquiry. For it was in question in C. B. between *Urry and Bowyer*, (4) but the court was divided, that is, COKE and NICHOLLS were of opinion, that they were subject to the payment of tithes; and WINCH and WARBURTON, that they were not. And as to the case of *Spurling and Quarles*, though it were adjudged, yet the judgment went upon another reason; for it was not found there by the verdict (which was special) that the lands came by dissolution to the King, nor was there any mention made of the statute of 32 H. 8. and then, if there were not a dissolution, (as happened in that case,) the former shall pay tithes. And after the judgment in *Spurling's case*, and after the decision in the case of *Urry and Bowyer*, it was made a point in the *Serjeants' case*. (5) This therefore proves, that the case was never adjudged: for no adjudged case was used to be put in the *Serjeants' case*, but a point of doubt, which was in controversy. DONDERIDGE said, that the 32 H. 8. was made from necessity; for that this corporation had power to purchase, but not to alienate lands; therefore without an act of parliament they could not surrender them. But it seemed to JONES, that they were capable

(1) *Anté*, 113.(2) *Anté*, 289.(3) *Cornwallis v. Spurling*, *anté*, 157.(4) *Anté*, 214.(5) *Anté*, 51.

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of surrendering them; for though it was a great order, yet it was a particular corporation here which had power to sue and be sued, to purchase and to alienate; 32 H. 6. 5. And the statute of 33 H. 8. c. 5. in Ireland proves this: for there it appears, that, before the making of that statute, the prior of St. John's of Kilmainham had made a surrender to the King. But the true reason, as JONES thought, was, that they were beyond the sea, and would not surrender; and they could not be compelled, as appears by the preamble of 32 H. 8. DODDERIDGE said too, that these words, "other means whatsoever," include an act of parliament; for there were no other means to convey the land to the King but by act of parliament, and such means as are particularly mentioned in the statute of 31 H. 8.: therefore, as he thought, this dissolution by 32 H. 8. is within the words "other means," and so within the words of 31 H. 8. JONES said, that as this point was otherwise determined in the *Maidstone* case, he had submitted to it; but, he said, that if the statute of 32 H. 8. had dissolved the corporation, and had said nothing further, in that case, this dissolution had been within the express words of 31 H. 8. not within the words "any other means," but within the word "dissolution;" for the word "dissolution" includes dissolution by act of parliament, as well as by surrender or other means; and therefore, if the statute of 32 H. 8. had only made a dissolution of the corporation, and not enacted that the lands should be vested in the King by that act, they would have been in the King by the statute of 31 H. 8. but, because the statute of 32 H. 8. says precisely, and enacts, that the lands shall be vested in the King, it controuls in express terms the vesting by 31 H. 8. and in that point he agreed with WHITLOCK and HYDE. In 1 Mar. *Bush and Culpepper's* case. The statute of 33 H. 8. c. 2. vests in the King the actual possession of the lands of one attainted: *Culpepper* was attainted by a special act; and the possession was vested in the King by that statute, and not by the 33 H. 8. But they said farther, that though they are not vested by 31 H. 8. but by 32 H. 8. yet the clause of discharge of 31 H. 8. extends to these lands: and so said DODDERIDGE. And first they answered the authorities to the contrary, and next the reason; and then they confirmed their opinion with reason and authority. The cases were two, namely, the *Maidstone* case, and *Wright's* case (*Spurling's* case being already answered). As to the *Maidstone* case, the main point upon which the resolution was grounded was, that because the unity of possession was not personal, it was a good discharge within the 31 H. 8. But, as to the point now in question, it was not resolved upon by them (though it be otherwise reported in the case in print). FENNER and POPHAM were of opinion, that the statute of 31 H. 8. did not give any discharge to those lands which came to the King by 1 E. 6. but GAWDY (*absente* WINCH) *à contrà*. *Wright's* case was this: (1) the prior of Hatfield Bradock, in the county of Hertford, was seised in fee of the impropriate rectory of Hatfield Bradock in that county, and also of a farm called Clownall in the same county. The priory being under £200 per annum, was dissolved by 27 H. 8. Afterwards King H. 8. granted the farm to the nuns of Barking; and upon their dissolution it came back to the King by 31 H. 8: the King granted the rectory to Trinity College in Cambridge, and the farm to another person: the farmer of the rectory sued the tenant of the farm in the ecclesiastical court for tithes, who brought a prohibition; and it was adjudged by HOBART, WINCH, and HUTTON, against WARBURTON, that a consultation should be granted. In this case these points were resolved by the three judges: 1. That the impropriation was given to the King by the statute of 27 H. 8. though impropriations be not mentioned in it, but all "tenements, churches, tithes, and hereditaments." 2. If it were not granted and given to the King by the statute of 27 H. 8. then it was not given by the statute of 31 H. 8. for by the dissolution in the 27 H. 8. the body, to which the appropriation was made, was dissolved, and, consequently, the appropriation was gone, as in 2 E. 3. in the case of the *Templars*; and the statute of 31 H. 8. does not extend but to those appropriations which were not dissolved until after 4 Feb. 27 H. 8. 3. It was there agreed that the statute of 27 H. 8. does

not *per se* give any discharge of tithes. And 4. That unity of possession perpetual, and beyond time of memory of the lands and rectory, does not *per se* make a good discharge of tithes, without the benefit of the said clause. They resolved, that the clause of discharge in 31 H. 8. does not extend to all monasteries which were dissolved, but extends only by way of exclusion to those monasteries which were dissolved after the 4th day of Feb. 27 H. 8. and the resolution as to the last point differs from the case in question; for there it was an absolute exclusion of all abbeyes, which did not come after 4th Feb. 27 H. 8. to the King, but here there is no such exclusion. The authorities being answered, it remains to answer the reason, which is no other, than that the equity and intent of a former statute do not extend to a subsequent statute; which is an argument urged in the *Maidstone* case, with a *teste meipso*, without any authority in law precedent to it, to warrant the opinion. And JONES said, that this reason is neither good, nor strong; for that in many cases, by the equity and intent of precedent statutes, things ordained by subsequent statutes were aided. Littleton, tit. Garranty, and 38 E. 3. 23. By the equity of the statute of Gloucester made 6 E. 1. a person shall not be barred by a lineal warranty to make title by the statute of 13 E. 1. without assets. 27 H. 8. 29. The statute of Marlbridge helps a feoffment by collusion made by the tenant in demesne; 4 H. 7. gives the wardship of *cestuy que use*, if he made a feoffment; this is within the equity of the statute of Marlbridge. *Buckley's* case in the Comm. the statute of 27 H. 6. extends to Wales, which was united to England afterwards by 27 H. 8. and the 21 E. 3. c. 11. the statute of Acton Burnell, provides, that if goods be over-valued, the extensors shall answer for it: by 13 E. 1. *de Mercatoribus*, execution given of land upon a statute merchant: if the extensors extend the land too high, they shall answer by the equity of the statute 11 E. 1. which was made before it. And 12 Eliz. Dy. 288, 289. a grant of the forfeiture of treason: if another treason be made afterwards, the grantee shall have the forfeiture of that. The authorities and reason then are answered. And to confirm their opinion, JONES said, that the words and intent of the statute do that: the "words" in the purview are general, namely, "lands of all monasteries and ecclesiastical houses;" and though in the preamble and conclusion of the clause, the words be "late monasteries," yet those words shall not be construed literally, but generally, according to the purview; otherwise monasteries afterwards dissolved would be out of the statute (for those were not "late"): but it was agreed in the *Maidstone* case, and it is clear, that monasteries dissolved after the statute are within this clause. And for the intent it appears plainly: for if the hospital had been dissolved without a subsequent act of parliament, it had been within the purview of this clause; and when this was done afterwards by an act of parliament, because the brethren were not present to make a surrender, why shall it not be within the intent? for the intent was to extend the clause to all monasteries, &c. dissolved according to the said statute, or those which were in possibility of being dissolved according to it. They are within the intension of the law, and to prove it, he cited *Priddle* and *Napier's* case, 11 Rep. (1) an insufficient surrender of a monastery was made, and afterwards the statute of 35 Eliz. aided it: now the lands came to the King by the statute of 35 Eliz. and yet the clause of exoneration from tithes extends to the monastery. A statute was made in Ireland by 33 H. 8. c. 5. and by that statute the priory of Kilmainham and all monasteries there were dissolved, and their possessions given to the King; and this clause binds both, that is, the priory and monastery equally; and there was a statute made in Ireland, 4 H. 7. that all acts to be passed there must be allowed here in England; as that was by the judges and council of the King; and it is not likely they would agree, that in Ireland these lands should be discharged, and the lands in England should not. And they concluded with the 10th Eliz. Dyer, (2) where the opinion of the chancellor, the two chief justices, and the chief baron and Justice Southcott, was, that the lands of the hospital of St. John of Jerusalem were exonerated from the payment of tithes by 31 H. 8:

(1) *Anté*, 205.(2) *Anté*, 59.

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And as to the statute of 32 H. 8. WHITLOCK held, that it does not give the King any discharge from tithes; and if it did, yet it does not extend to the King's patentees. The three other judges *à contrà*. They all agreed, that this privilege *non solvendi decimas* was given to them by an ancient council; and by the council of Lateran the privilege was explained, that it extended only to those lands which they had at the time when the exemption was granted, and not to lands acquired *de novo*. But, as it appears by the statutes of 2 H. 4. and 7 H. 4. several bulls were procured against this constitution, and those were made void by the statutes. The nature of this privilege is expressed in PANOMITAN, in *capite ex parte de decimis*, in his exposition upon the decretal, namely, *quod istud privilegium non solvendi decimas datur solis Cisterciis, Templariis, et Hospitalariis. 2. Ex prædiis quæ manibus suis propriis colunt. 3. Et non de prædiis quæ ab aliis conduxissent. 4. Vel quæ aliis pro certo redditu vel censu locassent. Et istud privilegium est personale: et omnia privilegia personalia non agrediuntur personam*. And this privilege, and all other privileges have a certain interpretation. And WHITLOCK from these grounds framed his reason, that this privilege, being personal, did not go beyond the person to whom it was granted: therefore, when the person, namely, the corporation, was dissolved, the privilege was gone also: as in the case of 3 E. 3. of an appropriation to the Templars; that corporation was dissolved, and by the dissolution the appropriation was gone also. And by the grant in general of all privileges to the King by the statute of 32 H. 8. this particular and personal privilege was not given to the King. The statute of 31 H. 8. gives all the privileges of the monasteries to the King; but that was not sufficient: therefore a particular clause was added, not as a gift of the privileges, but, that if the lands were exonerated of the payment of tithes at the time of the statute of 31 H. 8. then the King should hold them exonerated of tithes. 2. He said, also, that if this personal privilege were given to the King by the statute of 32 H. 8. that extends only to the King, his heirs and successors, and not to the grantees of the King: for it shall be personal in the King, his heirs and successors, as it was in the Hospitallers and their successors.

HYDA, C. J. DONDERIDGE, and JONES *à contrà*, that by the statute the privilege was given to the King. This immunity, which the Hospitallers had, was a privilege within a privilege, and *privata lex*, or *privata legis*, an exemption from the general law, which was, that every one should pay tithes. It is true, that a privilege does not extend *ultra personam*, and if the corporation be dissolved, the privilege will be so likewise: but, since an act of parliament gave this privilege to the King before the corporation was dissolved, the King shall have it as a grant to him by act of parliament. And JONES compared this case to the case of the appropriation; if the corporation be dissolved, the appropriation is gone, as appears in the said case of 3 E. 3. And DONDERIDGE said, that when the Templars were dissolved, their privileges were gone by the dissolution; but their lands reverted to the patrons and lords of whom they were holden: but by 17 E. 2. those lands were given to the Hospitallers; and though (as appears by the said council of Lateran) of lands *de novo acquirend'* tithes ought to be paid; yet of this land, which the Templars purchased (though it was *de novo acquirit'*) they should not pay tithes, because they enjoy the same privilege; which proves, as he said, that a privilege, though personal, may be transferred to another. But *quære* of that; for not a word of privilege is in the act. But if an appropriation be given to the King by an act of parliament, before the corporation is dissolved, there it is good, as was resolved in *Wright's* case aforesaid, 18 Ja. But, if the corporation be first dissolved, and thereby the appropriation gone; there, a general grant by an act of parliament will not save it, as it was also holden in the same case, though by special words it might be; for all appropriations annexed to monasteries [dissolved] after 4 Feb. 27 H. 8. and before the 31 H. 8. were gone, but by a special clause in 31 H. 8. they were revived, namely, that the King should have the impropriations in the same plight as they were at the day of the dissolution of the monasteries; and then the appropriations were *in esse*, and not determined; in the same manner for these privileges; if the corporation had

had been dissolved first, and then all privileges given generally to the King by the statute of 32 H. 8. the King would not have this privilege: but since it is given before the privilege was gone, the grant is good enough: and though the King shall not have the privilege *idem numero*, yet he shall have it *idem specie*, that is, the King shall hold the lands discharged, as the Hospitallers held them: he shall have such privileges as the Hospitallers had; as in the case of 20 E. 3. tit. Avowrie, and the case of the abbot of *Strata Marcella*, where the grantee was to have *tot, talia, &c. libertates, privilegia, &c. quot, qualia, &c. dictus nuper abbas tenuit, &c.* they are not the same liberties, but such liberties. And the objection upon the statute of 31 H. 8. for the addition of the clause of discharge, is of no force; for that was *ad majorem cautelam*, and it was also to give a discharge in other cases than in the case of privilege; namely, in case of discharge by prescription, composition, or perpetual unity, and other discharges. 2. This exemption will extend to the patentees; for it is not a personal privilege in the King, but a real discharge of the land given by the statute, which goes with the land, into whose hands soever the land shall fall; for the privilege is *quandis propriis manibus excolunt*; and when the King grants over, it shall be *propriis manibus* of the patentee, as it is resolved in 10 Eliz. And inasmuch as the three judges agreed that these lands were discharged, judgment was given against the plaintiff, and for the defendant.

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H. 1 Car. B. R. *Stilman v. Chanar*. [Latch. 8.]

UPON the statute 2 E. 6. c. 13. for not setting out tithes, the case was, corn was set out for tithe, and the owner of the land took the corn *damage feasant*, but did not shew in his declaration how long the corn remained on the land: and the court held it was not good, inasmuch as it did not appear that there had been any damage to the owner of the land, as he had not shewn how long it remained upon it. And the usual course in such cases is, if tithes be set out, and the parson do not take them in due time, the party shall have his action on the case. By the court, one cannot distrain shocks of corn, but he may distrain a stack *damage feasant*. But he does not shew how long it remained upon the land, and therefore it does not appear whether he was damaged. And also after the tithes set out, clearly by the statute the parson shall have his action of trespass, if any one take them; but if a mere stranger set out the tithes, that vests no property in the parson, so that he can have an action for the taking of them.

1. Tithe was set out, and afterwards the owner of the land took it *damage feasant*: in pleading he did not shew how long it remained on the land; and held bad, as it did not appear that he had been injured, as he had not shewn how long it remained.

2. If the tithe be set out, and the parson do not remove it in due time, the usual course is for the party to bring his action on the case.

3. After the tithes are set out, the parson may have his action of trespass, if any one take them; but if a mere stranger set out tithes, that does not settle any property in the parson, so as to enable him to bring his action.

H. 1 Car. B. R.

Mountford v. Sidley. [3 Bulstr. 396. Cro. Car. 69.]

W. Jo. 89. 1 Gw. 424.

IN an action of trespass for the taking of three loads of oats, the defendant in bar avows the *taking for damage feasant*, being upon his land, he having a lease of this land made unto him, by one Beckington; the place called Herles close, within the parish of Tawen. The plaintiff replies, and agrees the lease to be so made to the defendant, but says, that he was parson of the parish of Tawen, and that the oats were there set forth for him for tithes, and that he took them.

The defendant rejoins, and taking by protestation, that they were not set forth

1. If one who has some colour of title, come and sow the land, and set out the tithes, though he be a disseisor, this is good for the parson; otherwise it is, where

one without any colour sets out tithes, which is no setting out in law. 2. If the corn continue over long after it is set out, the farmer has a remedy by action on the case; or he may justify in trespass for taking away the tithes *damage feasant*; but then he ought to shew specially that the same remained there so long, that by reason of it there was a damage to him.

3. When tithes are set out, the parson has a liberty for a time convenient to come and carry them away, which conveyance of time is triable by a jury.

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forth for tithes; for plea, says, that Sidley did not demise to Haukes for one year, who, as the plaintiff supposes, did sow the land, and set forth the oats for tithes; and traverses the lease made by Sidley to Haukes for one year: upon this traverse the plaintiff demurred in law.

WHITLOCK, J. That the traverse here is not good; and upon consideration had of the whole matter, judgment ought to be given for the plaintiff. The defendant here has admitted that the plaintiff was parson, and has also admitted that the corn was set out for tithes, and the defendant took them. The case is no other than this, that corn is set forth for tithes, and the owner of the land takes this as for damage feasant, without making this to appear in pleading (as he ought to have shewn) that the parson had suffered corn to remain over-long upon his land, to his damage. The parson might have an action of trespass for the taking away, if once they were set out for tithes, and afterwards taken away. The Defendant here disclaims in any title or property unto the corn; he claims nothing in it, but he admits the plaintiff to have the sole property: where he distrains for damage feasant, he ought specially to shew that the same remained there so long, so that by this there was damage to him; and lawful it is in such a case, to distrain corn in shocks; but not so for rent, and so the difference is taken. 10 H. 7. 21 H. 7. and 22 E. 4. fol. 50. As to the traverse here taken, this is not a material traverse, and so for this cause not good, the same being (*absq. hoc*) that Sidley had demised unto Haukes for one year; this is no way at all material: if he had said, *absque hoc, quod possessionatus fuit*, and sowed, he needs not take notice of his title. In an action upon the statute of 2 E. 6. for not setting out tithes, he is not to lay and set forth a title in the defendant, but only that he was possessed, without shewing any title; and this is sufficient: here the defendant, by his traverse, admits the plaintiff to be parson; so the traverse is not good, and judgment ought to be given for the plaintiff.

2. JONES, J. It does not appear here whether the plaintiff has brought his action as parson, or otherwise; and therefore the defendant may well plead in bar, the parson ought to make his title: the parson, where tithes are set out, has a liberty for a time convenient, to come and carry them away, and this conveniency of time is triable by a jury; and this is a license which the law gives unto him, and if he exceed this, he shall be subject to an action; and then by the judgment of law, he shall be taken for a trespasser, *ab initio*; otherwise it shall be of a license in fact, given by the parson himself: if he exceed this, no action of trespass lies for this, but an action upon the case, and this difference is taken. Co. 8. 146. in the 6. Carpenter's case. If an action be brought for taking away tithes, the defendant ought to plead specially (s.), either that they were not set out for tithes, or else, being set out, they were suffered to remain there over long. Here the parson makes his title in his replication. As to the traverse by the defendant, of the demise to him, who set out the tithes, this is a bad and an impertinent traverse. If one, who has some colour of title, sow the land, and set out the tithes, though this be by a disseisor, this is good for the parson; otherwise it is, where one without any colour sets out tithes, this is no setting out in law, here the traverse being of a particular inducement to the title, is not good; and so the traverse here is bad, and judgment ought to be given for the plaintiff.

DODDERIDGE, J. The traverse here is bad, both for the matter and the manner of it. As touching a traverse, this thing is to be traversed, which goes to the point of the action; any other traverse is not good, because not material; so the title of the plaintiff here, be the demise to Hawkes for one year or for half a year, is not material, and for this cause the traverse is not good. The defendant here might have said that he was not parson, or that it was not within the parish; or, 3. not severed from the nine parts: if any of these be so, the same would have well served his turn, and a material traverse might have been upon any of these; but here he has traversed a thing merely immaterial. As to the manner of the traverse, the same is here also void, for the manner of it; for he has here traversed a conveyance only, and no other thing else; and this is not good. He here traverses only the conveyance

veyance to the title, which enables him to have the tithes, and therefore this traverse is not good. Also this traverse is not good, because he has here taken a captious traverse, the same being *absq. hoc*, that he demised to Haukes for one year; so that upon the whole matter, the traverse here is bad every way, both for the matter and the manner of it; and therefore judgment ought to be given for the plaintiff.

4. *Crew*, Ch. J. The defendant has here allowed a good title in the plaintiff unto the oats: if it appear by the declaration that he was parson, then, by the bar, he ought of necessity to have shewed the cause of his taking for damage feasant; but here, as this case is, he needs not to do it, because the plaintiff does not bring this action as parson, but in his replication makes his title as parson. The traverse here of the defendant is not good. If the corn had continued there over long, his remedy had been by his action upon the case; but here no title appears but only for the plaintiff, so the traverse is bad, and judgment ought to be given for the plaintiff.

And so accordingly, by the rule of the court, judgment was given, and so entered for the plaintiff. [*Bulstrode*.]

And upon this error was brought in the Exchequer Chamber, and error assigned, for that he alleged he was parson *tempore quo*, &c. and at the time of the trespass supposed, *ac diu antea*, but does not say that at the time of the severance of the corn he was parson, for it shall not be intended without shewing it, but rather that he was parson at the time of the trespass, and not at the time of the severance, and then he makes not a sufficient title unto them; but all the justices and barons conceived it was well enough, and shall be intended by all the circumstances, that he was parson at the time of the severance; for it is said, *antea et tempore quo fuit parson, et adhuc est*, &c. and especially the defendant having admitted that he was parson, and the said tithes due unto him, and making traverse to the lease, which was an idle traverse, and therefore good cause of demurrer, and the replication is good; for being pleaded that *diu antea et tempore quo*, &c. he was parson, it is certainly enough intended he was parson at the time of the severance, as well as at the time of the taking, whereupon judgment was affirmed, notwithstanding the book 35 Hen. 6. 48. which was much insisted upon. [*Croke*.]

E. 2 Car. B. R. *Steward's Case*. [Noy, 81.] Palm. 440.

A PARSON prefers his bill for tithes of corn, and alleges that time out of mind, &c. in that parish they have used to allot the tenth shock; whereupon the parishioner suggests, that the parishioners and all those who had estates, &c. have used only to set out the tenth sheaf for tithes, and had a prohibition. The parson prays a consultation, but it was denied(1); and resolved by the court,

1. That the parson might sue for *modus decimandi* in the spiritual court. 2 R. 3. 3. a. but if the parishioner deny that, they ought to surcease, and a prohibition lies, and that shall be tried at the common law.

(1) According to *Palmer*, *Whitlock*, J. thought consultation ought to have been granted, as the right to tithes was not denied, but the manner of setting them out. That

the dispute was not *de modo decimandi*, but *de modo exponendi*. The other judges said nothing upon the point.

1626.

Where a parson libelled for tithe in shocks, and a prohibition had been granted upon a suggestion of a custom to set it out in sheaves: consultation was denied.

A parson may sue for a *modus* in the spiritual court, but if it be denied by the parishioners, prohibition lies.

E. 2 Car. B. R. *Cope, Kt. v. Bedford*. Palm. 426.

TRESPASS concerning the rectory of Norton Pinkney, which belonged to Oriel College, in Oxford. The issue was, whether there was a vicarage endowed there, or only a stipendiary curate.

Crew, *Dodderidge*, *Jones*, and *Whitlock*, all agreed, that if a vicarage be

2. In things of antiquity *omnia presumuntur solemniter esse acta*.

1. If there be no endowment *de facto* of a vicarage, the vicar cannot claim any thing.

1696.

corp

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be erected and established, and there be no endowment *de facto* of the vicarage, the vicar cannot claim any thing.

2. An impropriation was shewn, made by license of the pope in the time of E. 2. DODDERIDGE, J. held that it was not good. — JONES, *è contrà*. It would be dangerous to such ancient impropriations, if the consent of the King should be [required to be] shewn, and at that time, the assent of the pope was held good, without the king. DODDERIDGE, J. denied that the pope, without the King, could make an impropriation with the ordinary and patron. CREW, Ch. J. agreed with JONES, and in things of such antiquity *omnia præsumuntur solemniter acta*, and said it was so ruled in a case where he who confirmed the impropriation (or lease, or endowment, I do not know which, he said), had but an estate tail. And JONES said, this was nothing to the vicar, for a vicarage might be endowed without the consent of the King, and is not mortmain.

3. Upon creation of the vicarage, it was made a condition by the ordinary, that one of the canons of the abbey should always be presented to the vicarage. DODDERIDGE, J. seemed to think that a stranger could not be presented, but only one of the canons; and that when the abbey was dissolved, the vicarage was gone. JONES, J. *è contrà*; but upon this they spoke with more doubt. And they all directed the jury to find this point specially, if it were necessary. DODDERIDGE, J. said that *Monk's case*, 14 H. 8. if well observed, would prove what he had said above.

E. 2 Car. B. R. *Stilman v. Cremer*. [Latch. 24, 228.]

If two persons be entitled to the tithes of a parish in moieties, the parishioner is not bound to set them out in halves, but the tithe owners must divide them.

NOT thought clearly that if two persons have portions of tithes by moieties in a parish, that the statute 2 E. 6. which orders tithes to be set out, does not enjoin the parishioner in such case to divide the tithes in halves, and set out their parts single; but the parishioner ought only to set out the tenth; as in case of the tithe of one lamb, the parishioner cannot divide it. According to another report, it was adjudged that the parishioner is not bound to divide the tithes into moieties, but the parsons shall divide it amongst themselves.

E. 2 Car. B. R. *The Vicar of Axford's Case*. [Latch. 115.]

A parson let his tithe hay to the vicar by parol; the court held that the contract was void in law, and that the vicar had no remedy for the tithes.

A PARSON by parol leased tithe hay to the vicar, rendering rent; the vicar paid the rent for the first year, but finding that the rent was more than the tithes were worth, refused to continue the bargain. The parson sued for the rent in the court of requests; the defendant did not plead any notice of refusal: they joined in commission for examining witnesses; and sentence was given for the parson; upon which the vicar prayed a prohibition. It was agreed by the court, that if the lessee had received the profits, he wasuable in the court of requests for the rent: so if he had given notice of refusal of the bargain, he would have been discharged from the rent from the time of notice, for he had no remedy for the tithes, as the contract was void in law. — DODDERIDGE and JONES. The law is the same, if he had not given notice. It was answered, that the parson had remedy in the spiritual court, if the farmers did not set out their tithes; or against a stranger who should take them after they were set out. But the vicar here had no remedy. But the Chief Justice thought it was equitable to make the lessee pay the rent, as he had not given notice, having once received the profits. — WHITLOCK. The lessee has no remedy for the tithes.

At last, by consent, the parson took half of the rent, which was decreed to him; and was left to his remedy against the farmers, who detained the tithes.

DODDERIDGE said, that after sentence, the time was gone by for asking a prohibition.

E. 2 Car. B. R. *Langton's Case*. [Latch. 125.]

1626.

NOTE, it was said by the court in this case, that a parson might sue for a *modus decimandi* in the spiritual court. So where a parishioner will not set out his tithe in cocks, when by custom he ought: but in such case the suit ought to be specially for not setting out in cocks, and not generally for not setting out. custom it ought; but in such case the suit must be special for not setting out in cocks, and not general for not setting out.

A *modus* may be sued for in the spiritual court. So if tithe be not set out in cocks, where by

Tr. 2 Car. C. B. Sir *Robert Banister's Case*. [Cro. Car. 38.]

DEBT for not setting out tithes: upon a special verdict the case was: A parson made a lease of his rectory, 9 Eliz. for sixty years, which was confirmed by the succeeding bishop and succeeding patron, neither of them being bishop or patron at the time of the lease. Resolved, *per totam curiam*, that it was good according to the opinion in *Newcombe's case*, in 5 Rep. 15. And so, without argument, it was adjudged for the plaintiff.

A parson leased his rectory for 60 years, which was confirmed by the succeeding bishop and patron, and held good.

Tr. 2 Car. B. R. *Anon.* [Latch. 7.]

BY the practice of the court, a prohibition shall never be granted upon the last day of term, and such a motion ought not to be made; but upon motion, a rule may be made to stay proceedings until the next term.

No prohibition will be granted on the last day of a term, but a rule to stay proceedings till the next.

Tr. 2 Car. B. R. *Watkinson v. S. G. Pacy*. [Latch. 140.] Noy, 81.

WATKINSON, parson of Doubleton, sued Sir G. Pacy for tithes of a dove-house, and upon suggestion Sir G. had a prohibition out of this court: sixteen months elapsed without any proof made, according to the statute: the parson went to issue upon the prohibition, and it was found against him. The question was, whether he should now have double costs. CREW, JONES, and WHITLOCK held he should not, for he had let his time go by; for the words of the statute are, that he shall have a consultation, and double costs, if the plaintiff in prohibition do not prove his suggestion. But here he can never have a consultation, for the matter has passed against him; he ought, upon failure of proof, to have prayed for a consultation, and then he would have had double costs.

In prohibition the suggestion was not proved within 6 months, but the parson notwithstanding went to an issue, which was decided against him; held that he was not in such case entitled to double

costs, having neglected to pray a consultation, for want of proof of the suggestion.

M. 2 Car. B. R. *Bellamy v. Balthorp*. [Godb. 373.]

Latch. 176. Noy, 189. N. Bendl. 202, 203.

IN an action of trover and conversion, the plaintiff laid that he was possessed of twenty loads of wheat, and that he lost them, and that they came to the defendant's hands, who converted the same to his own use. The defendant justified, and said, that the parish of O. is an ancient parish, in which there is a rectory impropriate, &c. and the Earl of Clare was seised of the rectory, and made a lease to him of the tithes of that parish for one year, by force of which he was possessed: and that the corn was set forth by the parishioners, and that one T. gathered the tithe, and delivered the same to the plaintiff, and that the defendant, his servant, took away the tithe, as it was lawful for him to do. Upon which the plaintiff demurred; first, because the plea amounted to no more than the general issue, viz. not guilty; and if the plea amount to no more than the general issue, then it is no good plea; but he ought to have taken the general issue, 5 H. 7. 11 Ass. For if in an assise the tenant say that the plaintiff disseised him, and that he entered upon him the plea is not good, because it amounts but to the general issue, viz. *nul tort nul disseisin*.

A justification by demise of tithes by parol for one year, held to be merely void. But a parson may discharge a parishioner from tithes by parol, or lease the rectory consisting of glebe and tithes by parol for years.

1626.

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disseisin, and the other party may demur upon it. 22 E. 4. 40. In trespass for battery, it is no plea to say that he did not beat him, because it is but not guilty by argument. 34 H. 6. 28. b. If I bring trespass for breaking of my close, it is no good plea to say that I have no close; or if it be for carrying away my goods, to say that I had not any goods; but the party ought to have pleaded not guilty.

It may be objected, that in this case the defendant makes title to the corn. To that we say, he derives a title to tithes without a deed, which gives no title to them; for tithes do not pass by demise alone, without deed; but by the demise of the rectory, (1) without deed, they will pass. So by a feoffment of a manor without deed, the services will pass; but the services alone will not pass without a deed. 21 H. 7. 21. 19 H. 8. 12. A WARREN may be demised without deed. 9 E. 4. 47. But the profits of courts will not pass without deed. 22 H. 6. 34. b. By way of contract a demise may be of tithes, without deed, but in pleading, it ought to be set forth that there was a deed. Co. 10. 92. Where the deed ought to be shewed, which proves that there ought to be a deed. In the C. P. in an action of trover and conversion of certain goods, the defendant said, that A. was possessed of them, and made him executor, &c. And the plaintiff demurred, and had judgment, because it amounted but to the general issue. — DODDERIDGE, J. The parson may demise his tithes to the owner of the land without deed, but he cannot grant them to a stranger without deed. If the defendant make title from a stranger, then it amounts to the general issue; but if both plaintiff and defendant make title from one person or donor, then the plea is a good plea. Otherwise, *per curiam*, it amounts to the general issue. But the opinion of the court was, because that the defendant made a title of tithes without a deed, therefore judgment in the principal case was given for the plaintiff.

(1) "Consisting of glebe and tithes." — *Latch.*

M. 2 Car. B. R. *Anon.* [Anon. in Poph. 197.]

Where sheep are removed to another parish before shearing time, the parson shall have agistment tithes for the time they are depastured in his parish. Of unprofitable cattle the parson shall have the tenth of the bargain for depasturing, as horses, oxen, &c. But if profitable cattle, he shall have tithe in *specie*, as cows, sheep, &c.

A PROHIBITION was prayed, because a parson had libelled in the ecclesiastical court for the tenth part of a bargain of sheep, which had depastured in the parish from Michaelmas to Lady-day; and the party surmised that he would pay the tenth of the wool of them, according to the custom of the parish. But the prohibition was denied; for, as DODDERIDGE, J. said, by this way the parson shall be defrauded of all, if he shall not have his recompense, for now the sheep are gone to another parish, and he cannot have any wool at this time, because it was not the time of shearing. *Nota, per WHITLOCK, J. de animalibus inutilibus*, the parson shall have the tenth part of the bargain for depasturing, as horses, oxen, &c. but *de animalibus utilis* he shall have tithes in *specie*, as cows, sheep, &c.

H. 2 Car. C. B. *Anon.* [Litt. Rep. 13. (1)]

Headlands and butts in corn-fields are free from tithes of hay, for they are left for the turning of the plough in ploughing the lands of which he has tithe corn, and these could not be cultivated unless they were left.

THERE was a libel in the spiritual court for tithes of hay: the defendant said, that the hay was growing upon headlands and butts in corn-fields; and YELVERTON and HUTTON, who were in the court, agreed that prohibition should go; for the defendant is in such case discharged of necessity, for they are left for the turning of the plough, and are parcel of the plough land of which the parson has tithes of corn, and he could not plough his land if they were not left; and this is the best reason of the case. 22 E. 4. 8. (2)

(1) Mr. *Gwillim* reports this case and the next, as *per Richardson arguendo*, and although, by reason of the misprinting, it may at first sight appear so in *Littleton*, yet upon consideration it will be clear that it is perfectly distinct from the preceding case, which concerns a prohibition to the chancellor's court at Oxford for words.

(2) In trespass the defendant justified by reason of a custom, that when a man went to plough, it was lawful for him to turn his plough upon the land next adjoining, whether sowed with corn or not: and held good, if such a custom existed in point of fact.

H. 2 Car. C. B. *Anon.* [Litt. Rep. 13.]

THERE was a libel in the spiritual court for tithes of rabbits, which the party killed solely for the use of his house; and it was agreed that tithes shall not be paid of rabbits killed to be spent in the house; therefore prohibition was granted; and in the next term it was also agreed, that by the common law no tithes are due for rabbits, but only by the custom of the place.

1626.

No tithe is due for rabbits killed for the use of the house. By the common law no tithes are due for rabbits, but only by the custom of the place.

H. 2 Car. C. B. *Anon.* [Litt. Rep. 19.]

IN prohibition, upon suggestion of a *modus*, and the suggestion was supported by HYDE not to have been proved within six months, as the statute 2 E. 6. requires, as the prohibition was granted on the 6th of May, and the suggestion was proved on the 22d October. But it was held well proved, for the six months shall be taken for half a year; and in this case the proof was besides offered on the last day of the six months, computing twenty-eight days to the month, but as it was Sunday, the judge refused to take it, but took it the next day; and held good.

The six months within which a suggestion is to be proved means half a year, and not months of 28 days; and where the last day was on a Sunday, proof on the next day was held good.

E. 3 Car. B. R. *Cicill v. Scott.* [Litt. Rep. 31.]

CICILL, a parson in Essex, libelled for tithe of rakings, after the corn was collected into sheaves, &c. And by the court prohibition shall be granted; but the suggestion must be, that he libelled for rakings after the corn, &c. involuntarily scattered; and so was a case in Suffolk adjudged, as cited by RICHARDSON. The parson libelled also for pelt wool, of sheep killed for the house, or dead, &c. And for hops, that had been paid, but which he could prove by only one witness. And prohibition was granted as to all; but it was directed, that these should be distinct suggestions.

1627.

Prohibition to a libel for rakings, but it ought to be suggested, that they were involuntarily scattered. It was also granted for tithe of pelt wool of sheep fatted for

the house, or which had died. Where payment of tithes libelled for can be proved by only one witness prohibition shall go.

E. 3 Car. C. B. *Anon.* [Hettl. 13.]

ONE libels for tithes of fish, which are due merely by custom; and the defendant pleads, that time out of mind, &c. they have paid no tithes of that. And Henden, serjeant, moved for a prohibition; and RICHARDSON replied, and said, it is merely a customary tithe, as rabbits, &c. whereof no tithes are due by the law of the land, and a prohibition shall not be granted. But all the other justices affirmed, that there should be a prohibition granted, because the custom ought to be tried by the common law; and they made a difference between a *modus decimandi*, which is also customary, and where there is a tithe precedent due, and that *modus* converts it into another duty; there no prohibition shall be granted, but it shall be tried in the spiritual court, whether there be such a *modus decimandi*; or not, and that case in the custom makes the duty itself. But if he alleged the *modus* to be for two-pence, and the parson for three-pence, it shall be tried by the common law. (1) And they said, that so was the opinion in the grand case of lead ore. And HURRON said, that so it was determined in the case of one Berry, for tithes of limekilns; which are as minerals, and are not titheable by the common law. But when the custom is tried, then they in the ecclesiastical court may proceed upon it.

Tithe of fish is due merely by custom, which if disputed shall be decided by the common law courts, for though customary payments for tithes due *de jure*, may be sued for in the spiritual court; yet if the tithe be not due *de jure*, but by custom only, as of fish, rabbits, ore, limekilns, &c. the custom shall be tried at common law, after which the spiritual court may proceed upon it.

(1) The meaning must be, that where no tithe is due but by custom, such tithes shall be decided by the common law; but where a tithe precedent is due, which has been con-

verted into a *modus*, and so due by custom, the suit shall be in the spiritual court, although it be for the *modus* itself.

1627.

Though tithes be due of acorns gathered and sold, yet where they dropt from the trees, and the hogs ate them, prohibition was granted.

Tr. 3 Car. B. R. *Anon.* [Heti. 25.] Litt. Rep. 40. 1 Gw. 428.

A PARSON libels in the spiritual court for tithes of pigeons and acorns. And the defendant prayed a prohibition; because the pigeons were spent in his own house, and the acorns dropt from the tree, and his hogs ate them. And it was said by the court, acorns are titheable, 11 Rep. 49. but then they ought to be gathered and also sold. And a prohibition was clearly granted.

Prohibition to a suit for tithes of pigeons to be spent in defendant's house.

Tr. 3 Car. C. B. *Booth v. Franklin.* [Heti. 31.]

If one contract with the parson for discharge of the tithes of his lands for years, (which may be without deed) and demise his lands to another, yet he shall not have tithes, for the discharge runs with the land. But if one take a lease of his tithes, by deed, and demise his land, he shall have tithes of the lessee.

BOOOTH, farmer of a portion of tithes for five years, without deed, demised a farm which he had in the same parish to Franklin, for years; and afterwards he libels against him for tithe of that farm. And Franklin said he was not farmer. And *Henden* prays a prohibition for that,

First, the lease for tithes is without deed; but he may be discharged of his own tithes without deed, as was adjudged before in this court.

Secondly, the lessee is not to pay tithes for that farm; for although the parson make a lease of the glebe for years, he paid tithes; but if a lay-man, who had the impropriation, lease the glebe, the lessee does not pay tithes. But the court denied the case of the lease of the parsonage impropriate; and said that the case of *Perkins* and *Hinde* was adjudged to the contrary, in that very point. (1) And also if he purchase other lands in the parish, (which are discharged of tithes in his hands,) and he demise them, yet the lessee pays him tithes. And the opinion of the court was, if one contract with the parson for discharge of the tithes of his lands for years, and demise his lands to another; yet he shall not have tithes, but the discharge runs with the land. But if one take a lease of his tithes by deed, and make a demise of his land, he has tithes of the lessee. And the direction was, that the lessee of the farm ought to shew expressly in the ecclesiastical court that the farmer had not a lease by deed; and a prohibition was granted. And it shall be admitted, that the words of the libel being *firmator, conductor et occupator*, were good.

(1) *Aniè*, 98.

Tr. 3 Car. B. R. *Clarke v. Prowse.* [Latch. 210.]

A *modus* may be sued for in the spiritual court, but if it be denied, they cannot proceed, for they shall not try a prescription; the denial however of the custom must be alleged positively and not by way of belief.

THE case was, that *Clarke*, a parson, sued *Prowse*, a parishioner, for a *modus* in the spiritual court, and alleged a custom to have two shillings in the pound for every house and shop in the town; and to this the defendant answered, as to the custom, "that he did not believe it to be true;" and also to have a prohibition, he alleged that he was a butcher, who kept an open stall in the market, to sell meat in the market only, and that he had no other shop or house. And it was agreed by the court, that a parson might sue for a *modus* in the spiritual court; but if it were denied, the Ch. J. and *Jones* said, that they could not proceed any further; for they could not try matter of prescription there; and if they proceeded, prohibition lay. But here no prohibition was granted: for *DODDERIDGE* said, that for the reasons above, the spiritual court had power to examine this, for it was not a denial of the prescription, which ought to be by allegation. — *HIDE*. This is their form of denial. — *Nov.* The form of answer to the articles, is as above, "that he does not believe," &c. But if the defendant would deny the prescription, it ought to be by way of allegation. — *JONES* agreed.

M. 3 Car. B. R. *Morant v. Cumming*. [Cro. Car. 94.]

1627.

MORANT, lessee of the Earl of Hertford, against Cumming, vicar of Libbeck, prays a prohibition to stay a suit in the spiritual court for tithes, because the lands were parcel of the forest of Beare, whereof King James was seised in fee in *jure coronæ*, and he and all his predecessors held it discharged of payment of tithes, and granted it to the said Earl of Hertford in fee, and so he ought to hold them discharged; and it was doubted whether the patentee may have such privilege, or that it be only a privilege annexed to the crown during the time that the land was in the crown; but it was granted *de bene esse*, unless cause were shewn to the contrary such a day.

doubted whether such a privilege extended to the patentee.

The King was seised *jure coronæ* of certain lands, parcel of the forest of Beare, which he and all his predecessors had held discharged of payment of tithes, it was

M. 3 Car. C. B.

The Vicar of Chesham's Case. [Hettl. 52.] Litt. 61.

THE Earl of Devonshire had a manor in the parish of Chesham, in Buckinghamshire, which extended to Latmos, where there is a chapel of ease; and the vicar of Chesham libelled for tithes, against one of the tenants of the manor. And *Henden* moved for a prohibition, for that the Earl prescribed, that he and all his tenants should be acquitted of all the tithes of land within Latmos, paying 10*s.* per ann. to the chaplain of Latmos. And he said that such a prescription is good, as it was adjudged in *Bowles's case*. And a prohibition was granted.

A prescription by a lord of a manor that he and all his tenants should be discharged of tithes of a certain place, he paying therefore 10*s.* to the chaplain of a chapel within the parish, held good.

M. 3 Car. C. B. *Anon.* [Litt. Rep. 72.]

ONE who was accepted as chaplain of a chapel of ease, which was not representative or donative, libelled for tithes against the inhabitants within the precinct of the chapel; and prohibition was granted.

A chaplain of a chapel not representative or donative, cannot libel for tithes.

M. 3 Car. C. B. *Wood v. Symons*. [Hettl. 147. 32.(1)]

THE defendant here in the prohibition libels for tithes of hay in the spiritual court. The plaintiff suggests that the hay was growing upon Greenskips, Deales, and Headlands, and that within the same parish there is a custom, that the parishioners in a meadow there used to make the tithe hay for the parson, and in consideration of that, to be discharged of all tithes of hay growing *ut supra*; and also that for the hay of the land, no tithe ought to be paid of such hay; but does not aver that the hay was growing upon Greenskips, &c. And an exception was taken by *Henden*: first, That the exception is double; the custom and common law: but by *YELVERTON*, that is not material: for you may have twenty suggestions to maintain the suggestion of the court. But *RICHARDSON* was against that, that a suggestion might be double here; for the suggestion of the common law is a surplusage. As in *Farmer and Norwich's case* here lately. One prescribes to be discharged of tithes, where the law

1. A suggestion was made of a custom that the parishioners in a meadow used to make the tithe hay for the parson, and by reason thereof to be discharged of tithe of hay of headlands, &c. and also that of such hay no tithe ought to be paid; but as there was no

discharged averment that the hay was growing upon headlands, &c. it was held bad; but they said, that the consideration of making hay was a good discharge, because it is more than they are bound to do.

2. Two may join in a prohibition if they be joined in the libel, but they ought to sever in the declaration.

(1) In the report of the commencement of this case (p. 32. *Healey*) the suggestion was of a discharge for headlands, &c. not exceeding the breadth that a plough or team might turn about the lands. And *Henden* moved for a consultation, for that it is said, *about*, &c. that is, *circa terras arabiles*, when the truth is, that there are skips at the side of lands, as broad as the lands themselves, and then he

would be discharged of them also, whereas it ought to be at the end of the headlands only.

—*RICHARDSON* said, that in arable lands inclosed, pasture is at the end, and at the sides, which is mowed, and yet discharged of tithes. But the court, in respect there was a prohibition, said, that he ought to join issue, or demur to the declaration.

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discharged him, and so was discharged by the common law. Second exception is, that he does not apply the custom to himself in the suggestion. For he does not shew that the hay grew upon the skips, upon which a plough might turn itself; that had laid the custom. And for this cause by the whole court, the suggestion is naught. And here RICHARDSON moved, how that two should join in a prohibition. — YELVERTON. If they be joined in the libel, they may join in the prohibition, and that is the common practice of the King's Bench. — RICHARDSON. The wrong to one by the suit in the spiritual court, cannot be a wrong to the other. — HUTTON. They may join in the writ, but they ought to sever in the declaration, to which HARVEY agreed. — YELVERTON. The prohibition is the suit of the King, and he may join *tant.* as in a writ. — RICHARDSON. But it is as the suit of the party is, and if any join here, I think good cause of consultation. — RICHARDSON. It is against the profit of the court to suffer many to join; and it is usual in the case of customs of a parish in debate, to order proceedings in the two prohibitions, and that to bind all the parish and parson. And it was said by them all, that the consideration of making hay is a good discharge, because it is more than they are bound to do.

M. 3 Car. C. B. *Comins's Case.* [Hetl. 60.]

1. It was said that the privilege of the King to hold a forest discharged of tithes was personal and extended to his lessee only, and not to his feoffee.

2. The right of tithes between parson and vicar shall be tried in the spiritual court, and Richardson said, that though the books made a doubt where it was between the servant of the vicar and the parson, it seemed to him all one.

IN one *Comins's* case, it was agreed by the court, that a subject may have a forest, but cannot have a justice seat. But he may have a swanmark court, and the other courts, and a commission to execute them. Then a forest in the hands of a subject shall pay tithes, and it was agreed that in the hands of the King it is privileged. And by *Henden, Davenport, and Atthowe*, Serjeants, it is only his personal privilege, which extends to the lessee of the King; but not to the feoffee. And it was agreed, that where the right of tithes comes in question between a parson and the vicar, who are both ecclesiastical persons, it shall be tried by the ecclesiastical court. — But RICHARDSON said, the books make a doubt; where it is between the servant of the vicar and the parson. But it seemed to him to be all one.

M. 3 Car. B. R. *Anon.* [Latch. 226.]

A custom, that in consideration of binding up the corn in sheaves, and setting them up in shocks, and then setting out the tenth shock for tithe, the parishioner should be discharged of the odd sheaves which would not make a shock, is good, for the parishioner does more than of common right he is bound to do.

TO a libel for tithe sheaves, *Noy* suggested, that the parishioners had been at the charge of binding the corn in sheaves, and for the better dividing of it, have been used to make it up in sheaves, and then into shocks, and when that was done, they set out the shock for tithe; and because the parishioners had been at such trouble, they had been discharged of tithe of the odd sheaves, which would not make a shock. It was holden a good custom, and a prohibition was granted; for the parishioners do more than by common law they ought.

M. 3 Car. B. R. *Anon.* [Latch. 254.]

A prohibition was denied to a suit for tithe wool of rotten sheep; *Jones* said, if sheep be sold, the parson shall be allowed for tithe of them after shearing.

If there be a custom to pay

KING, of the Inner Temple, moved for a prohibition, because the parson had libelled for tithe of wool of rotten sheep, which he ought not to have, for he will have tithe of the same thing at shearing time afterwards; as if tithe be paid of the cuttings of grass, it shall not be paid afterwards of the aftermath. — DODDERIDGE and JONES. The cases are not like, for there it is for the same thing, but here the parson has no recompense for this wool. — And JONES said, that if the parishioner sell sheep, the parson shall have an allowance for the tithes after shearing; and upon this point prohibition was denied.

2dly. The custom is, if the parishioner have three calves, he shall pay for three calves 1d. and if seven, one calf, the parson shall not have a calf where there were three in one year and four in another, he having neglected to take tithe of the first three.

the tithe of them 1*d.*; if seven calves, one calf. The parson sued for a calf, as he had three in one year and four in another, and he had not had tithe of the first three; and upon this a prohibition was granted; as if a man have an estover, he shall not take in one year what he did not take in another; his negligence shall not give him double estovers.

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3 Car. In Canc.

Yate v. Southby. [1 Ch. Rep. 25.] 1 Gw. 431. 1 Raym. 12.

A BILL of review brought to reverse a decree for tithes made by the Lord Ellesmere, in respect the plaintiff has had a verdict at law, and sentence in the ecclesiastical court, since the decree; this court would not reverse the decree, notwithstanding any thing urged against it.

bill of review, in respect of a verdict at law and sentence in the spiritual court for the plaintiff (in the bill of review) since the decree.

The court of Chancery refused to reverse a decree for tithes upon a

E. 4 Car. B. R. Lynner v. Wood. [Cro. Car. 157.]

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ACTION of *trover*, for divers loads of corn. The defendant pleads and entitles himself unto them as tithes severed, and because the plea amounts but to a *not guilty*, the plaintiff demurred and shewed for cause, that the plea was not therefore good. *Henden*, Serjeant, would have maintained this plea, because it concerns matter in the realty, *viz.* tithes, and title is pleaded, as it were a confession of the possession in the plaintiff, and as a general bar in action of trespass, and colour given, *sed non allocatur*; for this action comprehends title in it, and a plea which amounts but to a general issue is not allowable, it being specially shewn for cause of demurrer; whereupon without argument it was adjudged for the plaintiff.

If to an action of *trover* the defendant plead and entitle himself as for tithes severed, it is bad upon special demurrer, for it amounts but to the general issue.

E. 4 Car. C. B. Stiles's Case. [Littlet. Rep. 147.]

A PARSON libelled against Stiles and others, leasees of the Earl of Salisbury, for the tenth penny for the whiting of cloth. *Henden* prayed a prohibition, but grounded it upon another thing, *viz.* for that it was land parcel of a monastery which was discharged of all tithes, &c.

RICHARDSON. It is hard to have tithes for whiting of cloth.

HUTTON. Every thing which the earth itself yields, as grass or wood, &c. which grows and renews, is titheable, but this is for their handy work, as if one fetch limestones, and burn them upon the land, it is doubtful whether tithes shall be paid.

RICHARDSON Of all quarries, as of stone, lime, coal, &c. no tithes ought to be paid *de jure*; and where it is paid, it is by the custom; and the great case in Derbyshire, where the tenth dish of lead is now paid, is by reason of custom; and so it is of fish, at Yarmouth, Wells, and other coast towns; when they return from fishing they divide the doles, and the first dole which is set out is called Christ's Dole; half of this is given to the parson of the place where they land, the other half is to be divided amongst them, to give to the parson where each inhabits; but this is by custom.

HENDEN. If land be converted to a bowling alley, he cannot have tithes of this profit; but upon looking into the libel, it was for the tenth part of that which the land used to yield in rent.

But by **RICHARDSON** and **HARVEY**, he cannot have it; and they said, that any one might libel for the tenth part of the rent where land is demised, but they could never have it. And according to them, tithes of cabbages, or gilly flowers, or other herbs, shall be paid in a new garden.

And by **RICHARDSON**, although it be an old garden, unless there be some custom to discharge it.

No tithes are due *de jure* for quarries of limestone, coal, &c. and where they are paid it is by custom, as of lead ore in Derbyshire.

Tithes are due for cabbage or gilly flowers, or other herbs in a garden, unless there be some custom to discharge them.

Title of fish at Yarmouth, &c. is by custom.

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If trees be not lopped before twenty years growth, the bodies privilege the branches; but if oak or ash be lopped under twenty years growth, the loppings will be always titheable.

E. 4 Car. C. B.
The Vicar of *Wainsbrough's* Case. [Litt. Rep. 148.]

THE vicar of W. libelled for loppings of wood. *Fiach*, Recorder, moved for a prohibition, which was granted, as it was given for firewood.

RICHARDSON made this distinction; in some cases the bodies of the trees above the age of twenty years, privilege the branches, in some not; if they were trees which were never lopped before they were twenty years old, the body would always privilege the branches: but if oak or ash be lopped within the growth of twenty years, the boughs and branches are always titheable.

E. 4 Car. C. B. *Woolmerston's* Case. [Hettl. 85.]

If the custom be to pay a penny for every orchard, it will extend to new, as well as old orchards.

It is a custom in the north to give a hearth-penny for estovers burnt, for which they prescribe to be free for every thing which comes to the fire.

Hutton and **Yelverton**, who were in court, held, that no tithes should be paid for young cattle brought up for the cart or plough without a custom, but

ONE libels against *Woolmerston* for the herbage of young cattle, viz. for a penny for every one. And *Hitcham* moved for a prohibition; and said that he ought not to have tithes, if they are young beasts brought up for the cart or plough. And so it has been adjudged; as if a parson prescribe to have tithes for hedging stuff, he cannot, because it preserves the land out of which he has tithes. And then the parson libels for tithes of an orchard, for that it was a young orchard. And the custom of the place was, to pay 4d. for an orchard. *Hitcham* said, there is not any such difference between old and new orchards. For if the custom be that he shall pay 4d. for every orchard, it will reach to the new orchard. And then he libels for a hearth-penny, for the wood burnt in his house. — **HUTTON** said, the hearth-penny, &c. is more doubtful. For it is a custom in the north parts to give a hearth-penny for estovers burnt, for which he prescribes to be free of every thing which comes to the fire. And in some parts by the custom they had pasturage for the tenth beast, or the tenth part of the gains [for that] which is barren for the time; but he and **YELVERTON**, who only were present, said, that no tithes are due for them without custom. *Hitcham*, they also will have tithes for a thing before it comes to perfection, which would be titheable afterwards. But I agree, if he sell them before they come to perfection, then the parson will have tithes. But by **HUTTON** and **YELVERTON**, there may be a custom to have every year a penny for them. *Sed adjournatur, &c.*

if sold before they come to perfection, then tithes should be paid.

E. 4 Car. C. B. *Thornhill's* Case. [Hettl. 93.]

Quere, whether cattle preserved for the plough or pail, be discharged from tithes by the common law, without a custom in the place, and a consideration alleged.

If a penny has been paid for an ancient garden, if it be enlarged, tithes shall be paid in kind for that enlargement.

A PARSON libels for the tithes of young cattle preserved for the cart. And the question was as before, whether in such cases a custom ought to be surmised. And **CROKE**, Fitz-Herbert's *Nat. Brev.* is, that of right tithes shall not be paid for such things. — **RICHARDSON**. In all such cases the parson ought to have tithes, if there be not a custom alleged, by which the parson had any thing, or recompense, or by which his other tithe is better. And he said, that he had searched the books, and the book of entries, and there is not any such case; but some surmise is made, as for that, that he had tithe of corn in specie where the land is inclosed; and so the corn better. — **HUTTON**. It ought to be tried if the thing in its nature be titheable, or if there be any usage to discharge it or not; as the cattle are in their nature titheable, then you cannot prohibit it. But the usage ought to be surmised so; and it may be law, as the parson had better tithes. — **HARVEY**. If a libel be for tithes of hedging and fencing; there a surmise ought to be made to discharge that. But when it is for tithes of heifers which in apparence ought to be spared by the law of the land, otherwise it is, &c. — **RICHARDSON**. For the herbage of those heifers, tithe is due by the ecclesiastical law. And we never can take tithe of them without express custom or other recompense. — **HARVEY**. There was a case, 16 Jac. C. B. a parson sued for the herbage of horses, and the other alleged, that he kept

kept them for the carrying of coals. There he ought to surmise something to be discharged; and if he allege that he kept them in his house for serving of husbandry; the other may allege that he kept them to carry coals, and the allegation is traversable. — RICHARDSON. There was a case, where the question was, a husbandman keeps an horse to ride up and down about his business; whether he shall pay for the herbage of him. And a prohibition in that case was granted; but a surmise ought to be made. — CROWN said, that in the King's Bench he had twenty times seen a prohibition granted in such cases without any surmise. And if a libel be for dry cattle; if it be alleged that they are kept for the plough, the other may allege that he keeps them to sell, without that, that he keeps them for the plough; and before there is any profit of them, it is not reason they should be titheable, and the parson shall have the benefit for them after. And for hedging it is *lex terra* that he shall pay no tithes. — RICHARDSON. It is *lex terra ne consuetudo loci faciat legem terra*. And if he had used to pay tithes for the cattle or for hedging, he ought not to pay that still. If an ignorant man will pay tithes for those things, and after upon a libel a prohibition be granted; if the other do not allege a custom, the prohibition shall stand; or if they allege a custom, which is found against him, no consultation shall be granted. And for a garden penny, the reason of that is apparent; for otherwise tithes shall be paid in specie. And so for hearth penny, if he had always paid it, it ought to be paid. — HURTON. If a man had an ancient garden for which he paid a penny, and that is enlarged, of that enlargement tithes ought to be paid in specie.

Tr. 4 Car. C. B. Norton v. Harmer.

[Hetl. 88. 110. 117.] Cro. Car. 113. Litt. Rep. 5. 152.

JOYCE NORTON and Thomas Duckett, plaintiffs, against George Harmer, the vicar of, &c. In a prohibition, the libel was for wood employed in hedging, and for fire-wood. Issue was joined, that there was in the parish a great quantity of land inclosed, and that they used to take wood for hedge-bote and fire-bote, and they were discharged of tithes, in consideration that he paid tithes in kind of hay and corn, &c.; and it was found for the defendant. Crowley moved, that a consultation cannot be granted, for that they ought to be acquitted of tithes for those of common right. And for that, although prescription was alleged, it is nothing to the purpose. — Atthowe. For fire-wood it was proved that tithes always were paid. — RICHARDSON. There is no doubt but the discharge also ought to be by custom, and to be grounded upon *modus decimandi*. — YELVERTON and CROKE otherwise; that it is not upon *modus decimandi*, but by the common law. And the reason is for that, that when a man is owner of arable land, and he pays tithe milk and corn; and for that they are discharged of things consumed in the house; which are to make masters and servants fit to manure the land, &c. — RICHARDSON said, it is seen that it shall always be discharged, if a consideration be alleged; and a small consideration will serve. — CROKE. It is not *modus decimandi*, but the discharge is for that, that the parson for them had a benefit; for he had by them better means of tithes. — HURTON. If a man have an house of husbandry, and demise all the lands but the house, he shall pay tithes for them consumed in the house. — CROKE. Not. No profit is made by them to the party; but the parson had a benefit by him. And a day was given to search precedents.

Finch, Recorder, said, *de communi jure* for estovers burnt in an house, tithes ought not to be paid; by the common law there was not any tithes paid for wood: and although the statute of 25 E. 3. give a prohibition for timber, yet underwoods were discharged of tithes. Doctor and Student, 171, is express that estovers are not titheable, because they are not renewing every year; and it is parcel of the inheritance, for to destroy all the underwood is waste. And there is another case put, where tithes of wood had not by the custom been paid,

Where a custom was alleged by one, that the owners of a house and land in a parish who paid tithes to the parson, should not pay tithes of fire-wood spent in their houses, and found against him; it was moved in arrest of judgment that no consultation should go, inasmuch as such wood was discharged by the law of the land; but the court held that it was not discharged *de jure per legem terra*, but by special custom in respect of some consideration to the parson in another shape, as a hearth penny, or by reason of payment of tithes of other

lands; but it was said by Croke and Yelverton (according to Hetley) that there were many precedents of prohibitions in such cases without customs alleged.

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paid, neither ought they to be paid in law or conscience: but that is not to be intended, the conscience of every particular man, but of a county; [for a county may prescribe *in non decimando* for wood, as in 43 El. in *Downton's* case, it was resolved for the Weald of Sussex which made such a prescription. Litt.] and Mich. 13 Jac. B. R. in the case of *Porter and Tike*, (1) for the Weald of Kent, the same prescription resolved to be good; and so is the common experience that a whole county may prescribe so; and the reason is for that, that by the common law it was not due, but by the constitution of Winchelsey, Lindwood, 104. it was ordained to be paid; for the prelates imputed a great pestilence that then was, to negligence of paying tithes, and appointed tithes of wood. And 2 Ric. 2. the commons were desirous to have the statute of *silva cadua* otherwise explained than the clergy declare it; for they say that they ought not to pay tithes of any wood that is of the growth of ten years; [and their inducement was the consideration, that before the great pestilence no tithe of wood was demanded or paid, but by this constitution it was payable]; then if no tithe were due for firewood by law, it shall not now be paid: and 6 Jac. and before and after in B. R. prohibitions are usually granted without alleging a custom, and it is the best way; but in B. R. upon argument it was resolved that tithes were not due for it of common right, &c.

Attowe, it is true that there may be a prescription in *non decimando* for wood; but if issue be joined upon it and found for the plaintiff, judgment shall be that tithe shall be paid; which proves that by common law it is not discharged. Litt.]

HUTTON. Wood is titheable in its nature, and then there may be a custom to be discharged. And the case of *Hearthpenny* cannot be answered; for if he sue for the penny, a prohibition shall not be granted; *quod concessum fuit*.—By CROKE and YELVERTON. But of things not titheable, tithes of them cannot be sued, without alleging a custom.—CROKE. It is known that hearthpenny is good by prescription: this case is when there is not land belonging to the house, so that the parson is not answered for his tithes another way. But when there is land and servants kept for the maintaining it, then by the law of the land it appears, that firewood is discharged of tithes; so that it appears by the law of the land that tithe ought not to be paid; and although custom has been alleged, it is nothing to the purpose: as if a custom be alleged to pay four-pence for every acre in discharge of tithes, and the verdict find three-pence, no consultation shall be granted [and although it be here found against the party, yet it appears to the court that no tithes ought to be paid. And I know that, in like case, it was alleged in B. R. to be by the law of the land. Litt.] And so for wood to fence the ground, or dry cattle to manure the ground: although custom be alleged there in discharge of it, and found against the party, yet no consultation shall be granted. HUTTON. The herbage of barren cattle is titheable, because there is a custom which discharges those which are for the pail, &c. And he said that the custom only makes this *legem terre*. And he cited Doctor *Graunt's* case. (2) He libelled for tithe of a house, and the party brought a prohibition, and alleged *modus decimandi*, &c. And it was alleged in arrest of judgment, as here, that houses were not titheable *de communi jure*, and yet a consultation was granted. And there CROKE put this case, which I do not remember in the printed book, that one libelled for tithes of trees, (3) and custom alleged, and there was found no such custom in discharge; yet it was ruled that no consultation should be granted.

In *Norton's* case before; a consultation was granted, because of a custom alleged, and found for the party. But by CROKE and YELVERTON, there are divers precedents, where in that case a prohibition was granted, without alleging a custom. [*Hetley*.]

Prohibition was granted to stay a suit for tithe of wood, upon surmise that the wood was spent in his house for firing, and shews that the custom in the same parish is, that the owners of any house and land in the said parish, who

(1) *Ante*, 224.(2) *Ante*, 222.(3) "Which were timber."—*Litt.*

pay tithes to the parson, ought not to pay tithes of wood spent for fuel in their houses; and issue being upon this custom, it was found for the defendant, and moved in arrest of judgment, that although it be found there be no such custom, yet he ought not to pay tithes for wood spent in his house, nor for fencing stuff for hedges, but *per legem terræ* ought to be discharged of them; but the court resolved, that it is not *de jure per legem terræ* that any be discharged of them; for it is usual in prohibitions to allege customs, as for hearthpenny, or by reason of other lands whereof he pays tithes, that he is discharged of that tithe; but not to allege, that *per legem terræ* he is discharged; and the plaintiff here having alleged a custom, and being found against him, it was adjudged for the defendant, that consultation should be granted. [Croke.]

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Tr. 4 Car. Scacc.

Doctor Burgess's Case. [Litt. Rep. 102. 141.] 2 Gw. 439.

DOCTOR Burgess, parson of St. Magnus, by London Bridge, sued here for tithes upon the decree of the act of 37 H. 8. for tithes in London, and to give jurisdiction, shewed that the King had a revenue of four nobles a year out of it; and there was a demurrer to the jurisdiction, and there were precedents cited for the Doctor, one of the 14 Jac. where the parson of St. Botolph's extra Bishopsgate, being a parsonage impropriate granted in fee farm sued here. *Coventry* being recorder at that time of counsel with against the parson.

Quere, whether the exchequer has jurisdiction in cases under the decree 37 H. 8. for tithes in London.

Walters said, if a house in London stood empty for want of tenants during a pestilence, tithes should yet be paid for it; and that where a man purchased a house in fee which he had before hired at a certain rent, or by the purchase extinguished, yet he if he lived in it he must pay tithes according to the former rent: but that if a man built a new house and lived in it, or he leased it rent free, no tithes should be paid.

He said also, that this case was different from the case of under leases at an advanced rent; and of fines taken upon leases.

Finch, Recorder. These precedents may be for tithes claimed by custom, and then they may be well sued for here, or in court-christian. But tithes grounded upon, or which have their commencement by the statute, and not otherwise, ought not to be sued for in any other manner, nor before any other judge than the statute appoints. And there are no tithes for a house, except what are given by this decree, any more than for a mill before the statute of *Articuli Cleri*; but newly erected mills shall pay tithes; for no tithes shall be paid of the freehold by the common law; and therefore by the common law, wood and underwood were [not] titheable, as before the severance they were parcel of the freehold; and this is proved by the Doctor and Student. And it appears also, by the record which I have seen of Ric. 2. among the Parliament Rolls, by which the commons prayed that certainty should be made respecting wood; for they said that no tithes whatever were paid of wood before the great pestilence, but this was altered by the statute of *silva cedua*, 50 E. 3. and was first obtained by the constitution of Winchelsey; and at this day, no tithes are payable for mines and quarries, but by custom; so that there is no other ground here but this decree confirmed by parliament; for which reason, no court but the Mayor of London can take cognisance of it. And upon this ground 5 Jac. *Scudamore v. Bell*, prohibition, after argument, was granted to the spiritual court in like case; and it was resembled to the case of Orphans in London, where the court shall grant prohibition; if any spiritual court interfere with their estate, although it be upon particular custom only.

WALTERS, 38 Ass. (1) the King's farmer sued here for tithes, so that this court may hold plea of tithes in some cases; and there have been cases here, in which the question was, whether tithes should be paid upon the leasing of houses in London, with a great fine and rent, and upon this point, this court has had jurisdiction, but we will advise further.

The case was argued again in Mich. Term. And WALTERS said, that he wished purposely to decline the grand question of jurisdiction, and therefore he inquired what the case was between them. And it appeared that the parishioner farmed a house at £5 rent, and for that it stood empty as he could not get a tenant by reason of the late great pestilence, he for that time would not pay tithes.

But WALTERS said, if such were the case he would advise the defendant to pay tithes, and said he could point out a case adjudged, where one hired a

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CASE.

house in London paying a certain rent, and after purchased the same house in fee, yet although no rent was then paid for it, the parson had tithes according to the rent lately paid: but if a man erect a new house, and live in it, or lease it rent free, the parson shall have neither tithes nor remedy. And this is not like the great case so much questioned, if tithes should be paid for the increase of rent, when the lessee made under-leases reserving a greater rent, nor the case of tithes according to the fine taken for the lease, which was last resolved; and therefore he advised him to agree with the parson, and pay his tithes.

Tr. 4 Car. C. B. *Anon.* [Hedt. 100.]

In a suit for tithes of apples, defendant said they were stolen and never came to his use; It was held, that if a man suffered another to pull his apples the parson should have tithes: but if they were taken by persons not known, he should not have tithes. For (according to Yelverton) they are not titheable before plucking, but if they are suffered by negligence to hang so long that they are embezzled, tithes shall be paid.

Agistment tithes shall be paid for old milch cows that had become dry. And Harvey said, if milch cows be reserved for calves, but they are dry, [unexpectedly] no tithes shall be paid; but if they be sold, by which it appears that they were kept for fattening, tithes shall be paid.

ONE libels against another in the spiritual court for the tithe of two pecks of apples, and for feeding the cattle upon the ground. And the defendant for the apples answered, that there were two pecks only growing in his orchard, and that they were stolen and never came to his use; and for the cattle, that they were ancient milch beasts, and that they growing old were dry, and that for a month they depastured with other heifers, and that after they put them in a meadow, out of which the hay was carried; and afterwards he fed them with hay in his house. — *Atthowe*. Because that the answers were not admitted, prayed a prohibition. — *Hutton*. If apples be upon the trees, and taken by a stranger, shall the parson be hindered of his tithe? — *Yelverton*. If I suffer one to pull my apples the parson shall have tithes. But if they be taken by persons not known, the parson shall not have tithes of them; which was granted. For they are not titheable before plucking. And for that if he suffer them to hang so long by negligence, after the time, that they are embezzled, by *Yelverton* he shall pay tithes. For the second matter it was agreed by the court, that for the depasturing in the meadow, and for the hay with which they were fed afterwards, tithe shall not be paid. Because that the parson had tithes of them before. But if the question be for the tithes when they went with the other heifers, by *Croke*, that is no cause to excuse the tithe. — *Harvey*. If I have ten milch kine, which I purpose to reserve for calves, and they be dry, the parson shall not have tithe for their pasture; but if I sell them, by which it appears I kept them for fattening, there tithes shall be paid. — *Hutton* agreed, that although that there was so small time, yet when they went with the heifers, he shall pay tithes for them.

Tr. 4 Car. C. B. *Goddard v. Tiler.* [Hedt. 100. Litt. Rep. 151. 155.]

A suggestion of a *modus* of 4d. for every cow, and proof that some paid 7d. and others 6d. is void for uncertainty; but if a *modus* of 40s. be suggested and one of 20s. proved, it is good, as it is but to give jurisdiction.

Slight proof, as, "that he thinks, or believes," is sufficient in a suggestion: no proof can be added after the six months, but better proof may be supplied within that time, and if so made, may be certified afterwards.

IN a prohibition. *Tiler* sued for tithes of milk and calves, upon which *modus decimandi* surmised. A prohibition was granted, viz. that every inhabitant should pay four-pence for every cow, and two-pence for every calf; which they proved that there was never tithe paid *in specie*; but that every inhabitant should pay six-pence, and some seven-pence, &c. And because that that was not proof of the suggestion, *Atthowe* prayed a consultation; and by the court upon that reason it was granted: but it was agreed that if the *modus* be alleged twenty shillings, and proved forty shillings, it is good, because it is but to entitle the court to the jurisdiction: but in the principal case no *modus* is proved, for it is mere uncertainty. [*Hetley*.]

Afterwards it was alleged that other proof had since been made, which was sufficiently certain; but it appeared that this was after the six months. And the court agreed that slight proof of the suggestion would serve: as "that he thinks or believes;" and that if there be not sufficient certainty in the first proof,

proof, it cannot be supplied by good proof after the six months, as the statute is strict therein. But better proof may be given within the time, and if it be given within the time, it may be certified after the six months. [*Littleton.*]

1628.
GODDARD
v.
TYLER.

Tr. 4 Car. C. B.

Stone v. Walsingham. [Heti. 107. 122. 128.] Litt. Rep. 155.

IT was said by HUTTON in this case, that a parishioner compounding for his tithes for his life, was naught without deed. And it was said by YELVERTON, that the use in the King's Bench is, that if a defendant in a prohibition die, his executors may proceed in the spiritual court; and there may be a rule for the judges in the ecclesiastical court to proceed also: and then the plaintiff may, if he will, have a new prohibition against the executors, &c.

Stone libels against Walsingham in the spiritual court, and he pleads an agreement, that for five years he ought not to set forth his tithes, but to pay for them 6s. 8d.; upon which matter a prohibition was granted. — RICHARDSON. You ought not to have a prohibition. A lease for tithes ought to be by deed: but by way of contract it is good for a year only without deed, upon the Book M. 26 H. 6. but for four or five years by parol, such an agreement is not good. — RICHARDSON. May a parson bargain and sell his tithes happening four years after by parol? YELVERTON. It had been so adjudged in many cases in the King's Bench, and the difference is, where it is by way of demise, and where by discharge. — HUTTON. The reason why it is good for years is, for that that the contract moves severally: but by way of demise between parson and parishioner, it is not good. And *Weston and Biggs's case*, where it was resolved, If there were an agreement made between parson and parishioner for discharge for tithes for years, it was good without deed; otherwise if it be for life. — DAVENPORT. Not. — RICHARDSON. Then for more than a year that contract is void; and you cannot bargain and sell the profits of beasts which a man has not in his possession now; but for those which he has in his possession, he may sell any profits. *Quod concessum.*

The case was again moved in court, which was, that they agreed *de anno in annum* so long as the one should be parson, and the other parishioner, *si ambobus partibus tam diu placuerit*, he should retain his tithes for 6s. 8d. per annum. And RICHARDSON, J. said, and it was not denied, that the suggestion is naught for the uncertainty of it; and a prohibition cannot be granted upon that; for the words *de anno in annum* make an estate for a year; and the next words make an estate for life; and the last but an estate at will: and what shall be traversed here. It is seen that for years it is good without deed, but not for life: and if it be but at will, when the other demands his tithes, the will is determined. But at another day the suggestion was made, that he made several agreements with his parishioner, that he pay 6s. 8d. for his tithes for four years; and then a prohibition was granted. — HARVEY, *sufficit* if an agreement be proved for those four years.

An agreement by a parishioner for his tithes for life without deed, is bad.

A suggestion of an agreement "from year to year, so long as the one should be parson, and the other parishioners, if both parties should so long please," is bad; for the words from year to year, make an estate for a year, the next words an estate for life, and the last but an estate at will. But a suggestion of several agreements for 4 years was held good.

If defendant in prohibition die, his executors may proceed in the spiritual court; but the plaintiff may have a fresh prohibition against them.

Tr. 4 Car. C. B. *Alfrey v. Mill.* [Litt. Rep. 151.]

ALFREY libelled against Mill for tithes of hops and beans: the defendant surmised that they grew in a garden always used as such; and that the custom is for every one to pay one penny for a garden, and thereupon prayed a prohibition. And it was held to be a good *modus*, if they did not grow upon land newly added to the garden.

A *modus* of 1d. for every ancient garden held to cover hops and beans grown therein.

Tr. 4 Car. C. B. *Fowler's Case.* [Heti. 116.]

FOWLER libels for tithes, and a prohibition was prayed upon a suggestion that he came to the church by simony. By the court, a prohibition ought to be granted upon a surmise only, that he came to the church by simony. Then *Henden* shewed, that it was found by verdict in the King's Bench, that he came in by simony: and upon that verdict there was a decree in the Court

A prohibition ought to be granted upon suggestion of simony.

1628.

FOWLER'S
CASE.

of Wards accordingly. And then the court inclined to grant a prohibition. And the case here was, that Fowler being convicted of simony, the King presents Glapthorn, who was admitted, instituted, and inducted: and afterwards he takes another benefice above the value of eight pounds, by which the other was void: yet by the assent of the Lord Windsor, patron, Fowler continued possession. And by RICHARDSON, he cannot be any way removed until lapse incur.

M. 4 Car. Scacc.

The Parson of St. Botolph's Case. [Litt. Rep. 141.] 2 Gw. 434.

Privilege to sue in the Exchequer as the King's lessee, disallowed, because the rectory and fee-farm rent, under which the privilege was claimed, were entirely out of the King.

The court would not determine whether tithes of houses in London could be sued for in this court by a privileged person.

IN a suit in this court for tithes by the parson of St. Botolph, extra Bishopgate, Noy said that if one be bound to the King by deed, with a condition to do a certain thing, he may sue here before it be broken: for the same reason, one who holds land of the King by rent, service, or repair of a bridge, or causeway, or highway, &c.; for in such cases they may the better perform their services, if they be well paid by their debtors, &c. And so in this way all cases may be drawn here, if on the other point the lessee of the farmer shall be privileged: but the court dismissed the bill, and declared that their sole reason was, that the impropiator held the reversion, and the fee-farm was wholly out of the crown, and so the King could not take advantage of it. And they waved all the other questions; viz. whether tithes should be sued for here for houses in London, if the parson be privileged; and whether the feoffee of the fee-farmer should be privileged here; and merely ordered the bill to be dismissed.

M. 4 Car. C. B. *Luvered v. Owen.* [Hetl. 121.]

A declaration on 2 E. 6. *tam pro rege, &c.* was held good.

DECLARATION upon 2 E. 6. for tithes; and an exception was taken, for that it was said, *tam pro domino rege, quam pro scipso*; but it was affirmed to be good, for the King is to have a fine. — HUTTON. If an action be brought upon the statute *de scandalis magnatum*, the plaintiff may declare *tam pro domino rege, quam pro scipso*: and so upon the statute of hue and cry. It was objected that one Tomlins's case was adjudged to the contrary; but that case was, because that he demanded in this manner; and the statute, when it says, that he shall forfeit, it shall be intended to him who had the loss: so it could not be demanded for the King. And at length it was adjudged that the declaration was good.

H. 4 Car. C. B.

Wood, Dr. v. Greenwood. [Hetl. 135. Litt. Rep. 243.]

Alteragium shall be expounded according to the usage.

A defendant to a suit for tithes of wool, &c. prayed a prohibition upon suggestion of a composition in the time of E. 1. by which tithes of grain and hay were to belong to the parson, and the vicar should have *preterea alteragium*. It was objected that the parishioner should set out his tithe, and not dispute the title of parson or vicar; but that the vicar should come in the spiritual court *pro interesse suo*; yet, notwithstanding this, and that the vicar refused to claim those tithes, and that always within memory, they had been paid to the parson, yet a prohibition was granted upon the composition.

DOCTOR WOOD libels against Greenwood in the ecclesiastical court, for tithes of wool, wood, and apples, &c. and he shews that there (1) was a vicar there; and that the 8 E. 1. there was a composition that the parson should have the tithes of grain and hay, and *preterea* the vicar should have *alteragium*: and for that, those tithes did (2) belong to the vicar, the [defendant] prayed a prohibition. And HENDEN objected that the parishioner ought to set forth his tithe, and not dispute the title of the parson or vicar; but the vicar ought to come in the spiritual court *pro interesse suo*; but notwithstanding that, and notwithstanding the vicar refuses to claim those tithes, and that always within memory they have been paid to the parson, yet a pro-

(1) In *Littleton* the word is "it," and in *Hetley* "he;" but I have substituted "there," to render the case more intelligible.

(2) "Not" is inserted by *Hetley*.

hibition

hibition was granted upon this composition, which was shewn in court; and in the end of it power is reserved to the ordinary, if any doubt or obscurity be in the composition, to expound or determine it; and if he please, to increase the part of the vicar: and there was not power of diminution. As by HUTTON. It is also usual in such compositions; and they say that the word *alteragium* shall be expounded according to the use: as if wood had always been paid to the vicar by virtue of this word, so it shall continue, otherwise if not. And so it had been ruled in the Exchequer. And upon that precedent it was ruled accordingly in this court: and by them, wood(1) is *minuta decima*; as in *Tindal's* case it was ruled, and so it was ruled in the case of *St. Albans*.

(1) Both *Littleton* and *Hetley* have "wood;" is referred to by the former reporter, "wood" but as *Udall* and *Tindal's* case, ante, 339, must have been intended.

1628.
WOOD
v.
GREENWOOD.

4 Car. In Canc.

Browne v. Thetford. [1 Ch. Rep. 27.] 1 Rayn. 12. 1 Gw. 431.

THE bill is to maintain the prescription of a *modus decimandi*, to which the defendant demurred, and says it is proper for the common law, or the ecclesiastical court. This court allowed the demurrer, and dismissed the bill. But note the time, &c. such bills having been often allowed, both before and since.

A bill in chancery to perpetuate a *modus*, dismissed upon demurrer, though often allowed, both before and since.

E. 5 Car. C. B. *Anon.* [Litt. Rep. 263.]

IT was agreed by the court that real composition upon the endowment of vicarages shall be expounded by the common law judges, and therefore, if the spiritual court interfere, prohibition lies: and the judges said, that the words in such endowments are always expounded according to the usage; as *decima garbarum* in B. R. was expounded to extend to hay and flax, by reason of usage.

such endowments shall be construed according to the usage. Tithes *garbarum* extended to reason of usage.

1629.
Compositions upon the endowments of vicarages shall be expounded by the common law judges; and the words in hay and flax by

Tr. 5 Car. C. B. *Johnson's Case*. [Hetl. 145.] Litt. Rep. 297.

IF a prohibition be granted upon matter at common law, as upon a personal agreement between parson and parishioner for his tithes, and not upon matter within the statute of 2 E. 6. 13. the suggestion shall not be proved within the six months, as the statute limits; and so it was agreed by the whole court.

Prohibition at common law, as upon an agreement (and not upon 2 E. 6.), need not be proved within six months.

Tr. 5 Car. B. R. *Edgar and Street v. Sorrel, Street, and others*.
[MS. Bridg. 100. 153.] Cro. Car. 169. 2 Gw. 435.

IN an action of trespass upon the opening of the cause upon special demurrer, it was holden by the court, that a rectory might be without glebe. For by HYDE, the parson may convey away all his glebe: and he said that he had seen several compositions between the vicar and the parson, by which the parson gave all his tithes and glebe to the vicar, and reserved a rent only for himself. And by WHITLOCKE, originally a parson might be without glebe. For the common law, upon creating a parson, gave him tithes only, and the glebe is only an additament to him *ex dono fundatoris*.

This case was moved again by *Large*, of Gray's Inn, for the defendant, in trover and conversion of tithes. The plaintiff made title by lease of a rectory in Suffolk, made to one J. S. for years, by the dean and chapter of Norwich, which came to him by divers mesne assignments. The defendant pretended that the plaintiff made a feoffment of the rectory to one J. D. which was a forfeiture, wherefore the dean and chapter entered and made a lease to him for years, and traversed one of the mesne assignments under which the plaintiff claimed;

A rectory may be without glebe, for the glebe is only an addition, as the common law gave him tithes only; besides it may have been conveyed away to the vicar.

A grant of a rectory without deed, is good; for it shall be intended that it had glebe land.

1629.
EDGAR
and
STANLEY
v.
SORREL
AND OTHERS.

claimed; and upon this the plaintiff demurred specially, because a feoffment was pleaded of the rectory, and it did not appear that it had any glebe, so that a feoffment could be made of it. And by WHITLOCKE, no glebe shall be intended, because a rectory may be without glebe: but all the court against him. For by CHOLE, 15 H. 7. where a lease of a rectory was pleaded without deed, and held good; for it shall be intended that it had glebe. See 15 H. 7. and 16 H. 7. (1)

(1) *Ant.*, p. 50.

M. 5 Car. C. B.

Flower v. Vaughan. [Hedl. 147.] Litt. Rep. 311.

If land were mere waste and yielded nothing, no tithe shall be paid for seven years; but if sheep were kept upon it, or it yielded any titheable profit, that tithe ought to be paid.

Prohibition was granted to a suit for tithe of pigeons consumed by the owner. Henden thought they were titheable if sold. Fish in a pond, conies, deer, are discharged of tithes *de jure*.—*Quere*, if pigeons also.

FLOWER sued Vaughan for tithes of hay, which grew upon land that was heath ground, and for tithes of pigeons. — And by RICHARDSON, if it were mere waste ground, and yield nothing, it is excused by the statute of payment of tithes for seven years; but if sheep were kept upon it, or if it yield any profit, which yields tithes, this tithe ought to be paid, as the case in *Dyer*. And for the pigeons which were consumed in the house of the owner; he said, that for fish in a pond, conies, deer, it is clear that no tithes of them ought to be paid of right; wherefore then of pigeons? *quod nemo dedit*, and a day was given to shew wherefore a prohibition should not be granted. And the court agreed, that it was felony to take pigeons out of a dovecote. And afterwards a prohibition was granted, but principally that the pigeons were spent by the owner. But by *Henden* they shall be titheable if they were sold.

M. 5 Car. B. R. *Anon.* [MS. Bridg. 184.] 2 Gw. 485.

Suits between vicar and impropriator will lie in the spiritual court, although the latter be not a spiritual person.

NOTE, JONES said, that a parson impropriate may sue the vicar in the spiritual court, or the vicar him, just as if he were a spiritual person; and that it had been adjudged, that no prohibition lies.

M. 5 Car. In Canc. Before *Thomas Lord Coventry*, Keeper.

Anon. [Nels. Ch. Rep. 10.] 1 Rayn. 17. 2 Gw. 436.

A bill to establish certain customs of tithing set out therein, dismissed, the defendant denying the customs and alleging that they ought to be tried at common law by prohibition or such means.

THE bill was to establish certain customs of tithing within a particular parish, the plaintiff alleging, that there were such customs, and setting them forth at large in his bill.

The defendant, by his answer, denied the customs; and alleged, that it was not proper for a court of equity to determine whether there were any such customs or not; that the bill was in nature of a prohibition at common law; and in a case where such a prohibition had never been granted, or the custom tried; and therefore the bill was dismissed.

M. 5 Car. C. B. *Anon.* [Litt. Rep. 314.]

Copper mills, fulling mills, shaving mills, glass houses, &c. shall pay no tithes.

TITHE was demanded in the spiritual court, of a copper mill, and prohibition granted, for that it is for the labour and industry of man, and it is but to beat the copper broader and thinner; so a fulling mill, shaving mill, glass house, &c. shall not pay tithes.

H. 5 Car. C. B.

Sconie's Case. [Dy. in M. 170. b.] 1 Gw. 130. n. a.

1629.

IT was resolved that tithes are due and payable for all mills, unless they be as ancient as 9 E. 2. and before; for mills more ancient are discharged of tithes by the statute *Articuli Cleri*, c. 5.

Mills erected before 9 E. 2. are not titheable.

H. 5 Car. C. B.

Pain v. Evans. [Dy. in M. 170. b.] 1 Gw. 130. n. a.

A PROHIBITION was awarded to the Bishop of St. Asaph's, where it was awarded that tithes shall not be paid of ancient mills, &c. before the time 9 E. 2. and there also it was holden by the court, that if such ancient mill fall, and be rebuilt upon the ancient foundation, the discharge of tithes shall hold good and revive.

Tithes shall not be paid of a mill erected before 9 E. 2. and if such a mill fall and it be rebuilt, the discharge shall be good and revive.

Tr. 6 Car. B. R.

Halsey v. Halsey. [MS. Bridg. 290. 327. 343.] W. Jo. 230. 2 Gw. 468.

1630.

DEMURRER upon a prohibition; the case was this:—The parson libelled in the court-christian for disturbance of the way for the carriage of his tithes out of the close where they grew, alleging that it was the usual way. The defendant pleaded there, that all the rectors of that church time whereof, &c. had used to carry their tithes out of another gate of the same close, which is the usual way for the owner himself for the carriage of his corn out of the said close; *absque hoc*, that the other gate was the way; whereupon the defendant demurred.

If a parson be prevented from carrying his tithes by the usual roads and passages, he may sue in the spiritual court for the disturbance, and no prohibition lies, by reason of the covin.

Crawley, Serjeant, argued for the defendant, that the determination, which is the usual way for the carrying of the tithes, is ecclesiastical, as well as the consueance of the tithes themselves: and *qui obstruit aditum, destruit commodum*: *per Littlet.* inclosure of the land is disseisin of the rent. And as 9 Ass. p. 19. 26 Ass. pl. 17. 3 E. 4. 2. are, to divert the water, so that it cannot run to the mill, is disseisin of the mill. In F. N. B. 17 A. if any of the parishioners disturb the parson to carry his tithes by the usual ways and passages, the parson may sue in the spiritual court for this disturbance. And at Reading, when the term was adjourned there, this very point was resolved accordingly in C. B. for the rectory of Godden. And where the jurisdiction is ecclesiastical, the common law will not meddle, though the spiritual court should make a wrongful award, but an appeal lies, as appears by Dyer, 5 Co. *Cawdrey's* case, and 18 E. 4. 30. 2. The question being upon the usage of the ways and concerning tithes, shall be determined in the spiritual court, because the prescription and usage in their law differ from prescription in our law. In their law, if the prescription be *cum titulo et per ecclesiam contra ecclesiam*, the time of forty years is sufficient; if *sine titulo*, then it shall be the time of one hundred years, which they call *tempus memoriale*: and where the prescription is *per ecclesiam contra laicum*, or *per laicum contra ecclesiam*, there, the time of twenty years is sufficient if it be *contra absentes*, and ten years if *contra presentes*. But our law observes no such difference; but in all these cases prescription must be from time whereof, memory, &c.

Newdigate, on the other hand, for the plaintiff, insisted, that the prohibition well lay in this case, 1st. Because the point in question is upon a prescription for a way for the carriage of tithes, which is *jus mixtum*, and of temporal consueance. If a man swear a false oath, he cannot be sued in the spiritual court *pro lesione fidei*, because it concerns a temporal matter. 2^d H. 4. 10. 20 E. 4. 10. F. N. B. 42. 11 H. 4. 48. and 6 Co. *Marquis of Winchester's* case, where a man devised by his will, land and goods; [on a suggestion that the testator was *non compos mentis*,] the will was not allowed to be proved in the spiritual court, because it imported to concern land. 2. The parson in this case has

remedy

1630.
HALSEY
v.
HALSEY.

remedy at common law. Reg. 105. he shall have trespass in such case. 33 H. 6. 11 H. 4. 26. 27 H. 8. 26. where a man has a way over the land of another, and it is stopped, the party shall have an assize of nuisance: but if it be obstructed, he shall have a special action upon the case. 3. The title to this way being by prescription, and the common law prescription differing from that of the spiritual law, as 8 E. 4. 13. and 2 R. 2. 19. it is therefore triable by the common law. F. N. B. 51. As to what has been objected to have been determined in this point, I answer, that our case differs from that case, 1st. Because here the parson is not totally disturbed of his way. 2. It does not appear that this is the usual way, &c. But by JONES and HYDE, in the absence of WHITLOCKE, it is *prima facie* against the defendant; for as tithes are triable in the spiritual court, so must the ways and passages for the carrying of them, since without such passages for their carriage the parson could not have the fruit of his tithes. — And JONES said, that he was acquainted with a case. The Bishop of Bangor, as parson, was entitled to tithes in the land of Sir Richard Buckley, and there were great stones in the road by which they carried out the corn, and though Sir Richard could well pass this way, his horses being strong and able, yet the bishop's horses being weaker, could not pass by it, and therefore the bishop sued him in the spiritual court; whereupon a prohibition was granted, but afterwards a consultation was awarded, by reason of the coven.

At length a consultation was awarded in the principal case by the whole court, and that upon the statute of 2 & 3 E. 6. and F. N. B. 23 & 57. — JONES. *Landwood de decimis* says, that the parson must have a convenient way, and that it ought not to be craggy or mossy; and the spiritual court having consanance of tithes, which are the principal, shall also have consanance of the way through which it is necessary to convey the tithes; *qui tollit medium, tollit finem*. I doubted of this case at first; but I afterwards agreed.

M. 6 Car. B. R. *Anon.* [Cro. Car. 201.]

Forcible entry
lies for tithes.

INDICTMENT of forcible entry in tithes: where the party ousted prays restitution: and whether this indictment were maintainable, was the question. For it was agreed, that an assize lies of tithes by the statute of 32 H. 8. and they are recoverable as a lay inheritance. And *Calthorpe* moved, that the indictments should be allowed, as well for tithes as for rent: and for rent it appears that forcible entry lies, by Fitzh. Nat. Brev. 249. b. 20 H. 6. 11. and 22 H. 6. 23. And afterwards, *absente Hyde*, writ of restitution was granted.

H. 6 Car. B. R. *Stroud v. Hoskins.* [Cro. Car. 208.] W. Jo. 231.

PROHIBITION. Upon the statute *secundo Edvardi sexti*, because he sues for tithes of heath and barren ground within seven years after the improvement: the defendant pleads the statute of 50 E. 3. c. 4. and that at another time a prohibition was granted, and consultation thereupon, therefore he shall not now have another prohibition. It was shewn that the consultation was not upon the substance of the prohibition, but because he did not prove by two witnesses the suggestion within the six months; and it was thereupon demurred. The first question was, whether by the statute the suggestion ought to be proved by witnesses. And it was resolved, that it ought, because it is a mere matter in fact, and the suggestion ought to be proved by the intention of the statute, as well as a prescription *de modo decimandi*, or a discharge of tithes, or any other such suggestion. Secondly, It was resolved, that the consultation being granted for not proving the suggestion by two witnesses, according to the statute of 2 E. 6. and not upon the substance of the suggestion for want of its verity, or for the insufficiency thereof, it is not within the statute of 50 E. 3. c. 4. for that is intended where consultation is granted upon the substance of the suggestion, being proved to be insufficient in verdict or nonsuit after evidence, and not where it is granted for the insufficiency of the form of the suggestion,

gestion, or in the proceeding thereupon; wherefore it was adjudged for the plaintiff; especially as this case is, for that it is a collateral cause out of the suggestion, and not a cause of consultation at the time of the statute made.

1630.

STROUD
&
HOSKINS.

H. 6 Car. B. R.

Rawlins and others v. Wright. [Ceely's Rep. MS. 21. No. 25. 53. b.]
2 Gw. 470.

1631.

Tortious occupier of land shall pay tithes.

A MAN took the emblements growing on the land of another: for which tithes the parson libelled him in the spiritual court: and adjudged well, though the party were but a trespasser, because occupier of the land. And so he is liable to answer damages in an action on the statute of 2 E. 6. (1)

(1) This is not in the oldest manuscript.

H. 6 Car. A. D. 1631. B. R.

Walrish and Lewis v. Cropton. [Ceely's Rep. MS. 30.] 2 Gw. 470.

IN an action upon the case the plaintiffs declared, that whereas on the 1st of July, anno 4 Car. they were proprietors of the tithes of grain then growing and arising from and upon the glebe lands of the vicarage of the church of Chebsey, in the county of Stafford, and so continued from the said 1st day of July, in the fourth year aforesaid, to the feast of St. Michael the archangel the next following; and whereas the said Richard afterwards, on the 1st day of July aforesaid, in the fourth year aforesaid, was and still is vicar of the vicarage of the church of Chebsey aforesaid, and then held and occupied, and still holds and occupies fourteen acres of glebe land in Chebsey aforesaid, to the vicarage of the church of Chebsey aforesaid then and still belonging; the said Richard afterwards (to wit) on the said 1st day of July, in the fourth year aforesaid, at Chebsey aforesaid, in the county aforesaid, in consideration that the said James and Thomas had then and there demised to the said Richard all the tithes of grain then growing and arising from and upon the glebe land of the vicarage of the church of Chebsey aforesaid, for the sum of 22*s.* to be therefore paid to the said James and Thomas, undertook and then and there faithfully promised the said James and Thomas that he the said Richard the said sum of 22*s.* for the tithes of the said grain then growing and arising from and upon the said glebe land, of the said vicarage of the church of Chebsey aforesaid, would well and truly pay and satisfy to the said James and Thomas when he should be thereto afterwards requested, &c. The defendants pleaded not guilty: it was found for the plaintiffs, and judgment was given and entered for them. In which case these two points were resolved:— First, that if a vicar be generally endowed of part of the glebe of the parsonage, in that case the vicar shall not pay tithes to the parson, *quia decimas ecclesie ecclesie reddere non debet*. But, if the endowment be special, that the vicar shall have so much of the glebe, paying to the parson the tithes, this special composition shall bind the vicar; which composition evidenced to a jury by constant payment of tithes to the parson by the vicar shall be intended, though the composition itself be not shewn. Secondly, if a man lease tithes for years by deed indented, reserving 20*s.* annually, action on the case does not lie for these 20*s.* but debt; for though it be not properly rent, except in the case of the King, Dy. 87. yet it is a sum in gross of so high nature that no action on the case lies for it, but debt upon the contract. 5 Co. 3. a. *Jewell's case*. But if it be without deed, then this action well lies; for it is not properly a lease, because it cannot be without deed, being of tithes. Dy. 117. pl. 72. nor is it an annual sum in gross in the nature of rent; but it is only an executory contract or reciprocal *assumpsit*, which shall be intended in our case.

If a vicar be endowed generally of part of the glebe of the parsonage, he shall not pay tithes to the parson. But if the endowment be that he shall pay tithes of the glebe to the parson, the spiritual composition shall bind the vicar, and constant payment to the parson shall be evidence of such composition, though it be not shewn. If tithes be leased by deed, debt lies for the rent, but if without deed, as *assumpsit*.

1631.

Rape-seed is not corn, but it is among the small tithes, and when the prescription is for these it shall be included.

H. 6 Car. B. R. *Robinson v. Brooke*.
[Ceely's Rep. MS. 50. MS. Bridg. 360.] 2 Gw. 471.

ROBINSON, vicar, brought an action on the statute of 2 E. 6. for subtraction of tithes, against Brooks and Wood, lessees of the parson of the same church, which was in Kent, and declared, that the vicar, from time whereof, &c. had all the small tithes, and that the parson had no tithes besides the corn; and for subtraction of all the rape-seed, which amounted to 40*l*. this action was brought, and issue being joined upon *nil debet*, the evidence was given at the bar. And *Henden*, serjt. for the defendants, said, that rape-seed was but newly used in Kent, within these twenty years, and therefore could not be within the prescription; it is also in the nature of grain, because the land is ploughed for it, and it is sown as corn. But *per cur.* (*absente Whitlock*;) the vicar shall have it, because it shall be intended upon the first composition that the parson shall have only the corn; and rape is not corn, but it shall be among the small tithes, and the prescription being for those, this shall be included. And so hops, and woad for dying are, because they are of late use.—[*Bridgeman*.]

Upon evidence at bar it was agreed, if the vicar prescribe or shew a composition that the parson had used to have only the tithe of corn, there the vicar shall have the tithes of rape-seed and other new tithes, as woad, hops, &c. but if the vicar have only the small tithes, the parson shall have them, and not the vicar.—[*Yelverton*.]

1632.

Parson and vicar cannot join in one bill in the exchequer, though that court has jurisdiction of tithes or a *modus*.

M. 7 Car. In Scac. *Anon*. [MS. Turnor, 277. b.] 2 Gw. 472.

THE farmer of the impropriate rectory of Pancras, and the vicar of that church joined in an English bill in the exchequer chamber, against several owners of several lands in Kentish Town, which is within that parish, and suggest divers *moduses* to be paid, some of them to the parson, and some to the vicar, and that the defendants have refused to pay them to the farmer of the parsonage, and to the vicar, and that they have preferred this bill to avoid multiplicity of suits. The defendants demurred to the bill. First, it was agreed, that a suit for tithes or a *modus* may be in this court. Secondly, the second doubt was, whether the farmer of the parsonage and the vicar can join in one suit for their several duties; or, whether they ought to prefer several bills. — And *per DENHAM* and *WESTON*, Barons. They ought to prefer several bills, because the inheritances are now several and divided, though the vicapage originally were derived out of the parsonage; but it seemed to *DAVENPORT*, C. B. that they might join in a bill in equity. But afterwards, in his absence, the demurrer was allowed, and the plaintiffs were ordered to prefer several bills.

H. 7 Car. B. R.

Lockin v. Davenport. [Ceely's Rep. MS. 56. MS. Yelv.] 2 Gw. 472.

If grass be sold, he who buys it must pay the tithe.

A MAN sold his grass to A. before it was cut down. The parson sued the vendor in the spiritual court, who pleaded the sale in that court; and not being allowed there, he had a prohibition upon the statute of 2 E. 6. because the owner of the grass ought to be discharged.

H. 7 Car. B. R.

Cook v. Smyth and Tubben. [Ceely's Rep. MS. 60.] MS. Harg.

Where, on 2 E. 6. the declaration stated that the defendants were occupiers of certain lands, it shall be intended they were joint occupiers, and not occupiers in common, unless it be shewn on the part of the defendants.

IN an action on 2 E. 6. the plaintiff declared that he was farmer of all the corn growing on sixty acres of land in such a place, and the defendants occupied the said land, and sowed the same on such a day, and cut and bound together

together the corn, and all and singular the corn aforesaid, (to wit) forty loads of wheat, &c. carried away, without dividing or setting out the tithe, &c.; the defendants pleaded, and the issue being found for the plaintiff, it was now moved in arrest of judgment:—

First, That the plaintiff, entitling himself as farmer of the tithes growing on sixty acres of land, was too general and uncertain; *sed non allocatur*, for it is sufficiently certain, as if he had said, that he was farmer of the said rectory.

Secondly, He said that the two defendants were occupiers of the said land, without saying that they were joint occupiers; and they might be occupiers in common, and then several actions and not a joint action lies; but, *non allocatur*, for by occupiers shall be intended joint occupiers; unless the contrary be shewn on the part of the defendants.

Thirdly, No time of taking away is mentioned, which ought to be, for it is the sole cause of action, and not the mere severance itself, as appears from the words of the statute: "and that no person shall, &c." And therefore if the occupier do not carry away the tithes, but suffers them to rot upon the land, the farmer shall have no remedy by this action, but ought to sue in the spiritual court; which was granted; but in our case the time is sufficiently shewn, for he has shewn the time of cutting them, and by a conjunction has united the cutting and carrying together, so that the time of carrying is well shewn, and needs no "then and there." And therefore the plaintiff had judgment.

1632.

COOK

u

SMYTH

and

TUBBIN.

H. 7 Car. B. R. *Fuller v. Huntkins*. [Ceely's MS. Rep. 56.]

IF there be dispute in the spiritual court between parson and vicar for tithes, no prohibition lies, for the suit is proper for that court; and although it were adjudged to the contrary in the case of *Bush*, chaplain of Lincoln's Inn, who sued for tithes of hay in Pancras, (1) yet it has since been held otherwise; and that resolution not law. But if a *modus decimandi* be pleaded against both by the owner of the land, it lies.

If the dispute in the spiritual court be whether tithes be due to the parson or the vicar, no prohibition

lies. But if a *modus* be pleaded against both by the owner, it does lie.

(1) *Ante*, 90.

E. 7 Car. C. B. *Rocket v. Gomershall*. [Litt. Rep. 367.]

ROCKET had a prohibition against Gomershall, for libelling in the spiritual court for tithes of furzes, which the plaintiff in prohibition had converted into fuel to be burnt; and the suggestion was, that the plaintiff dwelt in a house of husbandry, and that these furzes were cut and burnt in the house, by reason whereof the parson had *uberiores decimas* of grain, &c. and that the custom was, that in such cases no tithes should be paid. The defendant appeared and pleaded, that the plaintiff sold these furzes *absque hoc*, that he converted them "into fuel, and burnt them in his dwelling-house," whereupon there was a demurrer.

Ashley, the King's serjt. The traverse is not good, inasmuch as it is contrary to the libel: for the libel is, that the plaintiff converted, and now he traverses this; but there are two customs in the bill, one for the discharge of tithes of furzes burnt, &c.; another for the discharge of tithes of furzes sold. And if this traverse should be good, inasmuch as we have framed our suggestion so as to bar him of tithes of furzes burnt, we should now lose the benefit of the prohibition for the furzes sold.

The court *contra*, That consultation should be granted, for the libel is that he converted them "into fuel to be burnt," without saying "in his dwelling-house," and if he burn bark with them, or the land, or in any place not "his house of husbandry," he shall pay tithes; and therefore it is contradictory for the defendant to say that they were sold, *absque hoc*, that he converted them into "fuel in his dwelling-house."

1. Furzes are titheable, and therefore there must be a custom to discharge them; and those burnt in a house of husbandry, may be so discharged.

2. Where the libel was for tithes of furzes burnt by the plaintiff in prohibition, who suggested that they were burnt in his house, &c. and that in such cases the custom was that no tithes should be paid, and the defendant pleaded *absque hoc*, that they were burnt in his mansion-

house, held a good traverse (and not contradictory to the libel); for if they be burnt any where but in his house of husbandry the tithes shall be paid. 3. Wood for fuel is titheable. 4. Lime is not titheable but by custom.

And

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And by HUTTON. Although the libel in the spiritual court were, that they were spent in firing, yet if he prove there that they were sold, he would recover upon this libel. And he cited the case of *Warton v. Dr. Agard*, where the libel was for herbage of barren cattle; and upon a suggestion that he kept them for the dairy and plough, prohibition was granted; the defendant took issue, that he libelled against him for herbage of such oxen as he fed and sold; and held good; and there the libel was general, yet he says in his plea, that he libelled for fat oxen sold. And all agreed that furzes are of their nature titheable; and therefore there ought to be a custom to discharge the payment of them, for the common law will not serve. 13 [18] E. 3.

By RICHARDSON. All trees shall pay tithes, if they be not timber, or above twenty years growth; if it be wood for burning it is titheable; and although the custom here be good, that furzes burnt in a house of husbandry shall pay no tithes, yet these furzes cut by the plaintiff ought to be shewn to be within the custom; for they were sold, as is confessed by the demurrer. *Hun's* case was, that he surmised in prohibition to be discharged of tithes of cattle which were bred for the dairy, and for young cattle untried, bred for the dairy; by the custom no tithes ought to be paid in the mean time; cannot the defendant say that they were sold, *absque hoc*, that they were untried for the plough or pail? it is plain that he could. And Vicar *Madifer's* case was cited, which was in B. R. he libelled for tithe of wood; it was suggested, that the libel was for wood for building, and wood above the growth of twenty years, and prohibition was granted there, as to the saleable wood. And so in one *Devonshire's* case, the libel was for tithe of lime by the custom, for it is not titheable in its nature, and there issue was taken in prohibition upon the custom.

Consultation was granted in the principal case.

H. 7 Car. B. R. *Facy v. Long*. [Cro. Car. 237. W. Jon. 254.]

Agistment tithe shall not be paid for any cattle eaten in the family, any more than for cattle reared for pail or plough. The court held, that the owner of the land, and not the proprietor of cattle agisted, ought in reason to pay the agistment tithe; but as it belonged to the spiritual court to determine, a consultation was granted.

PROHIBITION. A question was moved, whether tithes shall be paid for the depasturing of sheep for one's family only, and not to be sold; for the prescription was, that he paid the tenth pound of wool of all sheep sold there and depastured. But *Maynard* moved, that notwithstanding the payment of the tenth fleece, he should pay for the pasturage of his sheep eaten in his house. But all the court held, that tithes shall not be paid for any cattle eaten in the family, no more than for cattle reared for pail or plough; and a precedent was cited, Hil. 9 Jac. that so it was resolved.—[*Croke*.]

One point (*inter alia*) suggested for a prohibition was, that the parson sued the owner of land in the spiritual court for the tithes of cattle, which he took to agist, whereas he ought to sue the proprietor of the cattle. It seemed to the court, in reason, that the suit was well brought against the owner; but which way soever it be, it belongs to the spiritual court to determine which of the two ought to be sued; therefore upon this point a consultation was granted by the court, in the absence of RICHARDSON. (1)—(*W. Jones*.)

(1) It is to be observed that although in this case it was proper for the spiritual court to determine in the first instance who was liable to the payment of this tithe; yet if

they determined against the rule of the common law, a prohibition would afterwards have been granted.

T. 8 Car. B. R. *Anon*. [Cro. Car. 264.]

Tithes may be payable by custom for sea fish.

A PROHIBITION was prayed by *Calthorpe*, to stay a suit upon an appeal here, to the delegates from a sentence in Ireland, for tithes of fish taken in the sea; because fish in the sea or great rivers are *feræ naturæ*, and not titheable. Secondly, because the sea is not within any parish; so as no spiritual person can say it is within his parish, where the fish is taken. But the prohibition was denied, for tithes of fish are usually paid in Ireland, as *JONES* affirmed.

affirmed. And it was said, in Cornwall they pay tithes for fishing in the sea to the parson of the parish where they are landed. (1) And it is a custom in Yarmouth that tithes shall be paid for herrings.

1632.

(1) A MS. note, in a copy of *Croke*, says, "Cornwall." Vide *Holland v. Heale*, ante 156. "If the boats or nets had been wintered there where the parties went to issue upon the custom in Cornwall." "when not used, according to the custom of the parish, as at the Mount, and St. Ives, in

M. 8 Car. C. B. *Cole v. Wilkes*. [Hutt. 121.]

SAMPSON COLE brought an action of debt, upon the statute of 2 E. 6. against Leonard Wilkes; trial at the bar. A lease was made to two, they enter and occupy, and set out their tithes; debt was brought against one of them, it lies not.

But here it was found, that one only occupied the land, and therefore the action well lies.

And a case was shewn, M. 8 Jac. An action of debt was brought upon this statute, by Sir John Gerard, against two tenants in common, and it appeared that one of them set out his tithe, and that the other afterwards took it and carried it away, and adjudged that the action lies only against him who carried it away.

a like action against two tenants in common, one set out his tithe and the other carried it away, held that the action was only against him who took it away.

An action was brought against one of two leasees (on 2 E. 6.) who did not set out their tithes; held it did not lie; but being found that one only occupied, therefore the action well laid. Where in

E. 9 Car. B. R. *Baldwin v. Wine*. (2) [Cro. Car. 301. W. Jo. 321.]

1633.

EJECTIONE *firmæ* of a lease of tithes in Roughton, by Charles Baldwin, appertaining to such a chapel. The ejectment supposed in taking of so many loads of tithes of wheat and barley, being severed from the nine parts. After verdict upon not guilty pleaded, it was found for the plaintiff, and moved in arrest of judgment by *Grimston*, that an *ejectione firmæ* lies not of tithes only; but it may be of a rectory, or of such a chapel, and of the tithes thereto appertaining; so that he may be ejected of or from a thing in possession, whereof *habere facias possessionem* may be, but not of tithes only. The court would advise. See 1 & 2 Ph. & M. Dy. 116. b. 9 E. Dy. 258. Co. 11. 25. b. 15 H. 7. 8. It being afterwards moved again, was adjudged for the plaintiff. —[*Croke*.]

Ejectment lies for tithes only.

The declaration was upon a lease for years, of tithes of grain and hay, belonging to the rectory of Diddlebury, in Rowton and Anelston. "It was moved, that the declaration was not good, as it said that the defendant took 'the tithes in Rowton and Anelston, without saying that they were belonging' to the rectory of Diddlebury, to which the court agreed; therefore judgment 'was given, quod querens nihil capiat per billam.'" —[*W. Jones*.]

(2) This case is entitled "*Priest v. Wood*," in some editions, and is often referred to by that name.

E. 9 Car. B. R.

Andrews v. Lane. [MS. Bridg. 582. 591, 592.] 2 Gw. 473.

IT was moved by *Bulstrode* for a prohibition upon a libel for tithes of the second cutting of wood, upon a suggestion that no tithes are due for it by common law. —*BERKLEY*. Clearly tithes are due of the second cutting, for this is a separate increase from the first. *Calthorpe* and *Wightwicke* objected that no tithes are due of the lettermath, but that is discharged *per legem terræ*. And they cited *Johnson* and *Aubrey*, (1) and *Baxter* and *Hope*, (2) to have been so adjudged; and that two reasons were given for it: 1. For that it was rather the leavings upon the land, than the increase of it: 2. For that no tithes shall

A custom was pleaded, that in consideration of the expense of gathering the first crop of wood in baskets, and paying the tenth basket thereof, the parson should take

it for all the tithes thereof, for the whole year; and also, that no tithes were due of the second cutting thereof, by the law of the land: the better opinion of the court seemed to be, that tithe was payable of every cutting as well as the first.

(1) *And*, 147.

(2) *And*, 300.

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be paid twice in a year of the same thing. But BARKLEY clearly to the contrary, and of lattermath tithes are due of common right, and they are two separate increases of the land; and therefore the reasons given on the other side are of no avail. CROOK also agreed, that upon a custom, lattermath may be discharged of tithes; as upon a suggestion that they had used to make the tithes of the first math into hay; and in consideration thereof, they had been discharged of all tithes of lattermath; this is a good prescription in discharge of tithes, for the parson has a reciprocal benefit in another way; but of common right they both agreed that tithes were due as well of this cutting of woad, as of lattermath; wherefore, no others being in court, they gave a rule that the suggestion should be drawn. Afterwards,

Tr. 9 Car. B. R.

A PROHIBITION was moved for by *Calthorpe*, who had drawn his suggestion according to the direction of the court. It consisted of these two points: 1. that by the law of the land no tithes shall be paid for the second cutting of woad: 2. that great costs are requisite to the planting and sowing of the land with woad, and gathering it in baskets after it is cut; in consideration whereof a custom has always been, that the parson should take the tenth basket of the first cuttings thereof for all the tithes due for the whole year. And he cited *Co. Entr.* 459. *Baxter* and *Hope's* case(1), as a precedent in point.

RICHARDSON, C. J. For the aftermath of grass no tithes are due by the law of the land, and many prohibitions have been granted upon that point, *quod fuit concessum per cur.*

Calthorpe cited the case of *Aubrey v. Johnson*(2), 43 Eliz. to be so resolved: but **RICHARDSON**, C. J. said, that perhaps there might be a difference between the case of lattermath, and this of woad. And yet if you would prescribe in the custom to pay the tenth of the first cutting in discharge of the whole; this may be good by custom; but the cutting must not be fraudulent, *scil.* to cut but a part at the first, and leave a greater part remaining, and that of greater value than that which you have cut.

JONES, J. to *Calthorpe*. How can you allege a custom, as woad has not been used in England time out of memory? *Calthorpe* answered, it is good enough, as in the case of saffron.

BERKLEY, J. The case of lattermath differs much from that of woad; for the tithes of the aftergrass are worth little or nothing; but the second cutting of woad is commonly better than the first; and I do not know but that it may as well be said that no tithes are due of copse wood, which are cut every five or six years. Wherefore the court appointed the case to be argued the next week. It was therefore afterwards argued by *Noy*, the King's attorney-general, that no prohibition should be granted. The suggestion, he said, consisted of two parts: 1. that by the law of the land, no tithes are due of the second cutting, because no tithes are to be paid twice for the same land in one year: 2. it suggests a particular custom, that in respect of the great costs and charges which the farmer sustains in the buying of the seed, and ploughing for it, and in respect that when it is ripe; and that then *maturis temporibus anni* he gathers it, and buys baskets to put it in, and purges and cleanses it from the dirt, and that he does all this at his own costs; and therefore, that by reason of the premises, and by the law of the land, he ought to be discharged. He said that this is merely a prescription in *non decimando*, and no such custom is allowed by the common law. But the contrary is frequent about London, where the same land is twice sown in a year; for instance, at one time with peas, and at another with carrots, &c. and yet tithes are paid for both. They might as well prescribe, that if a man gather part of his apples at one time, and part at another, that he should be discharged of tithes of the second gathering. So, he said, if the osiers which grow here on the banks of the Thames, are cut down, tithes are paid as soon as they are cut. For if there be a double increase, why should there not be double tithes? And as to the case of aftermath, which has been objected, clearly aftermath is not

(1) *Ant.* 2, 200.

(2) *Ant.* 147

discharged of tithes by the law of the land; but a difference has sometimes been taken, that upon a collateral prescription to give to the person a reciprocal recompense, as to make the first math into perfect hay, when of right they need only make it into grass cocks; this will be a good prescription to be discharged of the tithes of the aftermath; but without such a prescription or recompense, it is not discharged. Then here that which is shewn, that the farmer puts the woad into baskets, &c. all the prescription is no more than he ought to do of common right, and that is necessary for the severance of it from the nine parts; for he could not suffer it to lie upon the land to be prepared, &c.(1) But, if he had prescribed, that from time whereof, &c. they have used in consideration that they dried the first cutting, and ground it in the mill, and paid it in the ball, to be discharged of the tithes of the second cutting: that would be, perhaps, a good prescription; for it is more than of common right. In the 41 of El. in Lord Roper's case, in the Isle of Thanet, where tithes were paid of apples, and afterwards in the same year, the apple trees were shredded, and cut, and sold, it was adjudged that new tithes were to be paid for the trees. But in the case of aftermath, the second cutting is worth little or nothing; but in the case of woad, the second cutting is worth more than the first; and inasmuch as the second cutting is but an excrescence of a new thing out of the same root, I conceive that new tithes are due for it, wherefore, &c.

RICHARDSON, C. J. JONES, and BERKLEY seemed against the prohibition; and JONES said, that woad being within time of memory first used in this realm, he did not see how a prescription could be made for it; wherefore he gave *Calthorpe* a further day, &c.

It was afterwards argued by *Beare*, of the Middle Temple, in support of the prohibition. And as to the case of Lord Roper, he said, cited by Mr. Attorney, I answer that the apple-trees there were dead trees, &c. He then cited *Baster* and *Hope's* case. As to the cases of corn and hay, and afterwards of carrots upon the same land, as here about London, I answer, that there are several crops; but here it is but part of one same crop. As to the osiers upon the river Thames, I say that the reason of that is in respect of the covin. Then in the case at bar, that no tithes should be paid of the second cutting, for these reasons: 1st. because you shall not have tithes twice in one year of the same thing; and upon that ground the case of lattermath has been often determined: 2. because here is more done than the parishioner ought to do of common right, and therefore it is a good *modus decimandi*. In *Ellis's* case, in 16 Ja. (2) in consideration of putting the hay of the first math into windrows, and tedding and shaking it, the farmer prescribed to be discharged of tithes of the second math; and held good: and there it was agreed, that no tithes shall be paid of stubble after tithes have been paid of the crop. So, he said, it was resolved in this court, that where corn is severed, and tithes are paid for it, and afterwards grass grows, and beasts feed upon the same land, that no tithes shall be paid either for this grass, which grows after the corn severed, or the pasturage. In Tr. 7 Car. C. B. Rot. 1449. a custom to pay the tenth pound of wool was holden a good *modus decimandi*, because the owner is not bound of common right to weigh it. — JONES, J. This last case was less (3) doubtful, &c. In *Gibson and Trof's* case, 15 Ja. B. R. one prescribed that in consideration that he bound up his corn in shocks, he has always used to be discharged of the odd shocks, if there were any; and held a good prescription. [RICHARDSON, C. J. doubted of this,] and he said that he conceived these stronger, for here this woad is part of the same crop. And as to the objection that woad has not been in England from time whereof, &c. and therefore there can be no prescription in a *modus decimandi* for it; I answer, that woad has been common here for fifty or sixty years: and then he said, if they have used to pay the tithes of it in this manner but ten years, that is a good prescription for the church in the spiritual court upon the *modus decimandi*; and therefore if the farmers shall not avail themselves of

(1) I have some doubt as to the word in the MS.

(2) *Ant* 2, 303.

(3) The word in the MS. is "*less*;" it is

however incorrectly written, and "*left*" might have been intended, from what appears afterwards.

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the same prescription, they will be twice charged; once with tithes in kind, and again according to the custom. *Calthorpe* said, that they could prove that woad had been used here for 100 years, or more. He added, besides, that the second cutting of woad is but *quoddam derelictum super terram*, as the rakings, &c., and that it is a thing of no or little value.

Palmer argued on the other side. He said, there are in our law some things which are not titheable, as quarries, coals, &c. But where the things themselves are *res decimabiles*, there our law does not allow of any prescription *in non decimando*. As to the first part of the suggestion, that no tithes shall be paid of one thing twice in a year, he utterly denied it altogether, and vouched *Plowden's Comm. Soby* and *Molins's case*, (1) where tithes were held payable for the loppings of hornbeam-pollengiers, and also for the trees themselves, if they be cut down the same year. So *Dr.* and *Student*, cap. ult. and 43 El. that tithes shall be paid, &c. and also *Hall* and *Fettiplace*, (2) between *Aubrey* and *Johnson*, (3) where a difference agreed touching the aftermath, namely, where the prescription is to make the first math into perfect hay, there it is a good *modus decimandi* for the second math, because there is a reciprocal benefit to the parson: it is otherwise where it is to make it into grass cocks, for it is due of common right. Tr. 3 Car. B. R. one libelled in the spiritual court for the loss of rotten sheep, and a prohibition was prayed, upon a suggestion that he had paid tithes for the wool at shearing time, and therefore ought not to pay again the same year; but it was determined to the contrary: and it was also agreed in that case if he had sold the sheep after shearing time, he should pay tithes for their wool *pro rata* before the sale. And *Lindw.* 141. b. 142. ver. "*renovetur*," says, "*Si eadem terra bis vel ter seminata fuerit, vel sæpius fructum produxerit, danda toties sunt decimæ.*" So of pigeons, and other creatures which breed often in a year. As to *Baster* and *Hope's case*, (4) that tithes shall not be paid of, &c. it is true the court there did not grant a consultation because the rewine grass is a thing of no value: 2dly, it is by manuring the land to make it more fertile, being converted into dung: and 3dly, for the maintenance of their sheep.

As to the second part of the suggestion, that here should be a *modus decimandi*, he said that here is no recompense or consideration to the parson; and he referred to *Hall* and *Fettiplace's case*; (5) there was a prescription to pay tithe cheeses between such a day and such a day, for discharge of all former tithes of milk in that same year; and adjudged a good prescription, because of common right the parishioner is not bound to make the milk into cheese. But it was resolved, that if the prescription had been, that in consideration he paid the tenth quart of milk between such a day, &c. that would not have been good, for it is no more than is given of common right. Tr. 31 El. C. B. *Bird* and *Adams*, (6) a prescription to pay the tenth sheaf, and to be discharged of the odd sheaves; and he said these cases were decisive; and he also said that the second cutting is of as great value as the first cutting; and woad being but a new thing, there can be no prescription respecting it.

Maynard acquainted the court, that in the case of the tenth pound of wool, cited by Mr. *Beare*, he was of counsel, and that they had a consultation, contrary to what *Beare* had said; to which *Jones, J.* agreed.

RICHARDSON, C. J. considered this a very great and doubtful case; for he could not conceive how payment of a part should be a satisfaction for the whole, and in effect this is so; and the second cutting being as good as the first, it would be altogether a plain *non decimando*. As to the cases that have been put to the contrary, he agreed to some of them. 1st. As to the case of the stubble hay, he agreed that no tithes shall be paid of it: 1st. because tithes were paid of the corn, which is the principal, and the stubble is of no value: 2d. because in the case of stubble there is no second renewing. As to the case of fruits, as apples, &c. he conceived that two tithes are payable. As to the aftermath, he agreed in the difference that had been taken before by *Palmer*, and mentioned a case in the C. P. which arose in Cambridgeshire:—one

(1) *Antè*, 60.
(4) *Antè*, 200.

(2) *Antè*, 157.
(5) *Antè*, 157.

(3) *Antè*, 147.
(6) *Antè*, 97.

prescribed,

prescribed, that where the grass grew in a wet place, in consideration of his carrying it out of the watery ground, and to another drier place to make it into hay, he was to be discharged from the tithes of the aftermath; and held to be a good *modus decimandi*. As to the case of the grass which grew after the corn was severed, it might be perhaps, that there were no tithes of it, because of such small value. But in the case at bar, there is a new increase, and the law is, that *de omnibus renovantibus et crescentibus, &c.* tithes shall be paid. And as to the case of the rakings, he held that where the rakings were of great value, or if they were left on the land covinously, that tithes should be paid of them; but if they be left there in a small quantity and involuntarily, it is otherwise; and therefore the words of the suggestion in such case are *minus voluntariè, &c.* So it was now lately resolved in this court for the locks of wool of sheep at shearing time upon this same distinction, where they are left in great quantity, or by covin, and where not. Therefore he said this case should be argued next term at the bar; and if the court should then have any doubt, it should be afterwards argued by the counsel on both sides, and the court would deliver their opinions *seriatim*.

JONES, J. said, that he intended then to have spoken, but that he subscribed to the rule of the chief justice.

CROKE and BERKLEY accorded; and, they added, that notwithstanding what had been said, they were strongly of opinion, that no prohibition ought to be granted; and so they had been always, else they would not have consented that the party should be delayed of his prohibition so long as Michaelmas term.

JONES, J. If apples be gathered, part at one time, and part at another, as commonly they are, there is no doubt but upon these several gatherings, there shall be several tithes paid.

RICHARDSON, C. J. Here at Fulham they have peas which are early ripe, and sold at London, for which they pay tithes, and yet at harvest, when they cut down the remainder, new tithes are paid.

CROKE, J. agreed the difference which had been taken touching the aftermath by *Palmer*: and he said, that in this case the baskets are things of necessity for the use of the owner of the nine parts; and the second cutting is commonly as good as the first by the confession of the party himself. And as to the rewine, and rakings, and locks of wool, he took the distinction made by the chief justice, for *de minimis non curat lex*; *aliter*, if in great quantities or by covin. And JONES, J. was of opinion that there should be no prohibition; for the providing of the baskets was for their own use; and that they might as well have prescribed to be discharged of the tithes of corn, because they were at the charge of providing scythes to cut it down. Which BERKLEY agreed to, and said, that of pigeons and hens, and such creatures as bring forth twice in a year, double tithes are paid.

RICHARDSON, C. J. hesitated about agreeing to the case of osiers put by Mr. Attorney.

JONES, J. If you could make this the custom of an entire county, *consuetudo patrie*, you might then prescribe in a *non decimando*, as in the case of the Wealds of Sussex; *quod fuit concessum*. Adjourned to Michaelmas term, and no prohibition *interim*.

E. 9 Car. B. R. *Anon.* [Widd. MS. Rep. 206.(1)] MS. Hargr.

SIR John Banks prayed a prohibition upon a suggestion that the libel was for tithes of lands which were parcel of the possessions of the abbey of Fountains, which was of the Cistercian order, and that they had these lands before the council of Lateran, 15th of King John, and had always enjoyed them discharged, &c. — Sir THOMAS RICHARDSON. How can you make it appear to us that they were purchased before the council of Lateran? Banks answered, that he could shew many records that this abbey was founded before the council, and these lands also given to them: and thereupon prohibition was granted, if nothing should be shewn on the other part by the second day of the next term, upon giving notice.

A prohibition was granted upon suggestion that the lands belonged to a Cistercian abbey before the council of Lateran, 15 John, and that the land had always been held discharged.

(1) These Reports are by Sir Thomas Widdrington, afterwards Lord Chief Baron.

1633.

No tithe is due for grass in the swathe cut for working cattle and for their maintenance in tillage.

E. 9 Car. B. R. *Crawley v. Wells*. [Widd. MS. Rep. 221.]

IN prohibition upon a libel for tithes of grass the suggestion was, that the grass cut was for working cattle in the swathe, and for their maintenance in tillage. — *JONES, J.* said, that if it had been carried into the barn, and you give this to your working cattle, yet tithes shall be paid; yet the court granted a prohibition unless cause shewn to the contrary.

Trin. 9 Car. B. R. *Anon.* [MS. Bridg. 590.]

No tithes are due of rabbits, but by custom, for nothing *feræ nature* is titheable by our law, as partridges or fish in a pond.

A PROHIBITION to a libel for tithes of rabbits was moved for. And *Lewin* argued, that no prohibition should go; for that in rabbits a man had property, and therefore in a writ it is, "*cuniculos suos*," and they are not to be compared with vermin, or cats and dogs, for which no tithes are due, as 12 H. 8. 4. by *Elliot*. He also said, that the vicar who had now libelled for the tithes of them had been endowed with them for 300 years past, as appears by express words in the instrument of endowment. But the whole court was against him, and held that no tithes are due of rabbits, for nothing *feræ nature* is titheable by our law: but they agreed that by custom tithes may be due of such things, if they have always been paid, (1) as of lead, no tithe is due by law, yet by the custom of Derbyshire, it has been paid, and therefore is now due. — *JONES* said to *Lewin*, *ridendo*, the Levites would not have tithes for they were unclean beasts, as appears. — *BARKLEY, J.* said, that clearly no tithes should be paid of partridges, or of fish in a pond. — *RICHARDSON, Ch. J.* to *Lewin*, you would destroy Norfolk if tithes of our rabbits should be paid, wherefore they unanimously granted a prohibition.

(1) It appears from this, that in the present case, though the vicar had been expressly endowed with tithe of rabbits, none had been

in fact paid, and that therefore there was no sufficient evidence of a custom to support the endowment.

H. 9 Car. B. R.

Dawes v. Huddleston. [Cro. Car. 339.] 2 Danv. Abr. 583. (4)

1634.

Tithes are not payable for fish taken in rivers, but by custom, per *Richardson, Ch. J.* He also said, that prohibition had been granted upon debate to a suit for rabbits in *Methold warren*.

A PROHIBITION was prayed by *Calthorpe* for against a parson of W. in the county of Westmoreland, for suing for tithe of trouts taken in a river, because they are *feræ naturæ*, and shewed a precedent in 5 Car. where a prohibition was granted against the same parson, for suing for tithes of eels taken in the river, because they are *feræ naturæ*; and day was given to shew cause why it should not be granted. And *RICHARDSON* said, that he knew where one suing for conies taken in *Methold warren*, a prohibition was granted upon debate: and that in *Yarmouth* was a suit for tithes of herring taken in the sea, but they could not prevail. — *JONES* said, that in his country of Wales they use to pay tithes for herrings: and in Ireland it is a common course to pay tithe of salmon taken in rivers. — *RICHARDSON* said, that, peradventure, may be by custom; otherwise tithes are not payable for fish taken in rivers.

E. 10 Car. B. R. *Anon.* [Dy. in M. 170. b.] 1 Gw. 130. n.

The common tradition that tithes are not due of ancient mills, means those before

9 E. 2. only, and not those before memory of our ancestors.

SERJ. HITCHAM moved, that before the statute *de clero* no tithes at all were payable for mills, but the said statute was *lex inde creativa*. But per *Cw'* it was adjudged that the common tradition, that no tithes are due of ancient mills, is to be understood of very ancient mills, *sc.* before 9 E. 2. only; for after that, and before memory of our ancestors, they ought to pay tithes.

H. 10 Car. B. R.

1635.

Moade v. Thurman. [Cro. Car. 393.] W. Jo. 357.

PROHIBITION was prayed upon suggestion of this custom, that for tares cut or mown before they are ripe, and given to plough-cattle, tithes ought not to be paid: and upon another custom for headlands sown with corn, used to be fed with plough-cattle, or mowed and cut for that purpose, that the owners shall be discharged of tithes. And upon this suggestion grounded upon special customs, the court granted a prohibition.

for plough cattle, granted upon suggestion of *special customs* within a parish.

A prohibition for tithes of tares cut green and given to plough cattle, and of headlands fed, and mown and cut

E. 11 Car. B. R. *Anon.* [Cro. Car. 403.]

A PROHIBITION was prayed by *Grimston* to the spiritual court, for suing for tithes of lambs, surmising the custom to be, that if one have lambs under the number of seven, he ought to pay an half-penny for every lamb under that number, in lieu of all tithes of lambs; and if he had but seven, the parson should have the seventh lamb, and should pay three-pence; and if he had eight he should pay two-pence; and if he had ten the parson should have the tenth without paying any thing. — *BERKELEY* and *JONES*, held, that the canon law is so, and so received in the spiritual court, and it is surmised that the spiritual court allows of it; and therefore there needs not any prohibition. But because it was alleged, that it was a custom, and the parson would stay until the tenth, and would refuse to accept according to the custom, and that in the spiritual court, this surmise is not allowed; therefore *BRAMPSTON*, Ch. J. and myself conceived, that a prohibition is grantable for that cause, and *JONES* and *BERKELEY* agreed, that it would be granted, and the party might demur if he would: also for tithes of aftermath, that there is a custom in consideration, that he should make the first tonsure into good and sufficient hay, and set it out in cocks sufficiently dried and ready to carry, that he should be discharged from the payment of tithes of the aftermaths: and this was held a good suggestion, by reason of the costs he bestowed in making it to be perfect hay: and upon a surmise made, that he was sued for tithes of bees, that in consideration he paid honey and wax, and was at the charge for hives and maintenance of them in winter, he should be discharged of the tithes of the bees themselves: and upon these surmises a prohibition was granted, being one of the first cases moved after *BRAMPSTON* was made chief justice.

Where a modes was alleged for lambs, prohibition went upon suggestion that the parson refused to accept according to the custom.

A custom to be discharged of aftermath, in consideration of making the first tonsure into hay and setting it out in cocks, held good.

A prohibition went to a suit for tithes of bees upon suggestion of payment of honey and wax, &c.

M. 11 Car. B. R.

Sydown v. Holmes. [W. Jo. 368. Cro. Car. 422.] 2 Gw. 479.

PROHIBITION. Surmising, that the prior of Bristol (1) was seised in fee of such land parcel of his priory, and that he and all his predecessors, time whereof, &c. until the dissolution, held the said lands, being parcel of the demesne of the said priory, discharged and acquitted from the payment of tithes, for his farmers and tenants for life or years of the said lands, &c. And that the said priory was dissolved by the statute of 27 H. 8. and that the said King was seised in fee of the said lands, &c. and shews the statute of 32 H. 8. (that none shall be sued for tithes, who were discharged by the laws and statutes of the realm) and the statute of 2 Ed. 6. And that King Henry the Eighth died seised of the said lands, and so conveys them by meane conveyance to Edward Bartell, and to the plaintiff, as his tenant for years: and that the parson of Bristol sued him for tithes, and upon that prohibition the defendant demurred in law. And after arguments at the bar, it was argued at the bench.

It was held by Croke, J. that the clause in the 31 H. 8. "that the King and his patentees of any monasteries, &c. should hold and enjoy them discharged of payment of tithes as the late abbot held them;" extended as well to abbays that

(1) Sir W. Jones calls it *Broadstall*: there were two of the smaller monasteries in Derbyshire, one of which was probably intended,

"*Bredael Prior*" *juxta Derby*," valued at £18 6s. 1d. and "*Bredesale*," valued at £10: 17s. 9d. per annum.

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came to the King by 27 H. 8. as the superior abbays, and he said that no question had been made in those times, or in sixty years after the making of the statute.

But the court resolved, 1st. that an abbot or ecclesiastical person might prescribe in *non decimando*: but when the corporation is dissolved, or when the corporation grants the land to a layman, such layman shall not have the benefit of the prescription, for it was personal to the abbot.

2d. That this privilege by prescription or other personal privileges, by bull, or order, belonging to abbays under £200 per annum, and dissolved by 27 H. 8. were not preserved and given to the King by that statute, and therefore not continued.

3. That privileges by prescription, or order, or bull, are preserved by the clause of 31 H. 8. and continued so that neither the

King, nor his patentee, shall pay tithes. But this extends only to monasteries dissolved after 4 Feb. 27 H. 8. and therefore the lesser abbays under £200, which were dissolved by 4 Feb. 27 H. 8. are not included within the clause of 31 H. 8.

A real composition is when a sum of money or lands, are given to the parson with the assent of the patron and ordinary, in recompense of tithes, then the land is discharged of tithes in specie, and the *modus* is made tithes; and upon grant of the lands the grantee shall have the benefit of it; and a *modus decimandi* is maintained upon the ground of a presumption of such a composition which is lost.

Berkeley, J. said, that the right of tithes, *de mero jure*, belongs to the parson of the parish; and when the abbays were dissolved by 4 Feb. 27 H. 8. the right of tithes was revived to the parson.

The first question was upon this discharge, being shewn to be, time whereof, &c. in a spiritual parson, viz. the prior, whether this privilege thereof be determined by the dissolution of the priory, or still remains, and may be in the King and his patentee, without the aid of the statute of 27 et 31 H. 8. And I argued, that in regard it was discharged, time whereof, &c. in a spiritual person (viz. the prior and convent) who were capable to have or to be discharged of tithes, it being a privilege vested in them, before the council of Lateran, (which was before any parochial right) it may by intendment be by composition real, then it shall go with the land, as 8 Ed. 4. 11. & F. N. B. 41 G. That any lay-person may have a composition, and thereupon may have a prohibition, much more a spiritual person may have it, by these means, &c. and it shall go with the land, *vide* 7 Ed. 3. 3. 10 H. 7. 18. That a spiritual person may make such a prescription; and then being a prescription, fixed in a spiritual person, by the dissolution, it comes to the King being *persona mixta*, and from him to his patentee, as Coke 2. 44, 45. a. the *Bishop of Winchester's case*, (1) and Co. 11. fol. 12. *Priddle and Napier's case*. (2) — But BRAMPSTONE, JONES, and BERKELEY, argued to the contrary, yet they agreed, that it shall be intended, that such discharge was by composition real, and shall go with the land; as the case put of a common person, which is, that a lay-person shall have advantage of a real composition, if he can shew it. But because a spiritual person may have divers causes of privileges, by grant, as well as by composition, and that in divers manners, it shall be intended the most general course, which is a personal discharge, which determines with their corporation, as in 3 E. 3. 11. And in favour of the church, it shall be intended, that it was rather by grant of privilege, than by any real composition, and that the tithes are due to the parson, and shall not be taken from him, unless the discharge continue, which is not here shewn. The second main question was, admitting that this discharge is by privilege granted to the priory, which being one of the inferior abbays, came to the King by the statute of 27 H. 8. being under the value of £200 *per annum*; whether this privilege be not merely determined, or whether it be not revived by the statute of 27 H. 8. and 31 H. 8. And in this point I argued, that it is aided by the statute of 27 H. 8. because that gives the possession of the abbays to the King, in as ample and large manner as the abbot had them, at the time of the dissolution; and it was discharged at the time of the dissolution. And if it be not aided by the statute of 27 H. 8. yet it is to be aided by the statute of 31 H. 8. by the general clause, which is that the King and his patentees of any monasteries, &c. shall have and enjoy the same, discharged of the payment of tithes, &c. as the late abbot, &c. had, held, and enjoyed, &c. And whereas it has been objected, that this statute extends only to abbays, which came to the King after the fourth of February, 27 H. 8. but this abbey came to the King the fourth of February, 27 H. 8. and so excluded out of the statute; I answered thereto, that this statute extends to abbays surrendered, relinquished, renounced, or given up to the King after the fourth of February, 27 H. 8. And that is intended to extend to all abbays, which are given by the statute of 27 H. 8. for although it has no relation to the fourth of February, 27 H. 8. yet that is but a foreign surmise, by such relations to prejudice the King, as it is Co. 3. 29. a. Relations are but fictions, which shall not prejudice the King by such constructions: and in *rei veritate* all the said abbays were surrendered, or relinquished after the fourth of February, 27 H. 8. or during that parliament: and the exposition has always been, that this clause extends as well to abbays which came after the statute of 27 H. 8. as to the superior abbays, and never

(1) *Ante*, 119.(2) *Ante*, 205.

never any question made in these times, or in sixty years after the making of the said statute. And therefore the cases in 7 Eliz. Rot. 245. betwixt and *Hayant*, in this court, and P. 27 Eliz. Rot. 328. betwixt *Cogall* and *Fairfar*, in this court, and P. 37 Eliz. betwixt *Smith* and *Putenson*, were cited, where prohibitions were granted upon surmise, that the lands came to the King by the statute of 27 H. 8. and that in 40 Eliz. Rot. 679. betwixt *Berly* and *Walter*, a prohibition upon the surmise, for this land was granted; where it being in question, whether where continual usage had been, that as well for inferior abbeys given to the King, by the statute of 27 H. 8. as to abbeys which came after, and held their lands discharged, such prohibitions should be granted, I held it to be an equal mischief, as well for the one as for the other, and that the statute extends equal remedy. And so the exposition has been always taken by the practice. But *BRAMPSTON*, C. J. *JONES* and *BERKELEY* argued to the contrary, that the statute of 27 H. 8. does not preserve or revive this privilege, because there be not any words, that it shall be discharged as the abbot held it, but that the King shall have it, in as ample manner and form as the abbots held it. And general words will never preserve the privilege and immunities which were determined, unless by special statute they be revived: and the statute of 31 H. 8. does not extend to them; for all the scope of the said statute is only to extend to abbeys which came to the King after the fourth of February, 27 H. 8. And all abbeys which came to the King by the statute of 27 H. 8. came unto him the fourth of February, 27 H. 8. And to those the statute of 31 H. 8. does not intend to extend; for in every branch are mentioned only the abbeys, &c. which came to the King after 27 H. 8. And although this clause to be discharged of tithes, in the body of the said clause, be *any monasteries*, &c. yet it is after the said late abbots, &c. and abbots are not mentioned before in that clause, and therefore it ought to be expounded and coupled with the clause before, which mentions and intends only what came to the King after the fourth of February, 27 H. 8. and does not extend to abbeys which came to the King the fourth of February, 27 H. 8. — And *JONES* said, although it be no statute until the end of the sessions when the King assents, yet when there has been a session, it shall have such relation to the first day of the sessions, that they vest actually in the King the said fourth day of February, 27 H. 8. that the King shall have the rents incurred after the first day, and before the last day: and if they be paid in the interim to the abbot, they shall be paid again to the King. And *JONES* and *BRAMPSTON* relied upon a judgment 18 Jac. in the Common Bench, betwixt *Gerard* and *Wright*, (1) where it was held upon solemn argument, by *HOBART*, *WINCE*, and *HUTTON*, Justices, that the statute of 31 H. 8. does not extend to abbeys which came to the King by the statute of 27 H. 8. And that in this court, in the case of *Whitton* and *Weston*, (2) for the possessions of the abbey of Saint John's of Jerusalem, 4 Car. where the question being, whether the said abbey came to the King by the special act of 32 H. 8. all the four justices agreed, that the case of *Gerrard* and *Wright* was good law, that the abbeys which came to the King, by the statute of 27 H. 8. were not within the privilege of 31 H. 8. nor to have the benefit of that statute. — And *BERKELEY*, J. insisted much, that this privilege to be discharged of tithes, being a mere personal privilege, was determined by the dissolution of the abbeys, and tied only to their bodies and persons, nor can be revived without especial words, which are not in the statute of 27 H. 8. And that although the statute of 31 H. 8. extend to the said abbeys suppressed by the statute of 27 H. 8. yet there is a saving in the said statute of 31 H. 8. of all rights and interests besides, to the donors, abbots, &c. Wherefore for the reasons before, but principally for that the abbey dissolved, appeared to be suppressed by the statute of 27 H. 8. by the opinion of the said three justices, it was adjudged for the defendant; and that consultation should be awarded. — [*Croke*.]

The prior of Breadstall was seised of lands in the parish of Breadstall, beyond time of memory, and all the priors held them before time of memory

(1) *Antè*, 389.

(2) *Antè*, 340.

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exonerated from the payment of tithes : the lands came by dissolution to King Henry the Eighth, by the statute of 4 Feb. 27 H. 8. the abbey being under the value of £200 [*per annum*] : the King granted the lands, and by means conveyances they came to one Bertley, who leased them for years to Sydown. Holmes, the parson of Breadstall, sued Sydown in the spiritual court for tithes, and a prohibition was obtained upon the surmise ; upon which the parson demurred, and prayed a consultation.

This case was argued at the bar several times ; and this term it was argued upon the bench by the justices. Three, namely, BRAMFSTONE, JONES, and BERKLEY, agreed for the defendant, that a prohibition did not lie. CROKE 2 *contrâ*.

The case was divided into two points.—The first was, a priory holds lands exonerated of tithes by prescription : the lands come to the hands of a layman : afterwards, the priory is dissolved : whether the tenant of these lands shall have the benefit of this prescription without the aid of any statute or act of parliament. The second question was, whether lands of an abbey, which came to the King by the statute of 27 H. 8. and were exonerated of tithes in the hands of the prior by prescription, shall be exonerated in the hands of the King, or of his patentee, by the statute of 27 H. 8. or the statute of 31 H. 8. of monasteries.

As to the first point, all the judges unanimously resolved, that there were three manners of discharge from tithes without the aid of any statute, viz. 1. by privilege or bull ; 2. By real composition and prescription in *modo decimandi* ; 3. By general prescription in *non decimando*. The first, namely, by privilege, as Templars, Hospitaliers, and Cisterians, who were exonerated by a general council (as it seems) ; for it is said by *Panormitan*, *capite ex parte decimis, Quod privilegium non solvendi decimas datur in apice juris canonici Cisterciensibus, Hospitalariis, et Templariis solummodo, et non aliis monachis quibuscunque*. 2. Several abbeyes were discharged by the pope's bull, sometimes granted to an order, as to the Præmonstratenses, or to a particular abbey ; these were personal privileges, *et omnia personalia privilegia* (as *Panormitan* there saith) *certam habent interpretationem, et non transcunt de una persona ad aliam*. If therefore a corporation which had such a privilege were dissolved, or its lands were granted over to another, the privilege was gone, and the grantee or feoffee of the lands must pay tithes.

2. The second discharge is by real composition, as appears by the Register, fo. 38. and F. N. B. 42. this is, when a sum of money, or lands, are given to a parson by the assent of the patron and ordinary, in recompense of all manner of tithes ; there the land is discharged of tithes in *specie*, and the *modus* is made tithes : and if the lands be transferred or granted to another, the feoffee or grantee shall have the benefit of it : for where the land is discharged of tithes in *specie*, there, whoever he be who has the land shall have the benefit of it, and upon the ground of a real composition, a *modus decimandi* by prescription is maintainable upon a presumption that there was a real composition, which is lost. F. N. B. 41. Regist. 38. 8 E. 4. 14. and 2 Rep. Bishop of Winchester's case : (1) and of such a prescription any one, who has the land, shall take advantage.

3. The third is a discharge in *non decimando*, either in *specie* or otherwise, by prescription, of which an ecclesiastical person only was capable, as appears in the Bishop of Winchester's case : for a layman, by the council of Lateran, was not capable of tithes, either in perannuity or in discharge ; but an ecclesiastical person was capable of both, and was not bound by that council.

And thus far all agreed ; but BERKLEY went farther, and said, that the prescription must be intended to have been either upon a privilege, or upon a real composition before time of memory. Privileges were the more frequent, the other rare ; in the present case, therefore, it must be presumed that it was founded upon a privilege in the beginning ; and if so, it will follow the nature of the beginning, namely, a privilege ; and all privileges, as was said before, were personal, and were extinct with the person, and therefore the prescription shall be extinct. And so he held, that in this case the prescription was per-

(1) *Ante*, 119.

annual, and extinct by the dissolution of the corporation, and could not be extended to the King or his patentee.

And CROOK agreed, that if it shall be presumed to be upon the ground of privilege, that then it was gone; but he said, that it shall be presumed to be upon a real composition, and then the tenant of the land shall have the benefit of it. But he gave no reason to shew, that such presumption should be made.

JONES agreed to the ground taken, namely, that if the prescription should be intended to be upon the idea of a privilege, at first, then the prescription was gone, and determined with the person. And BRAMPTON agreed to this, and that it was a stronger presumption than that it was grounded on a real composition. And JONES desired, that it should be taken to be upon a real composition; for though a prescription in *modo decimandi* by payment of a sum of money was good upon intendment that it was grounded upon a real composition, at the commencement, for the payment of the sum is good evidence of that; yet in a *non decimando* this does not hold; and so it is resolved in the Bishop of Winchester's case, 2 Rep. And BRAMPTON and JONES said, that there might be an intendment of another sort of commencement. It is said before, that ecclesiastical persons were capable of tithes in perannuity, and of an exoneration from the payment of tithes, and were not bound by any canon or council: that such therefore might be the commencement of the prescription; and if so, it is personal, it is tied to the church, *et non egreditur personam*: when therefore the land goes to the hands of a layman, the prescription is gone, and of that opinion was the chief justice also. JONES added, that inasmuch as a layman is not capable of a prescription in *non decimando* in himself, or his ancestor, he cannot be capable in a *que estate*. So that the three justices held, against the opinion of CROOK, that the privilege of prescription was gone by the dissolution of the abbey.

As to the second question, they divided it into two considerations; the one, upon the statute of 27 H. 8. only; the other, upon the statutes of 31 H. 8. and 27 H. 8. conjointly.

CROOK held, that by the statute of 27 H. 8. this privilege by prescription, as well as all other privileges and exemptions from tithes, was reserved, and given to the King by the words of the act. It gives "all rights, interests, and hereditaments, and that in as large and ample manner as the abbots held them;" and this privilege was "an hereditament, and a right, and an interest;" and the lands were given "in as large and ample manner as the abbot himself had them;" and he held them discharged of tithes. Also, the intention of the act was to give the privilege for these abbeyes, as well as other abbeyes, which came to the King by 31 H. 8.

The three other justices held, that this privilege was not preserved nor given to the King by this statute; for the words of the statute being general do not extend to this particular privilege, which is not any thing in right, or interest, nor properly a hereditament, but a matter of discharge merely. The Marquis of Winchester's case, 3 Rep. proves this, where these words, "right, interest, hereditament, and in as ample manner" in an act of parliament, do not extend to a writ of error, or right of action. 2. No such intent appears in the statute; for if the legislator had had any such, there would have been a clause of exemption, as there is in the statute of 31 H. 8.

CROOK also held, that admitting that this privilege is not preserved and given to the King by the statute of 27 H. 8. yet, taking the statutes of 31 H. 8. and 27 H. 8. together, it is saved; for, 1st. he said, the words of 31 H. 8. extend to it. 2d. If not, it is within the equity of it. As to the words, abbeyes under £200 per ann. were not dissolved until after the end of the parliament of 27 H. 8. and then the words of the 31 H. 8. extend to all abbeyes that came to the King after 4 Feb. 27 H. 8. 2. Although in fiction of law, a statute shall have relation to the first day of the parliament, yet, in truth, nothing is settled, nor is it a perfect statute, until the parliament is ended; and that was after the 4th of Feb. 27 H. 8. so that the words of 31 H. 8. extend to it: and the King shall not have the same profits accruing between the commencement of the parliament and the end of it. 3. The words of 31 H. 8. are in the pur-

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view. "all abbeys," without distinction. Farther, admitting that the words do not extend to this privilege, yet by equity it shall be within the intent of the act. For the intention of the statute of 31 H. 8. was to give the King equal benefit of the abbeys given by the 27 H. 8. as by 31 H. 8. and all were within the survey of the court of augmentations; and it was to encourage purchasers, which goes as well to the one as to the other. And, lastly, CROKE insisted upon contemporary exposition, and said, that several prohibitions (1) were granted upon these statutes in the beginning of Queen Elizabeth's reign, and constantly afterwards, and in this case now in question, between *Bery*, the owner of this land, and the parson, a prohibition was heretofore granted; whereupon he concluded, that this privilege was preserved either by the words of the statute of 27 H. 8. or by the equity of it: and if not by that statute, yet, by a conjunction of the statutes, it is given by the words, or by the intent of 31 H. 8.: for the clause of exemption from tithes does not in words extend to monasteries dissolved after the 31 H. 8. but only to those dissolved before, and yet, (as it is resolved in the Archbishop of *Canterbury's* case, 2 Rep. (2)) this clause of exoneration from tithes in 31 H. 8. extends by equity to monasteries dissolved afterwards.

The three other justices were of the contrary opinion in both points, namely, that the clause of discharge from tithes in 31 H. 8. does not extend either by the letter, or the intent of it, to monasteries dissolved by 4 Feb. [27] H. 8. *BERKLEY* insisted upon two reasons; the one, that the right of tithes *de micro jure* belongs to the parson of the parish; and when the abbeys were dissolved 4 Feb. 27 H. 8. the right of tithes was revived to the parson; and those things which are extinct cannot be revived by the general words of the act of 31 H. 8. Secondly, he held, that the parson was within the saving of the 31 H. 8. for he is not within the exception of the saving, namely, "donor," "founder," &c.

JONES did not rely (as he said) on these reasons; for, if monasteries were spoken of, this extends to abbeys dissolved after 27 H. 8. and before 31 H. 8. as well as to the abbeys dissolved by 27 H. 8.; and the words too of the act are express to give discharge of tithes; all discharges were within the intention of the act. And second, the said clause of exemption is after the saving; and the saving extends only to things before.

BRAMPSTON, C. J. said nothing to this; but they all agreed in one thing, that the 31 H. 8. does not give any aid in this case; for the statute speaks in express terms of monasteries after the 4 Feb. 27 H. 8. which came to the King; and the clause of exemption was intended for those abbeys, which came to the King by force of that statute, and not to other lands that were given to the King before or afterwards by act of parliament; as was resolved in the *Archbishop of Canterbury's* case, 2 Rep. for *Maidstone college*.

JONES answered *CROKE's* reason: First, That the abbeys were not dissolved until after the statute of 27 H. 8. and he said, that the statute of 27 H. 8. adds a much stronger clause, different from 31 H. 8. The statute of 27 H. 8. gives to, and vests in the King, all abbeys and their possessions, that were under 200*l.* per annum; and by that the King had them in actual possession, without any other act or thing to be done; and some of those abbeys too, as appears by the act, were dissolved within a year before, and given to the King by the act in possession. But the 31 H. 8. it is true does not give any abbeys to the King, but only vests in the King the actual possession of all abbeys which were surrendered, or should be surrendered; and without such surrender they were not given to the King. But *JONES* said, that though this be true in the general, yet the statute in particular cases gives the lands of abbeys to the King, as of those abbeys which were of the donation or foundation of common persons, the lands of which would, by the dissolution, escheat to the founder, if

(1) The cases referred to by *Croke* are stated in his report, and are 7 Eliz. Rot. 254. and *Hayant*, in B. R. P. 27 Eliz. Rot. 328. *Cogall* and *Fairfax*, in B. R. P. 37 Eliz. *Smith* and *Patenson*, and in 40 Eliz. Rot. 679. *Berley* and *Walter*, which is the same case

with that which is called *Berry's* in the text, in all which prohibitions were granted upon the surmise that the lands came to the crown by the statute of 27 H. 8.

(2) *Anté*, 113.

there had been no act; but the statute of 31 H. 8. gives the lands to the King in that case; so that *Croke's* first objection is answered. As to the relation of the act of parliament, they said, that it shall have relation to every purpose to the first day of the parliament, and shall vest the land that day in the King, and the King shall have the mesne profits from the first day of the parliament. And this was agreed by several authorities: see *Partridge and Croker's case*, in Comm. 33 H. 6. *Pilkington's case*, &c. And JONES said, that the words of the act go only to abbeys dissolved after the 4 Feb. 27 H. 8. for the preamble of the act speaks of divers abbots, priors, &c. of the said monasteries and priories; and there is no mention of any other monasteries but those which were dissolved after 4 Feb. 27 H. 8. and though in the beginning the words be general, all monasteries, priories, &c. yet this is restrained; for the patentees shall hold the lands exonerated of tithes, free as the said abbots, and priors, &c. held them; and the said abbots are only the abbots of the said houses mentioned in the preamble, and those were abbeys that were dissolved after 4 Feb. 27 H. 8. And as to the case urged, that the said clause was taken by equity, out of the Maidstone college case, that was for another reason; for there, though the abbeys were dissolved after 31 H. 8. yet those were vested in the King by that act; and it was the intent of the statute to give equal benefit in monasteries dissolved after, as to those which came to the King by that statute; but here there does not appear to be any intention to extend this clause to another act of parliament made before, no mention being made of it, but rather an absolute exclusion.

As to contemporary exposition, and precedents, it was answered, that the rule of contemporary exposition does not hold in *omnibus*; for in the *Archbishop of Canterbury's case*, the contemporary exposition was *à contrà*; but there was no express resolution on the point until that time, and upon great debate the exposition was altered. And in our case there is no resolution *à contrà* before. And as to precedents, it was answered, that many of these points pass *sub silentio*, but there is no direct judgment on the other side. It was resolved and adjudged in *Wright and Gerard's case*, 18 Jac. C. B. (1) that the statute of 27 H. 8. does not preserve the privileges of exemption from tithes; and 31 H. 8. does not give or preserve any such privileges in case where abbeys came to the King by the 27 H. 8. In the same manner both these points were resolved in the exchequer, 4 Jac. in the case of *Ward and Clarke*. And in the argument of *Weston and Whitton*, (2) in this court; it was agreed accordingly, by HIDE, DODDERIDGE, JONES, and WHITLOCK. They concluded, therefore, that a consultation should be granted to the defendant.

In this case, in short, these points were resolved: 1. That an abbot or ecclesiastical person may prescribe in *non decimando*: but when the corporation is dissolved, or when the corporation grants the land to a layman, such layman shall not have the benefit of the prescription; for it was personal to the abbot.

2. It was resolved, *per totam curiam*, that this privilege by prescription, and other personal privileges, by bull or order, belonging to abbeys which were under 200 l. per annum, and dissolved by 4 Feb. 27 H. 8. were not preserved and given to the King, or his patentee, by that statute.

3. That privileges by prescription, or by order or bull, are preserved by the clause of 31 H. 8. and neither the King nor his patentee shall pay tithes. But this extends only to monasteries dissolved after 4 Feb. 27 H. 8. and therefore the lesser abbeys, under 200 l. [per annum] which were dissolved by 4 Feb. 27 H. 8. are not included within the said clause of 31 H. 8.—[*Jones*.]

(1) *Ant^e*, 289.

(2) *Ant^e*, 340.

H. 11 Car. B. R. *Earl of Hertford v. Leech*.

[MS. Calth. No. 36. fo. 104. W. Jo. 387.] 2 Gw. 486.

THE plaintiff declares, that whereas, E. 6. 23 July, 1 E. 6. was seised of the forest of Savernack, in the county of Wilts, whereof eight acres of pasture, called Earl's Heath, are, and time out of mind have been, parcel in fee, in right of his crown of England; and whereas the said late King E. 6. and all his progenitors, late Kings of England, were seised of the forest aforesaid, with

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personal, et non
egreditur per-
sonam; there-
fore where a
forest had been
discharged of
tithes for time
immemorial
whilst in the
hands of the
crown, it was
held that a
grantee should
not have the
benefit of the
prescription.

with the appurtenances thereof, &c. in fee, as in right of the prown of England, and the said eight acres of pasture, called Earl's Heath, time out of mind, had holden and enjoyed, acquitted, discharged, freed, and privileged of and from the payment unto the proprietor or farmer of the rectory of Burbage, of any tithes whatsoever, of, from, and upon the said eight acres of pasture, with the appurtenances or any part thereof, yearly for all the time aforesaid growing, happening, renewing, or arriving: and the said E. 6. being of the forest aforesaid, whereof, &c. in form aforesaid seised, and holding the aforesaid eight acres of pasture acquitted, discharged, freed, and privileged of and from the payment to the proprietor or farmer of the rectory of all manner of tithes growing or renewing in the said eight acres; on 23 July, 1 E. 6. did, under his great seal of England, grant the said forest, with all liberties and privileges to the said forest belonging, unto Edward duke of Somerset, and the heirs male of his body. Edward duke of Somerset died, and the said forest descended unto the said Edward earl of Hertford: 25 May, 13 Ja. Edward earl of Hertford made a lease for five years of the eight acres to Francis Noy, the plaintiff. The statute of 2 E. 6. enacted, that no person should sue or be compelled to give or pay any tithes for any manner of lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privileges or prescription, were not chargeable with the payment of any tithes, or which were discharged by any real composition; the eight acres by prescription time out of mind, by the laws and statutes of this realm, were not chargeable with the payment of any tithes unto the proprietor of the rectory of Burbage, but freed and discharged from the payment of all manner of tithes unto the said proprietor of the rectory of Burbage; that the defendant had libelled against him for tithes.

To this declaration the defendant demurred.

So as the mere question in this case is, whether this was such a discharge of payment of tithes in King Edward VI. as that the patentee, after such time as the King has granted the forest unto him and his heirs, shall be capable of this discharge of tithes, and shall be discharged of payment of tithes. And I [*Calthorpe*] conceive that it is; for this discharge of payment of tithes of the forest of Savernack, that was in the King, was a real discharge of payment of tithes, and not a personal privilege; and it being a real discharge, and not a personal privilege, the patentee is as well capable of the same as the King himself was, during the time that the forest was in the hands of the King.

M. 11 Car. *Sydney v. Holmes*. (1) In that great case, that was so solemnly argued in this court by all the judges, although it was adjudged, that where the abbey came unto the King by the statute of 27 H. 8. and the prescription was, that the abbot and his predecessors had, time out of mind, been discharged of payment of tithes, yet this prescription would not serve the turn upon the statute of 27 H. 8. because it should be taken to be a personal privilege, whereof none was capable but the abbot himself; but it was there agreed by all, that if the discharge of payment of tithes had been a real discharge, as, if there had been a real composition, or something given formerly in lieu of those tithes; there the discharge should have gone with the land, so as whosoever had the land should be discharged of payment of tithes; according unto the Register 38. and F. N. B. 41.

And for the proof that this is a real discharge, I conceive it will be material to shew, that the settling of payment of tithes in this kingdom of England, is merely grounded upon decrees and upon councils; for although tithes were paid in some kind, yet the settling of parochial rights, and fixing of payment of tithes upon the parson of that parish where the land did lie, was made by decrees and councils.

Seld. Hist. of Tithes, 81. It is said, that the parochial priests had not at first such a particular interest in the profits received by oblations, as of latter times; for all that was received wheresoever in the bishopric, was, as a common treasury, so to be dispensed. One part was allowed to the maintenance of the ministry, out of which every parochial minister had his salary, by monthly

(1) *Ante*, 383.

pay in the first four hundred years; another to the relief of the poor, sick, and stranger; a third to the reparation of churches; and a fourth to the bishop. *Concil. Antioch.* 103 & 104. and *Urban*, c. 12. q. 2. c. 26. *Synod. Rom. sub. P. P. c. 5.* and *Gelas. Decret.* c. 27.; and at the first, the word *paracia* or parish, at first denoted a whole bishopric, (which is but as a great parish) and signified no otherwise than diocese; but afterwards, being confined to what our common language restrains it, the curates of those parishes were such as the bishop appointed to have under him the cure of souls in them; and those are they whom the old Greek councils call [*πρεσβυτεροι εφημεροι*, or *οι εν ταϊς χωραις*, or *εν ταϊς κωμαις πρεσβυτεροι*,] *presbyteri parochiani*, within the bishopric. These had their parishes assigned them, and in the churches where they kept the cure, the offerings of devout christians were received, and disposed of in maintenance of the clergy and relief of distressed persons, by the *Economi*, deacons, or other officers thereunto appointed under the bishop, *Concil. Gangr. Can.* 67. and *Chalced. Can.* 204.

Id. 58. *Concil. Matic. Can.* 5. A. D. 586. *Leges divina consulentes sacerdotibus ac ministris ecclesiarum pro hereditaria portione omni populo praeceperunt decimas fructuum suorum locis sacris praestare, ut nullo labore impediti per res illegitimas spiritualibus possint vacare ministeriis; quas leges christianorum congreges, longis temporibus custodiret intemeratas. Unde statutus, ut decimas ecclesiasticas omnis populus inferat, quibus sacerdotes aut in pauperum usum, aut in captivorum redemptionem erogatis, suis orationibus pacem populo ac salutem impetrent.*

Id. 72. *Quicumque decimam abstrahit de ecclesia ad quam per justitiam dari debet, et eam presumptuose, aut propter munera aut amicitiam, vel aliam quamlibet occasionem, ad aliam ecclesiam dederit, à comite vel à misso nostro distringatur vel ejusdem decimae quantitatem cum sua lege restituat. Leg. Longobard. lib. 3. tit. 3. c. 7.* So another was made against persons under pain of deprivation, that they should not persuade parishioners to come to their churches, *et suas decimas sibi dare. Benedict. Levita. lib. 7. c. 141.* With it agrees the complaint about the same time in the council of Pavia against such as used to give their tithes *aliis ecclesiis pro libitu*. And many express examples are of such grants made, not otherwise than as of rent-charge arbitrarily created. *Synod. Ticinens. c. 16. q. 1. c. in sacris Canonibus*, 56.

And although out of any continuance alone of voluntary payment, a kind of parochial right (which also, by the laws of the time, every rector should have enjoyed in the territory where he dispensed the sacraments) were created; yet consecrations of tithes (not yet established by a civil title) made to the church of another parish at the lay-owner's choice, were practised and continued in force; as may plainly be collected out of an old law made (but not put in execution) for punishment of such consecrations by compulsion of the party to restore to the church the quantity of the tithe so aliened.

Laudu. fo. 117. *lib. 3. De locato et conducto*, ver. "*portiones.*" *Hæ portiones poterant pervenire ad locum religionum de concessione etiam laici cum solius diocessani consensu de decimis vel proventibus quas laicus talis ab ecclesia aliâ habuit in feudum ab antiquo. Et hoc verum, si tales portiones decimarum eis donatae fuerunt ante concilium Lateranense, quod celebratum fuit anno Domini 1179, tempore Alexandri tertii, qui fuit Senensis. Nam ante illud concilium bene poterant laici decimas in feudum retinere, et eas alteri ecclesiae vel monasterio dare; non tamen post tempus dicti concilii.*

2 *Rep.* 44. *Bishop of Winchester's case* (1).—It is resolved, that a mere layman that was not capable of tithes in pendency, was yet capable of the discharge of tithes at the common law in his own land, as well as a spiritual man: for, by the common law, the parson, patron, and ordinary, might have discharged a parishioner of tithes in his own land; or the parishioner might have given part of his land to the parson for discharge of his tithes in the residue. 8 E. 4. 14. Register 38. And there it is said, that it is commonly said in our books, that, before the council of Lateran, every man might have given his tithes to any ecclesiastical person that he would.

(1) *Ante*, 119.

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7 E. 6. Dy. 84.(1) A portion of tithes is, where a man hath any profit of tithes within the parish of another parson or vicar. And the original of it is *ante concilium Lateranense, quo tempore licebat unicuique distribuere et solvere liberè pro libitu suo decimas suas seu aliquam portionem inde cuicunque ecclesie secundum meliorem discretionem suam*, and there was no restraint to any church or parish in certain. So, by continuance it accrued to a right or title; and this was so given for prayer or devotion. [8] Ass. pl. 25. agrees with this. 44 E. 3. 5. Selden, 231. notes the council.

10 H. 7. 18. Before the council of Lateran every man might give his tithes unto any curate; at which time it was decreed by the same council, that from time to time no man should grant or give his tithes, but to his proper curate.

7 E. 3. 5.(2) By *Herle*. The tithes that are out of any parish may not now be granted to whom a man wills; for the bishop of the place shall have them. And it is against reason, that a man may not give his alms unto whom he will.

Seld. 76. The bishop of Xaintonge maintained, that no church lands were to pay tithes to any church. And Godfrey, abbot of Vendosme, sharply corrects him in an epistle, saying, *Nobis dictum est, quia dicitis, quod ecclesia non debet decimam dare. Hoc verum est, ubi ecclesia nihil habet in paraciis alterius ecclesie; ubi vero ecclesia in alterius ecclesie paraciis possessionem aliquam habet, vel quippiam quod decimari debeat, ibi ecclesia ecclesie decimam reddere debet, si illud justè possidere desiderat.*

Hil. 9 Ja. A free school is built upon part of the churchyard of Paul's, in London: tithes shall not be paid of it unto the parson of St. Faith's: for *ecclesie ecclesie decimas non solvit.*

Hil. 37 Eliz. B. R. A vicar is endowed *de minutis decimis*: he shall not have the small tithes of the glebe of the impropriate parsonage; insomuch as this was discharged before in the hands of the parson. But, if the glebe come into the hands of a layman severed from the appropriation, tithes shall be paid of it both unto the parson and unto the vicar.

Seld. 112. Infeodations of tithes unto laymen were ordinary until the council of Lateran holden 1078, at which time the canon was made, *Decimas quas in usum pietatis concessas canonica auctoritas demonstrat, à laicis possideri apostolicè auctoritate prohibemus. Sive enim ab episcopis, vel regibus, vel quibuscunque personis eas acceperint, nisi ecclesie reddiderint, sciant se sacrilegii crimen incurrere.* And this in the same syllables is iterated in the general council of Lateran holden in 1139.

Id. 117. Princes sometimes joined with the bishop to bring in the payment of tithes, that thereby themselves might have beneficial infeodations of them from the church. But, as princes made infeodations out of their own demesnes, or their own churches, so other private lay persons: and the clergy sometimes of tithes already vested in them, and sometimes, it seems, out of their demesnes. Schaffrabung. A. D. 1073.

Id. 284. It appears that in 11 H. 3. a special grant was made by the King, that tithes of hay and mills should be paid thenceforth in all his demesne lands, which before then had not been paid. *Dominus rex, saith the patent, de concilio archiepiscoporum et episcoporum suorum concessit, ut decima feni et molendinorum de singulis dominicis suis in regno suo de cetero præstentur. Et mandatum est ballivis de Corsham, quod de dominico suo de Corsham decimas feni ecclesie de Corsham dari faciant. T. R. apud Westmonast. xlviii. die Maii. Rot. claus. 11 H. 3. p. 1. m. 9. in dorso.* And according to this were divers close writs sent out in the following years, as appears by 12 H. 3. m. 7. *in dorso*, & claus. 17 H. 3. dorso 16. & dors. claus. 20 H. 3. m. 24. & claus. 21 H. 3. m. 10.

Id. 285. 33 E. 1. in the petitions of the parliament, *De personis et vicariis petentibus decimam in Cornubid ubi rex solvit annuatim episcopo Exoniensi pro decima; ita responsum est, Fiat sicut consuevit tempore comitis et regis.* The earl and King meant are B. 1. and H. 3.

Rot. Parl. 4 H. 3. m. 1. & claus. 5 H. 3. m. 6. The bishop of Exeter had the tithes of the profits or rent of the stannaries there anciently given and paid to him.

Seld. 435. A writ of *scire facias* was grantable anciently for tithes before the statute of 18 E. 3. c. 7. upon patents of tithes legally granted by the King, when against the grant any clergyman by the canon law took them from the patentee.

Id. 436. 21 H. 3. m. 19. Rot. claus. Rot. Parl. 8 E. 2. Rot. 23. *Per petitionem in consilio*, the abess of Godstow hath a writ directed, *Custodi equitii sui de Woodstock, &c.* which relates, that *ex parte dilectæ nobis in Christo Abbatissæ de Godestow per petitionem suam coram nobis in concilio nostro exhibitam, nobis est ostensum, quodd cum per cartas progenitorum nostrorum quondam regum Angliæ concessum sit ei, quodd ipsam decimam omnium in manerio nostro de Wode-stoke, et parco nostro ibidem per annum renovantium percipiat et habeat*; pretextu *cujus* the abess and her predecessors had enjoyed it; and that the bailiff kept from her the tithe of the colts bred in the same park; wherefore it commands him to restore them, if they be so due.

P. 7 J. in the exchequer, Sir Carew Rawleigh against the vicar of Gillingham. The case was thus: the vicar libelled against the keeper of the forest of Gillingham for tithes of beasts agisted within the forest of Gillingham; and upon a surmise made of the special matter, and of the payment of 8s. by the year in satisfaction of all manner of tithe, a prohibition was granted. And it was resolved, that the King was not to pay tithes for any part of his demesnes, except they have used to pay tithes of the same land; and a judgment in 31 Eliz. was cited to be accordingly. And the beasts being agisted whilst the forest was in the hands of the King, no tithes are to be paid of it. But, of beasts commoning in the chase of the King tithes shall be paid; and farmers of the King for life or for years shall pay tithes; but not tenants at will of the demesnes of the King.

Hil. 37 Eliz. B. R. in the case of the Earl of Shrewsbury. A surmise was made, that Cashibury (1) had been the house of the King, and that the house was out of every parish; and a prohibition was granted upon this surmise.

Seld. 351. Henry the Second gives to the church of Sarum divers churches with tithes, and among them, *Ecclesiam de Durneford, &c. et omnes decimas de Nord Forest, et de Panetot, et de Bucholt, et de Anderd, et de Husburn, et omnibus forestis meis de Wiltshire et de Dorset, et de Berkshire, de omnibus rebus, scilicet, de firmis, de pannagio, de herbagio, de vaccis, de caseis, de porcis, de equibus, et omnes decimas de omni venatione predictarum forestarum, exceptâ decimâ illius venationis quæ capta fuerit cum stabiliis in Forestâ de Windlesford, &c.* What the bishop had yearly by reason of this grant, may be seen in Rot. claus. 5 H. 3. m. 14. And for grants from the King of the tithe of venison other examples are obvious; as, of the forests of Essex to the bishop of London by King John, and of others anciently, &c. Rot. Chart. 6 Johannis, ch. 107. m. 12. 11 H. 3. p. 1. m. 5.—4 H. 3. Rot. claus. p. 1. m. 2. and Rot. claus. 17 H. 3. m. 4. a grant was made of the tithe of the venison taken in the forests in Northamptonshire to the abbot of Bury.

Id. 364. *Inter fasciculos petitionum parliament.* 6 E. 1. in arce London. Nicholas of Cranford, parson of Gillingham, complained unto the King, *Quodd cum foresta domini regis, ibidem sita, sit infra parochiam suam, quodd dominus rex decimam feni, venationis, pannagii, et aliorum preventurum ipsius forestæ de gratiâ et pro salute animæ suæ, et animarum predecessorum suorum ecclesiæ suæ cui de jure communi debentur plenè solvi præcipiat secundum formam supplicationis et exhortationis apostolicæ porrectam domino R. apud Gillingham, quando fuit ibi ad natalem.* Did not some such thing coming from Rome about the time of the council of Lyons, make the monks think it a thing agreed upon in that council? It seems here too, that, in the King's case, parochial right of tithes was not every where settled, although the tithes were increasing in a parish.

Id. 444. 7 H. 3. Rot. claus. p. 1. m. 6. The King directs his writ to Brian de Insula, keeper of the forest of Sherwood, telling him, that *pro salute animæ domini Johannis regis, patriæ nostræ, concessimus monachis de Basingwere, quodd percipiant hâc vice usque ad festum S. Michaelis, anno regni nostri vii. decimas de*

(1) The name of the place is doubtful.

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bladis seminatis in defenso nostro inter Blakebroc & Glassop, et ideo vobis mandamus, quod ipsos monachos hinc vice sine impedimento permittatis decimas predictas percipere.

Id. 445. So in Rot. claus. 5 H. 3. p. 2. membr. 14. the bishop of Salisbury hath fifty shillings yearly, *nomine decimar*, out of New Forest, which Henry the Second had granted to his church by the name of *omnes decimas de Nova Foresta*. *Cart. Antiq. C. C. in dors.* 10. in arce London. In Rot. pat. 11 H. 3. m. 5. p. 1. Eustace, bishop of London, hath the tithe of the King's venison, taken in the forest of Essex, according to King John's grant, by writ directed unto the foresters and bailiffs of that county.

Id. 446. Mich. 9 & 10 H. 3. Rot. 15. in arce London, in an attachment upon a prohibition by John Fitz-Robert against Philip of Arden, clerk, in the pleading allows, that for tithe of hay and mills the prosecution in the spiritual court was lawful; but he further saith, that *de decima bestiarum forestarum cum implicavit contra prohibitionem*. (1)—16 H. 3. m. 7. Rot. pat. the King sent his command to the constable of Windsor castle, that the church of St. John in Windsor should have *decimas gardini regis de Windleshores*.

Id. 366, 367. Rot. Parl. 18 E. 1. (2) in *Receptu Scaccarii*, Ralph, bishop of Carlisle, *petit versus ecclesiam priorem de Karliel decimas duarum placearum terre* of the new assarts in the forest of Ingleswood, whereof the one is called Lanthwait, the other Kirkthwait, *quæ sunt infra limites parochie ecclesie sue de Asperterik, &c.* and lays by prescription in his predecessors the tithes of the pannage there, before the assarting or culture. Henry of Burton also, parson of Thoresby, claimed in parliament, the same tithes as belonging to his church, & *infra limites parochie sue*. And the prior comes and says, that *Henricus, rex vetus*, (Henry the First, it seems,) *concessit Deo et ecclesie sue beata Maria Karliel omnes decimas de omnibus terris quas in culturam redigeret infra Forestam, et inde eos fecisset per quoddam cornu eburneum quod dedit ecclesie sue predicta, &c.* Whereupon the King's attorney dicit, *quod decimas predictas pertinent ad regem, et non ad alium, quia sunt infra bundas Foresta de Ingleswood, et quod rex in Foresta sua predicta potest villas edificare, ecclesias construere, terras assartare, et ecclesias illas cum decimis terrarum illarum pro voluntate sua cuiusque voluerit conferre, eo quod Foresta illa non est infra limites alicujus parochie, &c.* *Et petit quod decima illa domino regi remaneant, prout de jure debent ratione predicta, &c.* *Et quia dominus rex super premisis vult certiorari, ut unicuique tribuatur quod summ est*, William of Vesci, justice of the forest beyond Trent, and Thomas of Normanvill, his escheator for those parts, (for so was the division anciently of escheatorships,) were assigned commissioners to inquire of the truth, & *certificent regem ad proximum parlamentum*. So, as it appears, that the attorney challenged not the soil by prerogative, but only in regard that the place being the demesne land of the crown, and not assigned to any parish, the tithes are grantable by the King, as owner, at his pleasure. And so it well agrees with the liberty claimed by King John in the name of his baronage, that they might found new churches at their pleasure in their own fees, (before the establishment of parochial right in tithes,) as also with the more ancient practice of this kingdom, whereby tithes might not be parochially exacted, nor were so reputed due, but by the owners arbitrarily conveyed in perpetual right.

Id. 368. Mich. 5 E. 3. *coram rege*, Rot. 168. in *Cumbrid* it was adjudged in the King's Bench, *quod de decimis grossis priori de Carleol et predecessoribus suis de dominicis domini regis infra Forestam de Ingleswood provenientibus, et extra quarumcunque parochiarum limites existentibus per cartam progenitorum domini regis nunc concessis, & per cartam ipsius D. R. nunc confirmatis, &c.* a prohibition should be granted against the bishop of Carlisle, that claimed them. It was upon a record sent thither out of the parliament, as in the roll appears largely.

Rot. Parl. 8 E. 2. m. 17. in *dorso*. Edward the First gave such tithes of the forest of Dean as increased not within any parish to the bishop of Landaff, by which title the bishop afterwards claimed them; and no question was of that point.

Hil. 19 Ja. in the Common Pleas, in the case of *Noyes and Crosse*, it was

(1) *Antd.* 2.

(2) *Antd.* 4.

resolved,

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resolved, that the King was discharged of payment of tithes in the forest of Severnack during the time that the forest was in the hands of the King; for that he was not bound by the council of Lateran which established the parochial right of tithes. And it was resolved also in that case, that the King might well enough prescribe in *non decimando*, and be discharged of the payment of tithes, which, as Lindwood says, is only *negatio oneris*, inasmuch as the King is *persona mixta*, et *sacro oleo unctus*, according to 33 E. 3. *Ayd de roy*, 103, and has the supreme ecclesiastical jurisdiction in him, and is the supreme ordinary that has the cure of souls, as appears by 5 Rep. 15. *Cowdrey's case*, 27 E. 3. 84. and F. N. B. 34. And as Lindwood says, the King of England has a spiritual character imprinted in him; and as the bishop has imposition of hands, so has the King the sacred unction of oil, and is the fountain of all spiritual jurisdiction. It is to be observed too, that the King is the founder of all bishoprics, and the giver of all temporalities and jurisdiction. The bishop, who had the collecting of all manner of tithes before the council of Lateran, which established the parochial right, did not collect any thing of the King; and the King might have given his tithes to whom he would; and if he might give them, he might retain them. Besides, the King, who had his chapel and his chaplains in his own family for the administering of the sacraments and the spiritual function, and did maintain them, had not the same cause for the payment of the tithes of his demesnes, as others had. And *jus præstandi decimas* being, as Lindwood says, *quædam servitus*, and therefore called *jugum decimarum*, it is not proper for the King, who is not subject unto the doing of any service, to perform this service, unless himself pleases.

Lastly, it is to be observed, that for any thing that appears, this forest is as ancient as the division of parishes, which was in the time of Honorius, A. D. 630, and long before the council of Lateran, which established parochial right. And forests, which were only a receptacle for wild beasts, whereof no use was made but only for the recreation and pleasures of the Kings of England, and in which, by the laws of the forest, there might not be any building of houses, nor tilling of ground, nor depasturing of sheep, were never upon the division of parishes annexed to any parish: for it was in vain to annex them, when there was nothing in them whereof to pay tithe.

Concilia Generalia Bini, T. i. [fo. 208.] A. D. 260. *Epistola Dionysii Pape 11. ad Severum Episcopum.*—*Ecclesias vero singulas singulis presbyteris dedimus, parochias et camiteria eis divisimus, et unicuique jus proprium habere statuimus, ita videlicet ut nullus alterius parochie terras, terminos, aut jus invadat, sed unicuique suis terminis sit contentus, et taliter ecclesiam et plebem sibi commissam custodiat, ut ante tribunal æterni judicis ex omnibus sibi commissis rationem reddat, et non judicium, sed gloriam, pro suis actibus accipiat. Hanc quoque normam, charissime, te, et omnes episcopos, sequi convenit; et quod tibi scribitur, omnibus, quibuscunque potueris, notum facias, ut non specialis, sed generalis fiat ista præceptio.*

Concilium Tridentinum Sessio 24. Bin. Concil. Tom. vi. fo. 416. cap. 13. *In his quoque civitatibus ac locis ubi parochiales ecclesie certos non habent fines, nec earum rectores proprium populum, quem regant, sed promiscue potentibus sacramenta administrant; mandat sancta synodus episcopis pro tutiori animarum eis commissarum salute, ut distincto populo in certas propriasque parochias, unicuique eorum perpetuum peculiaremque parochiam assignent, qui eas cognoscere valeat, et à quo solo licite sacramenta suscipiant, aut alio utiliori modo, prout loci qualitas cægerit, provideant. Idemque in his civitatibus ac locis ubi nullæ sunt parochiales, quam primum fieri curent; non obstantibus quibuscunque privilegiis et consuetudinibus immemorabilibus.*

Concilium Triburiense sub Formoso Papâ, A. D. 896. Bin. Concil. T. iii. pars 2. fo. 1037. cap. 13. *De decimis; quatuor enim fieri partes juxta canonice judicamus, de decimis et oblationibus fidelium: ut una sit episcopi, altera clericorum, tertia pauperum, quarta restorationi ecclesiarum servetur, sicut in epistola Gelasii Papæ, cap. 27. legitur.*

C. 14. fo. 1038. *Placuit huic sancto concilio, ut secundum sanctiones canonum decime, sicut et aliæ possessiones, antiquæ conserventur ecclesiis, sicut in Chalcedonensi*

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donensis S. Concilio statutum est, cap. 17. Si quis autem in affinitate antiquæ ecclesiæ novalia rura excoluerit, decima exinde debita antiquæ reddatur ecclesiæ. Si verò in quolibet silvâ vel deserto loco ultra milliaria quatuor aut quinque, vel eo amplius, aliquod dirutum conlaboraverit, et illic, consentiente episcopo, ecclesiam construxerit, et consecratam perpctraverit, prospiciat presbyterum ad servitium Dei idoneum et studiosum, et tunc demum novam decimam novæ reddat ecclesiæ, salvo tamen potestate episcopi.

Concilium Nannetense (1) c. 10. Bin. Concil. T. iii. p. 2. fo. 1045 cap. 10. *Ut de decimis quatuor fient portiones. Instruendi sunt presbyteri pariterque admonendi, quatenus noverint decimas et oblationes, quas à fidelibus accipiunt, pauperum, et hospitum, et peregrinorum esse stipendia, et non quasi suis, sed quasi commendatis uti, de quibus omnibus sciant se rationem posituros in conspectu Dei; et nisi eas fideliter pauperibus et his qui præmissi sunt, administraverint, damna passuros. Qualiter vero dispensari debeant canones sancti instituunt, scilicet, ut quatuor partes inde fiant; una ad fabricam ecclesiæ relevandam; altera pauperibus distribuenda; tertia presbytero cum suis clericis habenda; quarta episcopo reservanda, ut quicquid exinde jusserit, prudenti consilio fiat.*

Concilium Romanum sub Johanne Papâ ix. A. D. 904. [Binus, T. iii. p. 2. fo. 1050. c. 9.] *Ut omnis decimatio ab episcopis vel his qui ab eo substituti sunt præbeatur, nullusque eam ad suam capellam, nisi forte concessione episcopi, conferat. Quod si fecisse contigerit, primum legibus subiaceat humanis; postea excommunicatione populi constrictus; ad ultimum ipsa capella, quæ magis contentionem, quam utilitatem aliquam præstat, destruat.*

Synodus Augustana, A. D. 952. sub Joanne Papâ xii. (2) celebrata, c. 10. *Ut omnis decimatio in potestate episcopi sit, et si neglecta fuerit, quicquid inde emendandum sit coram episcopo ejusmodi misso corrigatur.*

Concilium Lateranense sub Calixto Papâ ii. A. D. 1119. *In parochialibus ecclesiis presbyteri per episcopos constituantur, qui eis respondeant de animarum cura, et de iis quæ ad episcopum pertinent, decimas et ecclesias à laicis non suscipiant absque consensu et voluntate episcoporum, et si aliter præsumptum fuerit canonice ultioni subjaceant.*

Concilia varia sub Alexandro Papâ iii. *Conciliabulum Clarendonense, quo sexdecim capitula consuetudinum, ut vocabant, Anglicanarum aequitati et ecclesiasticæ immunitati repugnantia confirmata sunt A. D. 1164. Alexandri Papæ iii.*

Ecclesiæ de feudo domini regis non possunt in perpetuum dari absque assensu et concessione ipsius.—Hoc toleravit [Papa].

Nullus qui de rege teneat in capite nec aliquis dominicorum ministrorum ejus, excommunicetur, nec terræ alicujus eorum sub interdicto ponantur, nisi prius dominus rex, si in terrâ fuerit, conveniatur, vel justitia ejus, si fuerit extra regnum, ut rectum de ipso faciat, et ita ut quod pertineat ad curiam regiam ibidem terminetur, et de eo quod spectabat ad ecclesiasticam curiam ad eandem mittatur, ut terminetur.—Hoc damnavit [Papa].

Appendix Concilii Lateranensis [tertii Œcumenici sub Alexandro iii. Papa, A. D. 1179 or 1180. Binus T. iii. p. 2. fo. 1387. pars 13. c. 9.] *Statuimus ut monasteria ex suis prædiis nullo modo decimas solvere cogantur. Quia si legitime dandæ sunt, orphanis et peregrinis dandæ sunt. Indignum est enim ut à clericis exigantur, qui propter eum cujus sunt decimæ, pauperes efficiuntur. Nam si pauperes domini sunt, pauperum hæreditas pauperibus ejus eroganda est illis videlicet, qui propter amorem illius quæ poterant possidere dimittunt, cumque nudi sequentes potestati alterius se submitunt.*

Parâ 13. c. 16. f. 1388. Novum exactionis genus est, ut clerici à clericis frugum vel animalium decimas exigant. Nunquam enim hoc in lege Domini præcipi legimus aut permitti: nec enim à Levitis Levitæ decimas extorsisse leguntur. Illi profectò solvere laborum suorum decimas debent, qui à clericis spiritualium ministeriorum labores accipiunt.

Parâ 50 et ult. c. 39. f. 1436. Noveris ergo quod si de artificio, vel de ne-

(1) The time of holding this council is not known; it is placed by Binus immediately after the preceding.

(2) I cannot find this under John xii.

gotiatione, aut etiam de agriculturâ, quam inter terminos parochiæ, in quâ moratur, exercet, vel hujusmodi aliis decimæ solvantur; æquum est, ut ecclesiæ illi reddantur in quâ ille qui reddit per totum anni circulum missam audit.

C. 40. Quod si laicus aliquis à clericis sive conversis decimas de laboribus suis in tuâ diœcesi requisiverit, te eum ab exactione hujusmodi prorsus compellas, et laicos illos qui à colonis tertiam vel quartam partem laborum suorum ante solutionem decimarum recipiunt, decimam de portione sud secundum quod colonus de parte, quæ illum contingit, exolvere consuevit, absque diminutione aliquid his quibus debentur facias exhibere.

Par. 28. c. 3. f. 1407. Statuimus, ut si super decimis inter vos et aliquam personam ecclesiasticam assensu episcopi vel archiepiscopi sui compositio facta fuerit, rata perpetuis temporibus et inconcussa persistat.

Canones Concilii Lateranensis Generalis sub Innocentio Papâ ii. celebrati. Binius T. iii. p. 2. c. 10. Decimas ecclesiarum, quas in usu pietatis concessas esse canonica demonstrat auctoritas, à laicis possideri apostolice auctoritate prohibemus. Sive enim ab episcopis, vel regibus, vel quibuscumque personis eas acceperint, nisi ecclesiæ reddiderint, sciant se sacrilegii crimen committere, et periculum æternæ damnationis incurrere. Præcipimus etiam ut laici qui ecclesias tenent, aut eas episcopis restituant, aut excommunicationi subiaceant.—[Calthorpe.]

THE King was seised of a forest in the parish of Pewsey in the county of Wilts, he granted it to the Duke of Somerset, from whom it came by *meane* conveyance to the Earl of Hertford: Leech, the rector of the parish of Pewsey, libelled in the spiritual court the earl for tithes in the said forest, who brought a prohibition against Leech, and suggested that King Edw. 6. and all his progenitors, Kings of England, held the said forest time out of memory discharged of payment of all manner of tithes, who granted it over as before stated; and the only question was, whether the prescription suggested was good, and the court (in the absence of BRAMPSTON) after several arguments at the bar held, that it was not a good surmise. They agreed, 1. that the King might prescribe *in non decimando*, as he was *persona mixta*. 2. that the council of Lateran did not bind him, unless where he voluntarily submitted to it, but they said, that this was but a personal privilege which *non egreditur personam*, and the grantee shall not have the benefit of it; and that there was no difference between this case and *Sydow v. Holmes*, (1) wherefore a consultation was granted, and afterwards BRAMPSTON agreed to it. [W. Jones.]

(1) *Ante*, 383.

M. 14 Car. B. R. *Broadhead v. Lewys*. [W. Jo. 414.]

IN prohibition, the case was, that the prohibition was grounded upon a unity of possession by an abbey of a rectory and lands, which came to H. 8. by the dissolution of the abbey, and afterwards the rectory and the lands were separated, and the grantee of the rectory sued the grantee and patentee of the lands for tithes. The defendant in prohibition pleaded for consultation, that at the time of the dissolution of the abbey, and before time of memory, the said lands were demised for term of years, and that the farmers paid tithes for all that time; whereupon the plaintiff demanded and judgment was given in C. B. for the defendant, and the plaintiff in prohibition brought his writ of error, and by all the court, the plea for a consultation was not good, for it was general, and no issue could be taken upon it. Therefore the judgment was reversed.

it was held by B. R. in error from C. B. that the plea was too general, and that no issue could be taken upon it, and therefore bad.

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Where upon suggestion of a unity of possession of a rectory and the lands of which, &c. the defendant pleaded for consultation, that time whereof, &c. the lands had been demised and tithes paid by the farmers thereof,

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Tithes shall be paid of young trees planted in a nursery, when taken up, and sold to be planted in other parishes, as well as of corn or carrots, or such things.

H. 14 Car. B. R.
Gibbs v. Wyborne. [Cro. Car. 526.] W. Jo. 416.

PROHIBITION. For that the defendant libelled in the spiritual court for tithes of young trees planted in a nursery, upon purpose to be rooted up and sold (1) to be planted in other parishes. Upon demurrer the question was, whether tithes shall be paid for them. For *Rolls* for the plaintiff argued, that they were of the land, and tithes shall not be paid of them, no more than of mines of coal or stone digged, or for trees or wood spent in hedging, or fuel in the house, wherein husbandry is maintained. But *Maynard* argued, that for as much as he made a profit by such young trees, it is reason tithes should be paid for them when he digs them up and sells them in another parish, as well as of corn, or carrot-roots or such things. And of this opinion was all the court; whereupon a consultation was awarded.

(1) According to Sir W. Jones, "which he used to transplant, and give or sell to others."

E. 15 Car. B. R. *Anon.* [March. 11.]

All tithes *de jure* belong to the parson.

A VICAR cannot have tithes but by gift, composition, or prescription; for all tithes *de jure*, do appertain to the parson.

E. 15 Car. B. R. *Anon.* [March. 15.]

Ancient mills are not titheable.

NO ancient mill is titheable; but mills newly erected, shall pay tithes, by the statute of 9 E. 2. 5.

E. 15 Car. B. R. *Anon.* [March. 17.]

Fish in rivers not titheable.

FISH in the river are not titheable, if not by custom.

E. 15 Car. B. R. *Anon.* [March. 21.]

A plaintiff in an action on 9 E. 6. need not state his interest: whoever takes the tithe is a trespasser, be he disseisor, or servant. So if he cut the tithes, and another carry them away, action lies against either.

IT was moved in arrest of judgment upon an action of trespass upon the statute of 2 E. 6. cap. 13. because that the plaintiff said that the defendant was occupier only, and did not shew how he occupied, or what interest he had. And the clear opinion of the court was, that he need not, because here he makes no title: and whosoever it be that takes the tithe, is a trespasser. And therefore Justice JONES said, that it was adjudged in this court, that an action lies against the disseisor for the tithes; so against a servant: and so if one cut them, and another carry them away, an action lies against any of them.

E. 15 Car. B. R. *Anon.* [March. 25.]

A suit by one of two joint tenants, is no cause for prohibition.

IF two joint tenants be of a rectory, and one sue for tithes by himself only, it is no cause of prohibition. So if a feme covert sue solely upon a defamnation, a prohibition shall not be granted.

E. 15 Car. B. R. *Anon.* [March. 25.]

A hundred may prescribe in *non decimando*, but a parish or town cannot.

A custom that tithes shall not be paid of pheasants.

A HUNDRED may prescribe in *non decimando*, and it is good; for it is the custom of the county, which is the best law which ever was. But a parish, or a particular town, cannot prescribe in *non decimando*. And thereupon a prohibition was granted. And a prohibition was granted in this court, upon this surmise: that the custom was, that tithes should not be paid of pheasants.

Tr. 15 Car. B. R. *Anon.* [March. 47.]

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TWO joint tenants of a rectory agree with some of their parishioners, that they shall pay so much for tithes; and notwithstanding, one of them sues for tithes in the ecclesiastical court; and a prohibition was prayed, because that one of them cannot sue without the other; and the court would not grant it: and their reason was, because although that one of them cannot sue without the other by our law, yet, perhaps the spiritual court will permit it.

No prohibition shall be granted to a suit by one of two joint tenants of a rectory, for though our law will not

allow it, yet perhaps the spiritual court will.

M. 15 Car. B. R.

Facy v. Lange. [Cro. Car. 559.] W. Jo. 447.

AT TACHMENT upon a prohibition. The plaintiff declares that the defendant sued him in court-christian, after a prohibition delivered, for tithes which were discharged *per modum decimandi*. The first issue was, that he did not sue after the prohibition delivered. The second upon prescription; and both found for the plaintiff, and damages and costs given by the jury. And now *Maynard* moved, that neither damages nor costs ought to be assessed, but the party is only fineable to the king for the contempt of prosecuting his suit, &c. But upon a judgment in the Common Bench upon advisement and search of ancient precedents, where the suit being continued in the spiritual court after a prohibition delivered, an attachment issued upon the prohibition; and because thereby the party was dammified, and put to his suit of attachment, which was found to be sued, the party there recovered damages and costs. So the court here unanimously agreed, that the party shall have his damages and costs found by the jury: and rule was given for judgment to be entered accordingly, unless cause, &c.

In an attachment upon a prohibition, the jury found that the suit was prosecuted after prohibition delivered, and gave damages and costs; and on motion in arrest of judgment it was held good.

M. 15 Car. B. R.

Barfoot v. Norton. [Cro. Car. 559.] W. Jo. 447. 2 Gw. 501.

PROHIBITION for suing for divers kinds of tithes, *et inter alia* for honey, *servans* it was not payable, *quia volatilia*; and it was thereupon demurred. And now moved by *Grimston*, that by law tithes are to be paid for honey; as appears in *Fitzh. Nat. Brev.* 31. g. and *Lindwood* fol. And of that opinion was all the court: and consultation was awarded, unless cause, &c.

Tithe shall be paid of honey.

M. 15 Car. B. R. *Anon.* [March. 56.]

A MAN libelled in the spiritual court, for tithes for barren cattle; and it was moved for a prohibition upon this suggestion: viz. that he had no other cattle than those which he bred for the plough and pail; and thereupon *Berkley* being alone there, granted a prohibition. And the same parson also libelled for tithes of conies; and for that also he granted a prohibition; for they are not titheable, if not by custom. And here *Berkley* said, that if land be titheable, and the tenant do not plough it, and manure it, yet the parson may sue for tithes in the ecclesiastical court.

Prohibition to a suit for tithes of barren cattle, upon suggestion that they were bred for plough or pail.

No tithes are due for rabbits, but by custom.

M. 15 Car. B. R. *Anon.* [March, 58. 64.]

SKINNER libelled in the ecclesiastical court for the tithes of roots of a coppice rooted up. And *Porter* prayed a prohibition. And it was said by *Jones* and *Berkley*, Justices, no other justice being present, that if cause were not shewed before such a day, that a prohibition should be awarded, because

No tithes are due of quarries of stone, or of brick or clay.

No tithe is due of the roots of underwood, but

by custom, which may make that titheable, which is not of itself so. It is a rule, that where the parishioner does any thing which he is not compellable by the law to do, which is for the benefit of the parson, if he demand tithe of the thing, in lieu whereof it is done, prohibition lies.

1640.

because it is *ad exheredationem*, and utter destruction of it. And the opinion was, that the branches should be privileged. And a man shall not pay tithes of quarries of stone. And BERKLEY said, it had been adjudged that a man shall not pay tithes for brick and clay.

Serjt. *Jermayn* came into the court, and shewed cause why a prohibition should not be granted in the case of Skinner before, who libelled for tithes of coppice rooted up. He agreed, that for timber-trees above the growth of twenty, no tithes should be paid; and so he said was the common law before the statute of 45 E. 3. which was but a confirmation of the common law. And he said, that as the body of the tree is privileged, so are the branches and root also; which is a proof, that where the body is not privileged, there neither shall be the root or branches. And in our case he libels for roots of underwoods, and the underwood itself being titheable, therefore the roots shall be also titheable. And he said that the roots are not parcel of the land. But Justice BERKLEY was against it, for they are not *crescentia*, nor *removantia*, as tithes ought to be; and therefore no tithes ought to be paid for them. And he said that a prohibition had many times been granted in the like cases; but Dr. Skinner did allege a custom for the payment of tithes of them: and upon that they were to go to trial. And here it was said, that Dr. Skinner had used to have some special particular-benefit of the parishioners, in lieu of tithe of roots: and thereupon BERKLEY said, that it is a rule, where the parishioner does any thing which he is not compelled by the law to do, which comes to the benefit of the parson, there, if he demand tithes of the thing, in lieu whereof this is done, that a prohibition shall be granted. And there is another rule: that custom may make that titheable which, of itself, is not titheable. And here he said to Dr. Skinner, being then in court, that he had two matters to help him, and if any of them be found for him, that a prohibition ought not to be awarded.

M. 15 Car. B. R. *Anon.* [March. 73.]

Prohibition upon suggestion of a *modus* (though pleaded in the spiritual court), denied after sentence there.

A PARSON libelled in the ecclesiastical court for tithes. And after sentence, *Rolls* moved for a prohibition upon the suggestion of a *modus decimandi*; but it was not granted, because too late. But *Rolls* took this difference, and said that so had been the opinion of the court, where the party pleads the *modus*, and where not; for if he plead it, there, notwithstanding a sentence, prohibition has been granted; contrary where he does not plead it. But, notwithstanding, the court refused to grant a prohibition.

M. 16 Car. B. R. *Anon.* [Cro. Car. 596.]

It was doubted whether a curate and sequestrator of a living in London could sue for tithes in the spiritual court, or other place, or before other judges than 37 H. 8. appoints.

PROHIBITION was prayed, for that one J. S. (who was a curate and sequestrator of the rectory of D. in London, by reason that Dr. Walker, for contumacy and other causes, was suspended from exercising his function there), sued four of the parishioners in the spiritual court, for tithes of their houses, and not before the mayor, according to the decree and the statute of 37 Hen. 8. for they ought clearly to sue before the mayor of London, and not in the ecclesiastical court; and therefore divers prohibitions have been granted: but whether in this case it was grantable, the said J. S. being neither parson nor vicar, was the doubt. And it was moved at the bar, that for houses tithes ought not to be paid, unless there be a special custom, as in Co. 11. 16. Dr. *Grant's* case is clearly resolved, (1) and the statute is introductive of a new law, and thereby is appointed how it shall be ruled, and before what judges, and what remedy shall be for the party grieved, unless their order be obeyed; and then he may not sue in another place, nor before other judges than the said statute appoints. And if prohibition should not be admitted for suing, it should be a defrauding of the statute, and would make it of none effect; wherefore the court doubted, and would further advise, and gave day to hear counsel on both sides.

(1) *Ante*, 222.

H. 16 Car. C. B. *Anon.* [March. 94.]

1640.

WHERE there are several *modus*es alleged, there several prohibitions shall be granted; but where divers are sued jointly, and they allege one *modus* only, there they shall have but one prohibition, by REEVE and FOSTER, Justices, the others being assent.

Where several *modus*es are alleged, several prohibitions shall go; where divers are sued for one *modus*, but one prohibition.

E. 17 Car. C. B. *Weeden v. Harden.* [March. 79.]

1641.

CUSTOM to pay tithes in kind for sheep, if they continue in the parish all the year; but if they be sold before shearing time, but an half-penny for every one so sold. And custom in the same parish also to pay no tithes of loppings or wood for fire, or hedges, &c. The first is an unreasonable custom, for by such means the parson shall be defeated of his tithes. But the last custom is good, by the whole court.

A custom to pay tithes in kind for sheep, if kept all the year; but if sold before shearing time, to pay a half-

penny for each sold; held unreasonable. A custom to pay no tithes of loppings, or wood for fire or hedges, held good.

E. 17 Car. B. R. *Hichcocke v. Hichcocke.* [March. 87.]

THE case was this: the vicar contracted with a parishioner to pay so much for increase of tithes, and died; and his successor sued in the ecclesiastical court for them: and a prohibition was prayed, and granted by all the justices. And here it was said, that a real contract made by the parson, and confirmed by the ordinary, could not be altered in the spiritual court. And by Serjt. Mallet, a real accord, though it be between spiritual persons, and of spiritual things, yet it is only questionable at the common law. 20 E. 3. *Annuity*, 32. 38 E. 3. 6. 8. & 19. And by Serjt. Clarke, Real composition by a parson, who claims not any increase of the endowment to the parsonage, shall not bind his successor. The words of the contract here were, *inter se convenimus*; and that is no real composition, although that the bishop call it so, *realis compositio*; and his calling of it so does not alter the nature of it, but it remains a personal agreement, and so shall not bind the successor, although it be confirmed by the bishop. A parson cannot do any thing to the damage of his successor. The vicar took oath, that they were not for increase of tithes: the ordinary being a stranger to the composition, is not made a party by his confirmation, nor is the composition altered by it. *Littlel. sect.* 335. The lord confirms the land to the tenant, the same does not alter the tenure, nor prejudice the lord. The power of the bishop, *augendi et minuendi* the portion of the vicar, is, by the common law, for general cure of souls. The parson and vicar have privity betwixt them. 40 E. 3. 28. 31 H. 6. 14. 16. *An. Annuity*, 32. 2 Rep. 44. *Plow. Com.* 496. 21 E. 3. 5. 10 H. 7. 18. *Dy.* 43 & 84.

A real accord, though it be between spiritual persons, and of spiritual things, is only questionable at common law.

A vicar contracted with a parishioner to pay a certain sum for increase of tithes in kind, and died; and his successor sued in the spiritual court for them: prohibition was granted.

E. 17 Car. B. R. *Anon.* [March. 94.]

THE inhabitants within the parish of H. having a chapel of ease, and custom that those within such a precinct ought to find a rope for the third bell, and to repair part of the mother-church; in consideration of which, they have been freed from payment of any tithes to the mother-church. Whether it be a good custom, or not, *quare*, for it was adjourned.

Quere, whether a custom that the inhabitants of the precinct of a chapel should be freed

from the payment of tithes in consideration of finding a rope for a bell, and repairing part of the mother-church, be good.

M. 17 Car. C. B. *Anon.* [March. 120.]

IT was moved by Serjt. Wild, that depositions taken in the ecclesiastical court might be given in evidence in a trial in this court; and the court was against it, because they were not taken in a court of record: and they

Depositions in the spiritual court rejected as evidence in said,

1641.

C. B. not being taken in a Court of Record.

FOSTER and REEVE, against CRAWLEY, thought they ought not to be received, although the parties would consent.

said, although the parties were dead, yet they ought not to be allowed. And by BANKES, Ch. J. no depositions ought to be allowed, which are not taken in a court of record. And FOSTER and REEVE were of opinion, that although the parties would assent to it, yet they ought not to be given in evidence against the constant rule in such a case. CRAWLEY contrary, for he said, that a writing which by the law is not evidence, might be admitted as evidence by the consent of the parties.

1642.

H. 17 Car. C. B. *Anon.* [March. 157.]

In a suit in the spiritual court for stopping and hindering the carrying away of tithes, prohibition will be granted, if the libel do not set forth the statute specially, upon which it is founded.

A MAN libelled for tithes in the ecclesiastical court, and in his libel he set forth, that the tithes were set forth, but that the defendant did stop and hinder the plaintiff to carry them away any other way than through the defendant's yard; and when he was carrying them that way, the defendant, being an officer, did attach them for an assessment to the poor, and did convert them to his own use; upon which a prohibition was prayed, because that the tithes being set forth, an action of trespass lies at the common law. But Serjt. *Clarke* was against the prohibition, because that the libel is grounded upon the statute of 2 E. 6. cap. 13. which is, that if the parson, &c. be stopped or let in carrying his tithes, that the party so stopping or letting, should pay the double value, to be recovered before the ecclesiastical judge. But notwithstanding that, it was resolved that a prohibition should issue, because he that will sue upon the statute, ought to mention the statute, or to make his demand *secundum formam statuti*. But here the plaintiff does not sue upon the statute, for he does not mention it, nor the double value, as he ought; for they all agreed, that he ought to ground his action upon the express clause of the statute for the double value; wherefore a prohibition was granted.

1648.

H. 23 Car. B. R. *Bowles v. Broadhead.* [Aleyn. 88.]

To debt on 2 E. 6. defendant pleaded a discharge under 31 H. 8. Issue was joined on the discharge, and found against the defendant: held that the value should be taken as confessed; the issue being on a collateral point, and the value not taken by protestation, but neither damages nor costs.

IN an action of debt for £200, upon the statute of 2 E. 6. for tithes of land in the parish of Rinston *alias* Royston, the defendant pleaded the statute of 31 H. 8. And that the lands were discharged in the hands of the prior of Mount Bretton, at the time of the dissolution, and issue joined upon the discharge: and upon a trial at bar, the defendant not making good his plea, the court ruled the value to be taken as confessed, because the issue is joined upon a collateral point. And the defendant took not the value by protestation, and so the verdict was given for two hundred pounds, but neither damages nor costs.

Tr. 24 Car. B. R.

Southcott v. Southcott. [Sty. 103. 108. Aleyn. 80.]

Upon arrest of judgment, garbs in a declaration on 2 E. 6. shall be taken according to common construction, and so signify corn bound up, and not in the large extent for bundles of anything else: and that grain should, according to common construction, be taken for corn, and not seeds, as mustard-seed, cole-seed, and rape-seed, &c. though in a large acception it may extend to seeds.

SOUTHCOTT brought an action upon the statute of 2 E. 6. for not setting forth tithes, against Southcott, and had a verdict. The defendant moves in arrest of judgment, and shews that the declaration was too general and uncertain: for it is for such a quantity of grain, and does not set forth what sort of grain, and so it may be for grain not titheable. *Maynard* of counsel with the plaintiff held, that in this case the declaration was well enough, although it would not have been so in an action of trespass, for that action requires more certainty. 2d. Exception was, that it is not said whether corn was in garbs or sheaves. To this *Maynard* said, it is well enough notwithstanding, for it shall be intended only of such grain as is usually put in garbs. *Hales* of counsel with the defendant said, the word *grain* was too general a word to be used, and

and no certainty in it, for it extends to mustard-seed, cole-seed, rape-seed, &c. and the *genus* ought to be expressed, and it shall not be intended of corn put in garbs. The court would advise, but inclined the declaration was too general, and not good. Afterwards,

In this case formerly moved, and judgment stayed till the plaintiff should move: *Maynard*, for the plaintiff, moved for judgment, and to the exception taken on the other side, that the word grain used in the declaration is too general, and may extend to grain not titheable, viz. to rape-seed and cole-seed, &c. as well as to titheable, and so the declaration is uncertain; he said it is well enough, for it is said grain growing in such a field by name, which makes it certain, 2 Co. lib. Int. 176. and for the word *grain*, in common understanding it is meant for corn, and not for seeds, though in a large acceptation it may extend to seeds also. *Hales*, on the other side, said, that the word grain is uncertain, and signifies more than corn; and also the word *garbæ* is too general, for it may extend to more than sheaves of corn; for bundles of anything bound up may be said to be *garbæ*, as well as corn bound in sheaves, and may extend also to grain not titheable. — *ROLLE*, J. held the words in the declaration, *seminavit cum grano* proper enough, and that by common construction it shall be meant with corn, and not with seeds, 10 Car. *Goldsmith's* case, Hil. Rot. 8. And for *garbæ*, it is also well enough, for it shall be taken according to common construction, which is to signify corn bound up, and shall not be taken in the large extent of the word for bundles of anything else. And the jury had taken notice of it, for they have found *debet*, which had they not, they could not have found the verdict so. The rule was for the plaintiff to take his judgment, if cause were not shewn Friday following.—[*Styl.*]

In an action of debt upon the statute of 2 E. 6. the plaintiff sets forth that he was *proprietary decimarum garbarum et feni*, &c. And that the defendant did sow certain land, containing so many acres in that parish, with grain, and after mowed it, and carried away the grain, not setting out the tenth part. And after a verdict for the plaintiff, upon *nil debet* pleaded, it was moved in arrest of judgment,

1. That the plaintiff had entitled himself as *proprietary decimarum garbarum*, and demands for tithe of grain in general, whereas *garbarum* is a word of uncertain signification, and divers sorts of grain are not wont to be bundled up as rape-seed, mustard-seed, and cummin-seed, which used to be threshed out in the field.

2. He demands for tithe of grain in general, which is too uncertain, for that there are several sorts of grain.

But it was resolved, 1. That *garbæ*, in its prime and proper signification, is intended of corn: and so *ROLLE* said it was resolved, 1. In *Barter's* case upon consultation with the Civilians, where one upon a grant of *decimas garbarum*, would have had tithe-hay; but they did agree, that the word in its latitude did comprehend anything that is used to be bundled, as wood, &c. but the ambiguity of the word here is taken away by the verdict, and is to be intended of grain that is garbable.

2. The word grain is certain enough, for that it is expressed to be sown upon a certain number of acres. And here is not a demand of the thing itself, but damages for it; and all predial tithes are within the statute. And this exception was over-ruled in the great case, *Coke*, Lib. Intra. 162. cited 2 In. 650. And *ROLLE* said, the same exception was taken in *Goldsmith's* case, Tr. 10 Car. Rot. 893. B. R. but the roll being seen in that case, the verdict was not entered. And *ROLLE* gave order that the judgment should be entered for the plaintiff; but after directed it might be respited till next term: but after the judgment was entered, and a writ of error brought in the Exchequer, but I think it was for delay only.—[*Aleyn.*]

1648.
SOUTHCOTT
&
SOUTHCOTT.

1648.

In an action on 2 E. 6. it was held sufficient in the declaration to say, that on such a day he was possessed, and from the same day occupied, and it shall be intended of a rightful estate; and when it is said that he is rector of the church, he shall be intended proprietor of the tithes till the contrary is shewn.

The parliament roll and not the journal book is the best evidence of a prorogation of parliament.

Tr. 24 Car. B. R. *Hobart v. Boraston*. [Styl. 107. 122. 155.]

UPON a rule to shew cause why judgment should not be stayed in an action upon the statute of 2 E. 6. for not setting forth tithes, these exceptions formerly taken were answered. 1. It was said the statute was misrecited, for the day when the parliament began wherein the statute was made is mistaken; but to this it is answered, that the declaration does not say *per statutum in parlamento inchoat. tali die*, but *in parliament. tento tali die*, and the parliament was held by prorogation the day that it is mentioned, though it were not then first begun, and so that is well enough. To the second exception, that the declaration does say that the plaintiff was *primo die occupator ac postea eodem die, &c.* So that it appears not, that he was proprietor, and so the action may not lie, for he may be occupator wrongfully, and so not proprietor. It is answered, that the declaration is, that he was *tali die possessionatus et ab eodem die occupavit*, and this shall be judged of a rightful estate; and it is said, that he is rector *ecclesie*, and so he shall be intended proprietor of the tithes, if the contrary be not shewn. The rule was, to shew better cause Friday following, else judgment for the plaintiff.

In an action of debt brought upon the statute of 2 E. 6. for not setting forth tithes, after a verdict, it was moved in arrest of judgment, that the statute was not well recited: for the parliament began in the first year of Ed. 6. and was prorogued, and the act was made the 26th of November, and not the fourth, as it is set forth to be. For proof of this a copy of the parliament roll, and an affidavit to prove the copy to be true were read in the court. *Hales* of counsel on the other side said, that the copy was taken out of the parliament journal book only, and not out of the writ for prorogation of the parliament, as it ought to be. — *Rolls, J.* said to the counsel on the other side, advise you how to answer this, and let the judgment stay in the mean time.

Upon view of the parliament roll of the statute of 2 E. 6. for payment of tithes, and comparing it with the declarations in the causes between *Bowes* and *Broadhead*, and *Boraston* and *Hobart*, it was found that the statute was rightly recited, notwithstanding what had been objected, and the journal book of parliament produced to the contrary; and thereupon judgment was given in both cases, and the court said that they were to be ruled by the parliament roll, and not the journal book.

M. 24 Car. B. R. *Banister v. Wright*. [Styl. 137.] 2 Gw. 501.

Lands must be parcel of a parish by prescription or by act of parliament, and extra-parochial tithes are due to the King.

Forest lands

in the hands of the King do not pay tithes although within a parish; but if they be disafforested and within a parish, they ought to pay tithes, for their not paying tithes in the hands of the King is but an immunity for that time only.

IN a trial at the bar between *Banister* and *Wright*, in an action upon the statute of 2 E. 6. for not setting forth tithes, it was said by the court, that tithes which lie not within any parish are due to the King, and that lands must be parcel of a parish, either by prescription, or by act of parliament; and that lands lying within a forest, and in the hands of the King, do not pay tithes, although they be within a parish: but if the lands be disafforested, and be within a parish, they ought to pay tithes, for their not paying tithes being in the hands of the King, is but an immunity for that time only.

1649.

E. 1649. B. S. *Gibbon v. Kent*. [Styl. 212.]

Two churches united by 37 H. 8. c. 21. are both of spiritual promotion.

A WRIT of error was brought to reverse a judgment given in the Common Pleas, in an action of debt brought upon the statute of 2 E. 6. for the not setting forth of tithes. The errors assigned were, 1. That it does not appear that the lands sowed lie in the parish that is laid in the declaration. 2. The plaintiff has not entitled himself well to his action, for the statute of 37 H. 8. is taken away by the statute of 13 Eliz. 3. The statute is not well pleaded, for it is pleaded too generally, and not in the several circumstances thereof, as it ought to be. The court commanded the record to be read, and

upon

upon oyer of it, answered, that two churches united by the statute, are both of spiritual promotion. And the statute of 13 Eliz. does not repeal the statute of 37 H. 8. But let the party shew cause why the judgment should not be reversed, and let us see a book.

1649.

GIBSON v. KENT.

M. 1649. B. S. *Cave v. Osby*. [Styl. 156.]

IN the trial between Cave and Osby, for not setting forth of tithes according to the statute of 2 E. 6. these things were delivered by the court, 1. That the King may present to a living by a letter, but a question whether he can do it by parol. 2. There ought to be the King's license to make an appropriation of a church, and to endow a vicar. 3. The King cannot make such a license without matter of record, and it ought to be with a condition to endow a vicar, and the endowment of the vicar may be by a distinct instrument from the appropriation, so that it be made at the same time when the appropriation was.

There ought to be the King's license to make an appropriation of a church and to endow a vicar; and the King cannot make such a license without matter of record,

and it ought to be with a condition to endow a vicar, which endowment may be by a distinct instrument, so that it be made at the same time as the appropriation.

M. 1649. B. S. *Harwood v. Paty*. [Styl. 161. 168.]

THE question insisted upon in this case was, whether upon a recovery in an action of debt against a parson, the tithes be extendible by *elegit*. *Hales* of counsel with the plaintiff held, that they are, because that tithes may be said to be tenements, and the parson has a freehold in them, although he hold them *jure ecclesie*. — But *ROLLE*, C. J. said, that a parsonage cannot be extended, but that the debt may be levied out of the profits of it by the sheriff, as it was wont to be done: for now there being no bishops the profits cannot be sequestered by the bishop of the diocese, as they used to be. But *JERMAN* and *NICHOLS*, Justices, doubted. — *ASK*, J. agreed with *ROLLE*, and said, that by the common law, the clergy are no more privileged from paying their debts, than laymen are. — *ROLLE*, C. J. said, it has been heretofore questioned, whether a clergyman be subject to watch and ward, or to contribute to satisfy for a robbery done within the hundred: but now it is no question but they are subject, and shall contribute. Adjourned till Saturday to be argued again.

The court were inclined to think that tithes are extendible by *elegit*: but they clearly held that they are not due *jure divino*.

The case between Harwood and Paty was again spoken to, by *WYLD*, of counsel with the plaintiff, wherein the action being an action of trespass for taking away wheat, rye, and wood, upon an *elegit* taken out against a parson, the question was, whether tithes are extendible upon an *elegit* by the statute, or not. And he held that they are not extendible, first, by the common law confirmed by *Mag. Charta* they are not extendible. Coke, upon *Magna Charta*, 3. and N. Brev. 227. Tithes are merely spiritual things, and exempt from all lay consideration, 11 Rep. 14. *Priddle* and *Napier's* case. (1) *Cawdrie's* case, 5 Rep. f. 15. 35 H. 6. 39. where rights of tithes are in dispute, the common law shall take place; but not where the tithes themselves are in dispute: *Selden's* History of Tithes, cap. 14. 2. The statute of Westminster makes no alteration of the common law in this point, and non usage is a good argument to prove it; for if they had been extendible, it would sometime or other have been put in practice; and by the express words of the statute of Westminster the second, tithes are excepted, and the process usually before that directed to the bishop for sequestration, is not taken away by the statute of 5 E. 3. 53. N. Brev. 266. Though it be a freehold, yet is it not within the statute; and if it be within the words of the statute, yet is it not within the meaning of it, as Coke upon the statute of Westminster 2. proves. 35 H. 5. 50. 9 E. 2. Clergymen anciently were not included in general acts of parliament; because the church was accounted as an infant always within age, and so favoured and protected by law. Next the late ordinance of parliament has made no alteration in this case; for the ordinance intended not to punish the parsons of churches, although it do oust bishops of their bishoprics and dignities. And as to the

(1) *Ante*, 205.

objection,

1649.

HARDWOOD

v.

PATY.

objection, that if the tithes should not be here extendible, there would be a failure of justice. I answer, that our case is out of the common law, upon which, the rule, that extraordinary courses are to be taken, rather than there should be a failure of justice, is grounded. — *ROLLS, C. J.* said, that there are two questions in this case, 1. Whether the tithes are within the statute. 2. Whether now that bishops are taken away by the parliament, the sheriffs may levy the debt of the clergy as the bishops used to do. And I conceive they may, by a *levari facias*. But the great question is, whether the *elegit* lie. And the court inclined it did. But you will argue it again, therefore we will deliver no opinion in it. And the court clearly held with *Mr. Selden*, that tithes are not due *jure divino*; and directed to search precedents, if a recognition had ever been extended upon tithes. [*See Hardr. 64.*]

1650.

Tr. 1650. B. S. *Cane v. Pell.* [Styl. 229.]

A motion in arrest of judgment, on the ground that it did not appear by the declaration on 2 E. 6. in what parish the lands laid. *Rolle, C. J.* said, that it shall be intended after verdict, that the tithes belonged to the plaintiff as parson of the parish, and were within it, but the declaration would have been bad on demurrer.

CANE brought an action of debts, upon the statute of 2 E. 6. for subtraction of tithes, against Pell, and had a verdict. The defendant moved in arrest of judgment, and took an exception to the plaintiff's declaration; that it did not appear by it, in what parish the lands lie, out of which the tithes grew due. On the other side it was said, it appeared well enough by implication; but if it did not, it is not now material, there being a verdict in the case by which it is helped. — *JERMAN, J.* said, there was only an implication to shew in what parish the lands lie, and that is not a violent implication neither, and therefore the declaration cannot be good. But *ROLLS, C. J.* answered, what if the plaintiff had only said, that the tithes belonged to him? And it is here after a verdict, and the declaration is helped by it; but if you had demurred to the declaration, it would have been ruled to be naught. And if the tithes belong to the plaintiff, why may it not be implied, that they belong to him as parson of the parish, and are of lands lying within the parish: but let us see a book, and speak to it again the next term.

M. 1650. B. S. *Fairefax v. Fairefax.* [Styl. 236.]

In a writ of dower the court at first held, that a demand out of *decimæ garbarum* was certain enough by common intentment; but afterwards they would advise whether such a demand, without saying *granorum* (by which it was held corn was signified) would be good; but it was not necessary to express the setting forth of the dower in the tithes by metes and bounds, for tithes cannot be so set forth.

IN a writ of error brought to reverse a judgment given in a writ of dower, these exceptions were taken:—1. That the original was not well returned, for there appears not to be any return of the proclamation of the summons; and though the party do appear, yet it was said, that it is not helped thereby. 2. The demand is uncertain; for the demand is *de tertid parte decimarum garbarum in Colton*, and by this demand the kind of the tithes demanded is not made certain; for the word *garba* admits of divers constructions, and so *Lindwood* the civilian shews. 3. It is not expressed whether the defendant be terre-tenant or heir. 4. The demand is *ac etiam de rectorid de Acerstall Malois*, which is uncertain, for it ought to be *de rectorid ecclesie*. — *ROLLS, C. J.* To the 1st exception said, that the appearance of the party will help miscontinuance of process, and so it does here. — *HALES*, to the 2d exception said, That *decimæ garbarum* is certain enough to common understanding. To the 3d exception, he held it not necessary to say *de rectorid ecclesie*, for it must be so necessarily intended. The court desired to see books, and so it was adjourned. At another day the case was again moved, and then spoken to and answered; 1st. As before, that *decimæ garbarum* is certain enough to common intentment. 2d. That it is not necessary to express the setting forth of the dower in the tithes by metes and bounds, for tithes cannot be so set forth, and it is not constant to use the expression *per metus et bundas*. — *LATCH* took another exception that it was improperly expressed, for one to enter into an advowson. And to the exception formerly taken, he held that the proclamation of summons ought to have been returned, and that fault is not helped by the late act, because it is matter of substance, and not mere matter of form; and he said that appearance of the party saves a discontinuance of mean process, but not of original process, as this is, which is the very foundation of the action; and that

that though the want of a summons be helped by the party's appearance, yet the want of returning the summons is not helped by the party's appearance. Next he held, as formerly, that *decima garbarum* is uncertain, and that the nature of the corn ought to be shewed. — **ROLLE, C. J.** said, that the not returning the proclamation of summons is not material; for the summons is only to make the party appear, and he has appeared in this case, and the late act extends to it, if it were not good without it. And the demand of *tertiam partem garbarum* is certain enough by common intendment; but it seems more certain here than so, for it is *tertiam partem garbarum granorum*, which signifies corn. And it is not necessary to express the setting forth of the dower *per metas et bundas*, but it is well as it is without that expression. And lastly, It is well enough said, *ingressus est* into the advowson, although it be not so proper an expression as might have been used; for it is good enough to make the party tenant. — **JERMAN, J.** to the same effect, and said, that if there be two tenants in common, and one of them die, it is a great question how the wife shall be endowed; viz. whether *per metas et bundas* or no. And he doubted whether the writ of error here brought were good or not; for it is returnable *coram custodibus libertatis, &c. apud Westmonasterium*, whereas it ought to be *coram custodibus ubicunque*; for they are not fixed to Westminster. — **NICHOLAS, J.** to the same effect. — **ROLLE, C. J.** said it was a good exception that **JERMAN** took to the writ of error; but the court was here at Westminster at the return of the writ, and the writ was made by the *custodes* themselves, and the parties did appear upon it; and therefore he questioned whether it might not be made good for these reasons. — **JERMAN, J.** held it could not. — **ROLLE, C. J.** said, that all the Latin precedents are agreeable to this writ, and it would be dangerous to alter them; but let the cursitors attend, and give their reasons why they do not alter this form, and if the writ be good, methinks the judgment should be affirmed. Yet we will advise a little of the writ, and whether the demand of *decimam partem garbarum*, without *granorum*, be good or not.

1650.
FAIRFAX
v.
FAIRFAX.

E. 1651. B. S. *Ritch v. Sanders*. [Styl. 261. 278.]

RITCH brought an action of trespass against *Sanders*, for taking away his corn set forth for tithes; upon issue joined a special verdict was found, whereupon the case fell out to be upon the construction of the words of a will, which were these, "I give all my free lands wheresoever to my brother John Sanders, and his heirs, upon condition that he suffer my wife to enjoy all my freelands in Holford, for life," the testator having only a portion of tithes of inheritance in Holford, and no lands. The question here was, whether this portion of tithes shall be accounted free lands, within the intent of the will, and so the wife be to have them during her life. *Twisden* held, the tithes were not devised by the will to the feme; for if I devise my fee-simple lands to John a Stile, and his heirs, tithes do not pass by this devise; for tithes are a collateral thing arising out of land, and not part of the land itself. 42 E. 3. f. 13. 10 Ja. *Moyle* and *Ever's* case, (1) 31 El. *Perkins* and *Hind's* case. (2) In the will here they pass not, for there are no words in the will to devise them, nor can the words be so expounded; and here are other lands devised to satisfy the words of the will. A term for years has more relation to land than tithes; and a term could not have passed by the words of the will. Next, the second clause does not pass the tithes, for there is no such thing as is expressed in it; but if it should pass to the wife by implication, yet it cannot pass to John Sanders the brother; for there are neither express words nor any implication to devise this portion of tithes to him, but the contrary rather is to be collected from the will. *Wadham Windham*, on the other side, answered, that the testator calls the tithes in Holford his free lands. It is true generally, that by the devise of lands tithes do not pass, but in a will by the intent of the devisor they may pass; and the word land includes all real things in common intention and legal construction, as *Latterel's* case is, 1 Mar. Bro. Tit. *Elegit*. An *elegit* may be of a rent, and tithes have a nearer

1651.

A testator devised all his free lands to his brother, upon condition that he suffered his wife to enjoy all his free lands in H. during her life; the testator had only a portion of tithes of inheritance in H. and no lands; the question was whether the portion of tithes passed to the wife by this devise. The opinion of the court seemed to be, that being used in a will they did pass, though it would have been otherwise in a conveyance.

(1) *Ante*, 204.

(2) *Ante*, 98.

1651.

BITCH.

v.

SANDERS.

relation to land than rent has. 2dly. Here is an apparent intention to devise the tithes; for he explains his meaning in his second clause of the will, that he intends tithes by the word lands, 44 Eliz. C. B. *Gery* against *Gery*. The question there was, what passed by the word rents, whether lands passed. The words were, "as to all my lands in Dale, I devise my rents," &c. and here the matter comes in by a proviso, which enlarges the matter, Trin. 3 Ja. *Fitzwilliam's* case: one devised all his goods, jewels, and plate, excepting his lease in C. there it was adjudged that all his other leases passed. 4 B. 3. Br. Grants, 51. Another circumstance in the will enforces this construction, viz. the word wheresoever, which word expresses the intent of the deviser to be so, otherwise that word will be idle, and to no purpose. Hob. Rep. *Stakely* and *Butler's* case. It may also appear out of the body of the will; for it appears thereby that his daughter was provided for in his will by his personal estate, and that the intention was, to dispose of his lands to the heir; and his copyhold lands, which he had in Holford, were surrendered at the time of the making of the will, and so the devise cannot refer to them; and besides this is called free lands, which distinguishes them from copyhold lands: and so he prayed judgment for the plaintiff. — ROLLE, C. J. There is a condition annexed to the devise, that his wife shall enjoy this land, though the words in the will are not very proper to express it; but we must consider them as used in a will, and not in a conveyance. — NICHOLAS, J. said, the deviser himself calls them freeholds, and this distinguishes them from copyhold lands. Adjourned till Saturday following to be argued again.

In an action of trespass and ejectment, upon a special verdict found, the case fell out to be this: a man, by his last will and testament, devised all his fee simple land wheresoever to his brother, upon condition that he suffer his wife to enjoy all his free lands in Holford, during her life; and the jury found that the testator had only a portion of tithes in Holford. The question was, whether the portion of tithes did pass to the wife by this devise. *Merfield* held, that the tithes pass not by the devise, because the word lands cannot extend to tithes, for that would be a very forced construction, and cited Trin. 17 Ja. B. R. *Knight* and *Knight's* case; and M. 39 & 40 Eliz. entered 38 Eliz. Rot. 269. *Yow* and *Harding's* case, B. R. that houses are not devisable by the name of lands; and he said, that the word wheresoever, makes no difference, as to make the tithes pass; and though there be an implication and an intent in the testator here to devise the tithes, yet that will not serve, because there wants words to express this intent, and though this be in a will, yet there must be words used to support the intent of the testator, for wills must be ruled by the rules of the common law. *Ashinghurst* and *Curtice's* case, Mich. 7 Ja. Hob. Rep. 34. the last edit. Mich. 42 & 43 Eliz. B. R. A devise of lands extends not to tithes, for tithes are not lands, but a mere collateral thing to them, and have no relation to them, Mich. 1 Ja. Rot. 192. *Mills* and *Hide's* case, B. R. 11 Rep. *Pridle* and *Naper's* case, (1) f. 13. b. Trin. 42 Eliz. B. R. *Sherwood* and *Winston* held, that tithes cannot be appendant to a manor, 1 Rep. 111. *Albanies'* case; and here are no words in the proviso to pass the tithes. It is true that tithes may lie in tenure, and that an action of debt lies for them, but that is by the statute of 19 Eliz. Dyer, f. 354. The word land in a will does not extend to tithes; and heirs ought not to be disinherited by doubtful and ambiguous words, as it must be here, if these tithes should pass. Next, as to the verdict, he said, that it is not thereby found that the testator died possessed of the tithes, as it ought to have been, as it has been adjudged, 43 Eliz. and so he prayed judgment for the plaintiff. *Maynard* of counsel with the defendant argued, that the tithes did pass by the will, otherwise part of the will must be void; which ought not to be, if all parts may be so construed that they may stand together; and he agreed that lands and tithes are distinct things; but in wills it is not to be so much considered whether the words of them be proper, but what was the intent of the testator in them, and whether they do declare his meaning or not; and here, by construction of the words by free lands, inheritance is meant in opposition to copyhold lands, or terms for years. 2dly. Here is a positive assertion of the testator himself,

(1) *Ante*, 205.

that

that in his understanding he had free lands in Holford, for he had no other lands there. 35 Eliz. *Robinson's case*, Rot. 504. B. R. by a will things of one nature may pass by words which are proper to pass things of another nature, 44 & 45 Eliz. Rot. 125. A devise of lands and tenements will pass leases for years, if there be no other lands, to pass by those words in the place expressed in the will; and so prayed judgment for the defendant. — *ROLLE*, C. J. asked what he said to the exception, that it is not found that the testator died seised of the tithes? without doubt it had been ill upon a demurrer, therefore see if you cannot help it by the notes by which the verdict was drawn up. But for the matter in law, methinks it is a strong case that the tithes do pass; for we are in the case of a will, where the meaning of the party shall be observed, if it may be found out by any means, though it cannot be collected *ex vi termini*; and should it not be so here, part of the will would be void, which may not be, if we can make it otherwise by a reasonable construction: but I will consider of the verdict, and do you consult with your notes. — *JERMYN*, J. The verdict ought to find the dying seised, and till I am satisfied from the notes I will deliver no opinion. — *NICHOLAS*, J. held both the devise good, and the verdict also, but said it been otherwise upon a demurrer. — *ASK*, J. to the same intent. — *JERMYN*, J. It is clear that the testator intended to devise the lands (1) in Holford, and it is a good devise; but if the verdict be imperfect it is for the plaintiff, but if otherwise it is for the defendant. The court would advise touching the verdict.

(1) Qu. "tithes."

M. 1651. B. S. *Cressit v. Burgis*. [Styl. 296.]

AN action of debt was brought upon the statute of 2 E. 6. for tithes. Upon *nil debet* pleaded, and a verdict and damages given for the plaintiff, it was moved in arrest of judgment, that the damages given are for tithes growing upon seventy-one acres of land, whereas the plaintiff in his declaration declares but for tithes growing upon seventy acres of land; so that the damages are given for more than is declared for, and contrary to the demand. To this it was answered, that this is but the mis-counting of the jury, and is not material; because by the whole declaration it appears there was but seventy acres, and this is but a description by the jury how the several parcels of land were sown, viz. with what corn. — *ROLLE*, C. J. said, the declaration is, that the defendant was seised of seventy acres of arable land, and that so many acres were sowed with wheat, so many with oats, so many with mealin, so many with beans; and as to the five acres residue, sowed with barley, which all amount to seventy-one acres; and it ought to have been as to four acres residue; so that this is but a mis-counting of the jury, for the jury cannot be deceived, for the land is called but seventy acres in the declaration, and no damage arises to any by this mistake. To which the rest of the judges agreed, and judgment was given for the plaintiff, *nisi*.

In an action of debt on 2 E. 6. it was moved in arrest of judgment, that damages were given for 71 acres, whereas only 70 acres were declared for; but the court held it to be but a mis-counting of the jury, which would not vitiate.

Tr. 1652. Scacc. *Baynton, Kt. v. Bennett*. 1 Wood, 4.

Wiltshire, 28th June, 1652.

THE bill stated, that the late dean and chapter of the cathedral church of Winchester, by indenture under their common seal, dated the 26th day of June, in the eleventh year of Charles the First, did "demise and grant unto "T. Lambert all that rectory and parsonage of Rewill, with all houses, and "tithing of corn and grass, and all commodities to the same belonging, which "he then had, or that H. Blackborrow or J. Blagden, or their assigns, before "had, or ought to have, belonging to the said rectory, to have and to hold to "the said T. Lambert, his executors and assigns, for twenty-one years:" that afterwards the same, by several conveyances, came to William Dunch, who for

1652.

A payment to the rector of Rewill, of twelve bushels of wheat yearly, out of certain lands in the parish of *Steeple Ashton*, as a portion of tithes or composition for tithes arising out of some

the said lands, held good, and decreed, and also that it should be continued for the future.

1652.

DAYTON

v.

BENNETT.

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some time enjoyed the same; that in February, 1646, he conveyed the same to the plaintiff, who, by virtue thereof, became possessed of the said rectory and premises, and received the profits thereof; and that among other things belonging to the said rectory there is due to the rector and impropriator, about the first day of November yearly, twelve bushels of wheat out of certain lands in the parish of Steeple Ashton, as a portion of tithes or composition for tithes arising out of the said lands, which had been paid for the space of sixty years and upwards by the tenants to the rector and impropriator of Rewill, and which the defendant himself, until of late, had constantly paid; but that for five years past he had refused to pay the said twelve bushels of wheat; and also had refused to let plaintiff know from what lands the said tithes arise; and thereupon he prayed the aid of the court to be relieved in the premises.

The defendant answered, and confessed, that he had paid twelve bushels of wheat to the rector of Rewill every year for twenty-one years, but at no certain times; but denied that he paid it as a portion of tithes, or as a composition for tithes.

The plaintiff replied; the defendant rejoined: and witnesses were examined.

The cause came on to be heard this day before Mr. BARON THORPE; and upon debate of the matter, and reading the depositions of divers witnesses in the cause,

The court ordered, that the plaintiff shall bring an action, wherein he shall declare, that the defendant, in consideration of five shillings in hand paid by the plaintiff, has affirmed and promised, that if the plaintiff shall prove that the owners and farmers of the farm of Steeple Ashton have accustomed, and for the time being ought to pay twelve bushels of wheat yearly, as a portion of tithes or composition for tithes, to the rector of Rewill for the time being, that then he, the said defendant, will pay to the plaintiff forty shillings; the defendant at the trial to admit the plaintiff's title to the rectory of Rewill, and insist only upon the right of payment of the said twelve bushels of wheat yearly.

The said trial was had accordingly, and a verdict given for the plaintiff. And upon hearing counsel for the said parties,

The court ordered, that the defendant shall pay to the plaintiff twenty pounds for the arrears of the tithes in question for five years, and that for the future he shall continue the payment of the said tithes.

STEELE, *Chief Baron.*  
THORPE, *Baron.*

1654.

M. 1654. Scacc. Page v. Lawe. 1 Wood, 11.

Northamptonshire, 26th October, 1654.

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Tithe issue for furze.

A custom that the inhabitants of a hamlet should pay a rate or sum of moneie in gross, or as a rent to the rector of the parish of 13s. 4d. yearly, in lieu and satisfaction of all tithes, commonly called small tithes, or white tithes, yearly arising in the said hamlet, sent to an issue at law; upon which a verdict was found against the custom.

THE bill stated, that the plaintiff had been for twelve years past the true owner and proprietor of the impropriate rectory or parsonage of Cundle, and that he ought to have had all manner of tithes of corn, grain, hay, furzes, wool, lambs, milk, calves, and all other great and small tithes arising within the manor or lordship of Cundle, and all the hamlets, and places, and territories whatsoever, part of the said manor, as belonging to the said rectory; that the hamlet of Ashton then was, and always had been, within the said rectory of Cundle; that the inhabitants of the said hamlet had always paid, and ought of right to pay, their tithes arising and renewing within the said hamlet to the rector of the said rectory in kind; that the defendant was an inhabitant in Ashton aforesaid for several years past, and ought to have paid his tithes to the plaintiff, but that for seven years past he had not set out for the plaintiff any tithes of furzes growing therein, although he had cut several; that he also denied to pay to the said plaintiff any tithes of wool, lamb, milk, calves, pigs, pigeons, turkeys, apples, and other fruit, or any other of his small tithes, although he had sheared many sheep, and had many lambs, calves, pigs, turkeys, pigeons, apples, and other fruit, and much milk within the said rectory, for which he ought to have paid tithes in kind to plaintiff; and he prayed that the defendant might set forth what quantity of furze he had cut down and carried

carried away for seven years past, and what small tithes he had in the said hamlet of Ashton, and give the plaintiff a satisfaction for the same.

The defendant answered, and alleged, that although he had been an inhabitant in Ashton aforesaid, for the time mentioned, yet he never paid any tithes for furzes or pigeons to the plaintiff, or any other impropriator of Cundle, nor did he conceive any ought to be paid for the same, or any thing in lieu thereof: and for the other tithes in the bill mentioned, called small tithes, he denied the same, or any part of them, to be due and of right belonging and payable in kind to the plaintiff, or any other impropriator of the said rectory; for that the custom and usage, time out of mind or otherwise, had been in the said hamlet of Ashton, "that the inhabitants of the said hamlet should pay a rate or sum of money in gross, or as a rent, to the impropriator of Cundle, of thirteen shillings and four-pence yearly, in lieu and satisfaction of all tithes commonly called small tithes, or white tithes, yearly arising in the said hamlet;" that the defendant had made a tender of the same to the plaintiff, in satisfaction of the said small tithes, which he had refused to accept. The defendant by his further answer set forth the number of sheep, lambs, and calves he had, which were depastured in the common fields of the village or hamlet of Ashton.

The plaintiff replied; the defendant rejoined; and witnesses were examined on the part of the plaintiff only.

Upon opening the pleadings, and reading of several depositions, and of several records produced by the defendant,

It is ordered and decreed by the court, that the possession of the said tithe furzes shall be settled with the said plaintiff.

It is further ordered, that the possession of the said small tithes shall be established with the said plaintiff until he be evicted by law.

And to the end a trial may be had touching the manner of tithing mentioned in the answer, it is further ordered, that the defendant shall bring an action against the plaintiff, and that the custom of tithing shall be the only thing to be tried. And the equity of the said cause reserved.

In pursuance of the said order, a trial was had, and a verdict given for the plaintiff.

Upon hearing counsel on both sides, and reading the said order, and the record of the said trial,

It is ordered by the court, that the said defendant shall pay to the said plaintiff eight pounds for the tithes in question, and shall continue the payment of the tithes for the future to the plaintiff. And it is further ordered, that the said defendant shall pay to the said plaintiff four marks for his costs.

WM. STRELE, *Chief Baron.*

M. 1654. Scacc. *Tourie v. Pearson.* 1 Wood, 18.

Yorkshire, 13th November, 1654.

THE bill set forth, that the late King James was heretofore seised of and in the rectory of Kirkby Grindelitch; and being so seised, by his letters patent, did give and grant the said rectory to Richard Foster and his heirs for ever; by virtue whereof the said Richard Foster became seised of the said rectory in fee; which estate was, by good and sufficient conveyance and assurance, conveyed to the said plaintiff, who had for many years last past enjoyed the same; that a certain messuage and grounds called Mowthorpe Grange is, and time out of mind had been, and was ever reputed and taken to be within the said rectory and the titheable places of the same; that the owners or occupiers of the said Mowthorpe Grange, with the lands and grounds to the same belonging, have continually, and time out of mind, paid, and been accustomed to pay, all manner of tithes arising upon the said Grange, lands, and grounds; and that the said tithes were so paid by the owner and occupier of the said grange and grounds from time to time without any manner of question or denial until of late that the said defendant, being occupier of the same, began

Copy of a bull of Pope Innocent III. out of the register of Alvingham deposited in a college in Oxford (not a party) allowed to be read.

1654.
TOWRIE
v.
PEARSON.

began to debt to pay to the plaintiff the tithes of wool, and lamb, and calve yearly arising therefrom; that for five years past, the said defendant has occupied the same, and had yearly kept, fed, and depastured divers beasts and cattle upon the said ground, viz. ewes, wethers, and milch cows, the tithes of which were worth yearly twenty pounds, which he had denied to pay to the said plaintiff; and he prayed, that the defendant might discover and declare the reasons for so doing, and might set forth the number of sheep and cows, and the value of the tithes he had in the said years; and that he might pay a satisfaction for the same.

The defendant answered, and confessed, that he was owner and occupier of the said grange and grounds, and that he denied to pay the tithes of wool, lamb, and calve, yearly arising and renewing thereof, for that he conceived no tithes ought to be paid of, for, or in respect of the same, or any part thereof, for that the said grange, lands, and grounds were parcel of the land and possession of and belonging to the late dissolved monastery, of Old Malton, and in the hands and possession of the said monastery at the time of the dissolution of the same in the reign of King Henry the Eighth, or in the hands and possession of some of his predecessors, priors of the said monastery, in right of the said house and convent, before the said dissolution, and that during all the time that the said grange, lands, and grounds continue in the possession and occupation of the owner thereof, no tithes ought to be paid out of the same, for that during the time they remained in the hands and possession of the said prior and his predecessors, they were discharged of payment of tithes, and the same were so discharged at or before the dissolution of the said monastery; that the said rectory of Kirkby Grindelitch was then also parcel of the abbey of Kirkham, and being parcel of the said abbey came to the crown in the reign of Henry the Eighth by the dissolution of the said abbey; that the said grange, lands, and grounds, being parcel of the said late dissolved monastery of Old Malton, and being so discharged of tithes as aforesaid, came to the crown in the thirty-first year of the reign of the said King, by the dissolution of the said monastery; that the said Henry the Eighth being seized of the said grange and lands, and of the said rectory, the same, by and after his death, came to the late King Edward the Sixth, who, by his letters patents, did give and grant unto John, then Earl of Warwick, all the said grange, farm, tenements, and hereditaments of Mowthorpe, with all the appurtenances whatsoever, to have and to hold to him the said Earl of Warwick, his heirs and assigns, for ever, under the yearly rent of twenty shillings thereby reserved; and that the said Earl of Warwick, his heirs and assigns, should and might have, hold, use, and enjoy, within the said grange, lands, and grounds, so many and such rights, privileges, jurisdictions, franchises, liberties, commodities, profits, emoluments, and hereditaments whatsoever, with all and singular the premises, as the last abbot of the said late monastery of Malton, in right of the said late monastery, or any of his predecessors, or any other, at any time heretofore, having and possessing the premises, or any part thereof, had used or enjoyed, or ought, might, or could have held, used, or enjoyed, in the said grange, lands, and grounds, by reason or pretence of any letters patents of any of his progenitors, or by reason or pretence of any lawful prescription, use, or custom, or otherwise in any lawful manner whatsoever; that the said grange, lands, and premises are now, by mesne conveyances and assurances, well and sufficiently conveyed to the defendant and his heirs, and that he is lawfully seized thereof, and to have and enjoy the same, with all the rights, privileges, &c. as the same were granted to the said Earl of Warwick, or as the last abbot of the said late monastery of Old Malton heretofore had held and enjoyed the same. The answer also stated, that the defendant had been owner and seized of the one moiety of the said grange, lands, and premises since the 26th of March, 1650, and not before, and of the other moiety thereof since the 3d of November, 1652; and confessed, that during the said times only that he was owner as aforesaid, he had refused to pay any tithes to the plaintiff, as he hoped he might lawfully do; but denied the depasturage of any cattle, as stated in the bill, during the said time, and only a few ewes, wethers, and milch cows; and also that the

tithes

tithes of the same so kept, fed, and depastured in said years were worth yearly twenty pounds.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides.

The cause came on to be heard on the sixth instant, when the plaintiff attended the hearing by his counsel; but the defendant's counsel alleging that they were not prepared for the said hearing, by reason of the want of some records, &c. concerning the discharge of the tithes in question, it was thereupon ordered, that the said defendant should pay to the said plaintiff £5 costs, and the said cause to be heard this present day.

Now upon opening the pleadings, and reading the letters patent of the said late King James, dated the 26th of February, in the fourth year of his reign, made to the said Richard Foster, whereby the said rectory of Kirkby Grindelitch and the said tithes in Mowthorpe and Mowthorpe Grainge, as late parcel of the said possessions of the said late dissolved monastery of Kirkham, were conveyed to the said Richard Foster, under whom the plaintiff claims the tithes in question; and upon reading several ministers' accounts to prove how the said lands came to the crown, and of several depositions taken on the part of the plaintiff in the said cause; and upon reading the copy of part of an ancient writing or bull of Pope Innocent III. out of the Register of Alvingham, remaining in — college, in the university of Oxford, produced by the defendant, whereby it was endeavoured to be made out, that the grange and lands were exempted and discharged from tithes: and upon full and deliberate hearing and debating of the said cause,

It was ordered by the court, that the right of the tithes in question shall be tried by an action to be brought at law, by the defendant against the plaintiff, in which action the defendant is to prove, that the land out of which the plaintiff now demands tithes of wool and lamb ought to be discharged thereof, as in his answer is set forth; the action to be tried at the bar of this court by the defendant; and the equity of the cause to be reserved.

1654.

TOWRIE
V.
PEARSON.

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Tr. 1655. Scacc. *Hardwicke v. Newre.* [1 Wood, 16. Hardr. 4.]  
Hertfordshire, 21st June, 1655.

1655.

**T**HE plaintiff being minister of the parish church of Much-hadam, in Hertfordshire, preferred his bill concerning the tithes of two hundred acres of arable land and eighteen acres of meadow within the said parish, held by the defendant in 1653, and for the tithe of wool and lambs sheared and fallen thereon, and for the tithe of ten acres of upland meadow within the said parish, cut by the said defendant, at four-pence by the acre, according to the custom there used.

The defendant answered, and denied the plaintiff's title to the said tithes.

The plaintiff replied; and witnesses were examined on both sides.

Upon opening the bill and reading the answer of the defendant, who did not appear, although duly subpoenaed, to hear judgment, as appeared by affidavit; and upon reading an order of the honourable House of Commons, assembled in parliament, made the 20th of December, 1643, whereby, for the causes in the said order expressed, it was ordered by the said Commons, that the said benefice of Much-hadam, and the profits thereof should be forthwith sequestered for J. Paske, doctor in divinity, the then rector there; and that the said now plaintiff, then chaplain to the lord general, should officiate the said cure of Much-hadam, and preach diligently there; and that he, paying all duties due to his Majesty out of the said rectory, should have, for his pains therein, the parsonage house, glebe lands, and all the profits, tithes, and revenues of or belonging to the said church of Much-hadam until further order should be taken by the said House of Commons; and also upon reading the depositions of divers witnesses proving the value of the tithes detained from the plaintiff by the defendant,

It is ordered by the court, that the defendant shall pay to the plaintiff

£52:

A bill was exhibited in the Exchequer for predial and other tithes, against the defendant who did not appear to hear judgment; upon proof of the quantities and values the whole were decreed, the single value only being demanded.

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NEWARK

§52: 4s. 4d. for the value of the said tithes by him detained from the plaintiff, unless cause be shewn to the contrary.

Now, upon hearing of counsel on both sides, and upon debate had concerning the validity of the plaintiff's title to the tithes by the order of the House of Commons, and also concerning the value of the tithes, forasmuch as the witnesses examined in this cause do differ in the valuation of the tithes,

It is ordered by the court, that the defendant do pay to the plaintiff £40 for the value of his tithes for the said year, and that he shall from time to time pay to the plaintiff all such tithes and other dues as shall of right belong to the plaintiff for the time to come, so long as the plaintiff shall continue minister of the parish.—[Wood.]

The plaintiff exhibited his bill as parson of Haddam in Hertfordshire for predial and other tithes, and upon proof of the quantity and values, had a decree for the whole; and the clerks said, that this was the constant practice where a bill is exhibited for predial tithes, and the single value only demanded.—[Hardr.]

Tr. 1655. Scacc. *The Attorney-General v. Straite*. [Hard. 4.]

A bill in the Exchequer was dismissed, the plaintiff not having made proof of quantities or values, the defendant in his answer not admitting the plaintiff's title, but alleging an extinguishment of the tithes by unity of possession.

IN an information in the Exchequer-chamber by English bill for small tithes appertaining to the rectory of Southwycke in Dorsetshire; the defendant in his answer did not admit the plaintiff's title, but alleged an extinguishment of the tithes by unity of possession. And the plaintiff made no proof of the value of the tithes, nor what cattle had been depastured in the place, where, &c. And for that cause the court upon hearing of the cause, refused to direct a trial at law, because no particular damnification appeared to them, whereon to ground a decree for the plaintiff, if the verdict should pass for him; and thereupon the bill was dismissed.

H. 1655. Scacc. *Guilbert v. Eversly*. [Hardr. 25.] 2 Gw. 502.

Tithe is payable by the inn-keeper for the herbage eaten by travellers' horses. But the court doubted at what rate it should be paid, it being ascertained by custom. They said, however, they would award a commission to inquire the value unless the parties should agree.

Agistment  
tithe shall be paid by the occupier of the land.

THE plaintiff preferred an English bill in the Exchequer-chamber for tithes of herbage, as vicar of Eling in Surrey, against an inn-keeper who depastured travellers' horses, for which there was no customary payment, and the value of the lands depastured was proved to be £30 per annum, and the court was in doubt what decree to make for a certain rate to the parson; it not being ascertained by custom. And they conceived, that they ought to have regard to the value of the land, which is proved to be £30 per annum, and so to allow him 2s. in the pound; but they agreed clearly, that tithes were payable for such herbage eaten by the mouths of travellers' horses, as aforesaid; and so it was adjudged in Trin. 16 Jac. B. R. in a prohibition, the court denied to grant a prohibition, the libel being against an innholder for tithes of herbage eaten by travellers' horses. (1) And in Mich. 7 Car. B. R. FACE and CAUGE held that tithes shall be paid for agistment of cattle, by the occupier of the lands: but the court said, they would award a commission to inquire into the value of these tithes, *nisi partes concordarent en le mean tempe*, which they advised.

(1) *Richardson v. Cabell*, ant2, 296.

M. 1655. Scacc. *Kirkby v. Redhead* and others. [1 Wood, 19.]

Lancashire, 12th November, 1655.

Tithes decreed in the Exchequer for the future.

THE bill set forth, that the rectory of Hawkehead is, and, time out of mind, has been, a rectory impropriate; that all tithes, oblations, and obventions, within the said rectory, and within the towns of Hawkehead, Nibthwaite, Graithwaite, Claith, Cotton, and Saturwaite, are belonging to the said rectory, and ought to be paid to the proprietor and farmer thereof; that

that the plaintiff is, and for seven years past has been, owner and impropriator of the said rectory, and ought to have had and received the tithes thereof, great and small, and all oblations, obventions, Easter dues, rates, and all other duties and profits whatsoever yearly happening and renewing within the limits and titheable places thereof, as the other owners and proprietors have time out of mind received, in kind; but that nevertheless the defendants Redhead and Rawlinson had for several years denied and refused to pay their tithes and other duties, or to compound for the same: and that all the defendants in the said years had been occupiers of several parcels of lands in the said limits, and had several great and small tithes thereon, as in the said bill set forth, which they refused to pay in kind, under several pretences of customary payments, &c. The bill therefore prayed a full discovery of the same; of the quantities and values of the tithes; an account and satisfaction for them; and a quiet enjoyment thereof.

The defendants answered, and confessed the said rectory to have been time out of mind impropriate; that the towns, bailiwicks, and precincts aforesaid, did all lie within the said rectory; and that the tithes, as well great as small, arising, &c. therein, were sometime heretofore reputed as belonging to the said rectory: and the defendants Redhead and Rawlinson said, that all the lands, messuages, tenements, and hereditaments, situated within the said towns, &c. had been and were anciently, before the reign of King John, or before the council of Lateran, and during the reign of the said King, parcel of the lands and possessions of the late dissolved monastery of Saint Mary of Furnies; within the said county of Lancaster, and belonging to the same, and so continued till the thirty-first year of Henry the Eighth, and were then given to the crown, and to the King, his heirs and successors, and were since, by other acts of parliament, annexed to and made parcel of the lands belonging to the crown in right of the duchy of Lancaster; and that the aforesaid monastery was freed and discharged from payment of any manner of tithes whatsoever; which said privileges, &c. were also allowed, ratified, and confirmed by the laws and statutes of this nation, as fully stated in the said answer. All the said defendants fully set forth the letters patents in their said answers, by which the said lands and grounds descended to them; and claimed the lands, &c. they held, to be exempt from payment of tithes; and, as to other lands, they set up several customs in lieu of tithes, and set forth the values thereof.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides.

Now upon opening the pleadings, and upon long hearing and debate as well of the demands in the said bill as of the matters respectively insisted upon by the said defendants in their answer for their respective discharges from the payment of tithes, or of a *modus* or certain sum or composition in lieu of tithes,

It was ordered and decreed by the court, that, as touching the discharge insisted upon by Redhead and Rawlinson of being freed from the payment of any tithes whatsoever, for or in respect of the messuages, lands, and tenements used by them, or either of them, within the said rectory, or arising or yearly growing of or upon the same, it be referred to a trial at law, whether the said messuages, lands, and tenements, by them held and used within the aforesaid rectory and the titheable places thereof, are and ought to be freed and discharged of and from the payment of all manner of tithes to the plaintiff; by which action, against whichever of the said defendants, Redhead and Rawlinson, the same shall be brought, the other defendants shall be concluded. The equity of the cause to be reserved till after the said trial be had.

And it was further ordered by the court, that the defendants Braithwaite and Wilson, shall account for and pay their tithes, *modus*, and ancient customary payments to the said plaintiff, as well for the time past as for the future; and for the better ascertaining the same, the said plaintiff may take out a commission for that purpose.

The answer, in setting out the *modus*, stated, that the defendants and their ancestors, or those whose estates they then had, whereof tithes are demanded,

having

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having all customary lands, and held by a customary estate of inheritance, from ancestor to heir, according to the custom of the manor of Furnies, had, by a prescription or custom, time out of mind, enjoyed the said messuages, lands, and tenements, and so ought to enjoy the same, free from the payment of any tithes of corn, grain, and sheaves in kind, by and upon the payment of several small sums of money for the several messuages, &c. in their possession, as well for their ancient arable land, as for their lands lately improved and converted from pasture into arable, that is to say, the defendant J. Wilson by the payment of eleven-pence halfpenny; the defendant, W. Braithwaite, one shilling and three-pence; and J. Braithwaite, two shillings and six-pence yearly for all their tithes of corn, grain, and sheaves whatsoever, growing upon their respective lands for seven years in the said bill charged; and that they, for all other tithes whatsoever, as well greater as lesser, had, by prescription or custom, time out of mind, used to pay the several sums following, that is to say, for every tenth lamb twenty-pence; and if but four lambs, then two-pence; if five, ten-pence: if six, and under ten, one shilling and six-pence: for milk; for every geld milch cow or hand milch cow, one penny, and for every muckett cow, two-pence; for every calf, if five calves, two shillings and sixpence; if ten, then five shillings: for bees; for every swarm under five, one penny; for five, three shillings and four-pence; if ten, then six shillings and eight-pence: for pigs; for every pig under five, one half-penny; if five, then ten-pence; if six, then one shilling and sixpence; if ten, one shilling and eight-pence: for geese, whether many or few, two-pence: for foals; for every foal, one penny: for ploughs; for every plough, one penny: for oblations; for every man and his wife, one penny yearly; for unmarried persons, for the first year, one halfpenny, for every year after until they be married, two-pence: and for all other manner of tithes whatsoever (excepting wool), for every house seven-pence half-penny yearly; and that for wool they always used to pay the tenth fleece.

In the pursuance of the said decree, a commission issued, and was executed, and returned. Now upon reading the said decree, and the depositions returned,

It was ordered by the court, that it be referred to the auditor of the county of Lancaster to peruse and cast up how much hath been paid to the said plaintiff by the said defendants for their tithes, *moduses* and customary payments aforesaid, and what is still due to him according to the values thereof, and to return his certificate to this court, so as the said cause may be further heard upon the said certificate.

Mr. Sadler, auditor of the said county, returned his certificate; and now upon reading the same and the said decrees, and upon hearing counsel on all parties,

It was ordered by the court, that the said defendants shall forthwith pay to the said plaintiffs the several sums certified due to him for tithe wool, and for the tithes, *moduses*, and customary payments for the year and time in the said bill specified; and shall from time to time respectively pay the aforesaid *moduses decimandi*, and ancient customary payments and rates, and at the respective times mentioned, and shall respectively pay their respective tithes of wool in kind to the plaintiff for the time to come.

In pursuance of the said decree, an action was brought, and a verdict given for the said plaintiff.

Upon reading now the said *postea*, and hearing of counsel on both sides, and the defendant Redhead's counsel alleging the said trial was had upon the plaintiff's evidence only, his witnesses not being present, and upon reading affidavits and hearing counsel,

It was ordered by the court, that a new trial be had accordingly, upon the said defendant paying to the plaintiff ten pounds costs towards the last trial.

A trial was had pursuant to the last order, and a verdict again passed for the said plaintiff, that the messuage, lands, and premises of the said defendant Redhead were not discharged from payment of tithes as aforesaid, as by the *postea* returned and produced in court appeared.

The plaintiff's counsel then desiring that the tithes of the defendant's messuages, lands, and premises aforesaid, and other the payments and duties aforesaid, might be ordered and decreed to be paid to the plaintiff in kind, or due satisfaction for the same, as by his bill prayed, and for a commission to inquire into the same, and no counsel appearing for the said defendant,

It is thus declared and ordered, &c. by the court, that the said tithes and duties of the lands, messuages, tenements, and hereditaments in the said defendant's possession or occupation for the seven years in the said bill mentioned, and in the said answer set forth, are payable, and to be paid, *in kind*; and that the same shall be forthwith paid and satisfied to the said plaintiff as well for the time past as for the future; and that a commission under the seal of this court shall be awarded for ascertaining the same.

In pursuance to the said decree a commission issued, and was executed, and returned into this court. Upon hearing counsel for the said plaintiff and defendant, and reading the decree and return of the commission and proofs, whereupon the value of the tithes of his corn is proved but of small or no value, yet it evidently appearing that the said plaintiff has right to all the said tithes demanded by the bill,

It is ordered by the court, and declared, that the said plaintiff has right to the tithes and duties of the messuages, lands, tenements, and hereditaments, and other the premises in the said defendant's possession or occupation, and by him enjoyed for seven years; and that all and singular the said tithes and duties are yearly payable and to be paid in kind from time to time; and that the said defendant shall duly set forth and pay to the said plaintiff all his tithes that have arisen and happened, or that shall hereafter arise and happen within the said rectory and places aforesaid, in kind, from time to time, in the years in the bill specified, and for the future.

NICHOLAS, *Baron.*  
PARKER, *Baron.*  
HILL, *Baron.*

E. 1656. Scacc. *Hancock v. Price.* [Hardr. 57.]

**I**N ejectment for 3000 acres of waste: *inter alia*, after a verdict for the plaintiff, it was moved in arrest of judgment, that an ejectment does not lie of waste for the uncertainty what it means.

*Baldwin pro quer.* There is a diversity betwixt a *præcipe*, in which the demand must be certain, and an ejectment, which lies *de pomario, de cottagio*, &c. of which a *præcipe* does not lie, 10 Jac. *Rethoricke* and *Chappel's* case; so *de portione decimarum*, *Price* and *Wood*, Hil. 5 Car. Rot. 181. in B. R. so of a coal mine, 5 Jac. B. *Cumming* and *Kimming*; so of a boiery of salt. Mich. 36 & 37 Eliz. and *Palmer* and *Umphries's* case, ejectment *de pecid terræ*, judgment in that case was reversed in the Exchequer Chamber; but if it had been *de pecid terræ* containing so many acres, it had been well enough: so ejectment of a close of land containing so many acres good, 6 Jac.

*Shaftoe* on the same side. 1. The law takes notice what waste ground is. *Vide* the Statute of Merton, cap. 4. which speaks *de vastis, boscis et pasturis*, *vide* 2 Ed. 6. the statute of tithes; ejectment lies *de cubiculo*, Mich. 30 & 31 Eliz. *Brandon's* case, and there *Wray*, C. J. cited a judgment in 29 Eliz. where *ejectione firmæ* was brought *de quiddam fabricæ*, and good; and in 31 Jac. *de terrâ montand*, good.

*Finch pro defendente.* A convenient description and certainty are requisite; as *de domo* has been held ill for the uncertainty, 22 Jac. B. R. *Warren* and *Walker*, *de terrâ montand* is naught; and for that cause upon a writ of error out of Ireland, a judgment has been reversed, 18 Jac. in B. R. *Stafford* and *Mack-donnell's* case, upon conference betwixt the judges; *vide* 16 Ed. 2. Warr. Chart. that ejectment lies not *de pasturâ*: so here the word waste is uncertain, and may comprehend land of any quality, and the sheriff will be at a loss what land to deliver; and of that opinion was the court; and afterwards the plaintiff released the waste and damages, and took judgment of the residue.

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1656.

Although the statute of Merton and 2 E. 6. c. 13. take notice of waste land, yet in ejectment it is bad for uncertainty, for it may comprehend land of any quality.

Ejectment lies of a portion of tithes.

Tr. 1656. Scacc.

*Staveley v. Ullithorne* and others. [Hardr. 101. 1 Wood, 24.]

2 Gw. 502.

Yorkshire, 24th June, 1656.

1656.

The council of Lateran, which discharged the order of Cisterians from payment of tithes, is a general law received in England, and if lands belonging to them were discharged of tithes from the time of that council, no after contract made by the abbot to pay tithes could dispense with the privilege, or make them liable to tithes; and if there were any such agreement for payment of tithes before the council, yet as a general law that council had dissolved it, and the lands are discharged.

Lands belonging to the Cisterians before the second council of Lateran, which came to the King by 31 H. 8. held to be discharged, notwithstanding tithes had been paid for some two years.

**T**HE bill set forth, that the late King James being seised in fee, in right of his crown of England, of and in the prebend of Studley, belonging to the collegiate church of Rippon, and of all the tithes of wool and lamb arising, &c. within the town-fields and territories of Stenningforth, parcel of and belonging to the said prebend, by his letters patent, dated the twenty-eighth of April, in the sixth year of his reign, did give and grant unto E. Phillips and R. Moore, and their heirs, in fee farm, the prebend of Studley, and all and singular the tithes of wool and lamb arising, &c. within the townfields of Stenningforth, at the yearly rent of twenty-six pounds eleven shillings and three-pence; by virtue whereof they became lawfully seised of the said prebend and of the tithes of wool and lamb; that they, by deed inrolled in the court of Common Pleas, within six months after the date thereof, according to the statute, did grant, bargain, and sell unto Sir William Ingilby, Kt. and T. Ingilby, and their heirs, (among other things,) all and singular the said prebend of Studley, and the tithes of wool and lamb as aforesaid, who became lawfully seised thereof to them and their heirs for ever; which said estate afterwards came to and was vested in William Ingilby, nephew of Sir William Ingilby, and his heirs, who entered thereon, and became lawfully seised thereof in his demesne as of fee; and being so seised, he, by indenture of demise, dated the tenth of October, in the eighth year of the reign of the late King Charles, for the considerations therein mentioned, demised to Bassett Staveley, deceased, his executors, &c. all the said tithes of wool and lamb, and all other tithes whatsoever, coming, &c. within the townfields and territories of Stenningforth aforesaid, (the tithes of mines and quarries only excepted,) to hold the same for twenty-one years; by virtue of which he entered into the said tithes and premises, and did receive and take a good part of the said tithes; that in May, 1646, the said Bassett Staveley died intestate, possessed of the same; after whose death the plaintiff had letters of administration granted to him, and as administrator became possessed of the said lease for the remainder of the said term; that the defendants for the last seven years, living within Stenningforth, had subtracted their respective tithes, of which part was due to the plaintiff as administrator. The bill therefore prayed an account of their tithes of wool and lamb, and a recompense for the same.

The defendants answered, and said, that they are and ought to be cleared and discharged by law for their respective lands and tenements of the payment of any tithes; for that the lands they respectively stand seised of to them and their heirs, were parcel of the possessions of, and were belonging to, the Abbot of Fountains, and were vested in that abbey before the second council of Lateran; which abbey was of the Cisterian order; and that all the lands and possessions of the said abbey, coming to the crown by a statute made in the thirty-first year of Henry the Eighth, were and ought, by the said order and statute, to be discharged of and from the payment of all manner of tithes in the owner's hands, in as large and ample manner as the abbot held the same discharged; and that, the said defendants claiming and deriving their title from the crown, the inheritance of the said lands, by force of the said order, ought to be discharged from payment of all tithes for those lands during such time as they hold the said lands in their own hands and possession; that although the defendants, the Ullithornes, did pay their tithes to the said Bassett Staveley for some two years, yet if they ought to be discharged, those payments have not prejudiced them, as they conceive; and that the defendant Atkinson did never pay any tithes.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides.

Upon opening the pleadings, and on debate of the matter,

It is ordered by this court, that, as concerning the discharge insisted on by

the defendants, it shall be referred to a trial at law upon the usual terms; the issue to be, whether the messuages, lands, and grounds, the defendants hold in Stenningforth, parcel of and belonging to the Abbey of Fountains, be discharged from the payment of tithes by the Cistercian order, in such manner as the same is set forth in the answer, or not.

Which trial was accordingly had, and a verdict thereupon passed for the defendants.

In pursuance of an order dated the tenth of February, a new trial was granted, to be had at the bar of this court, by a jury of the county of York; which trial was also had, and a verdict given for the defendants.

The cause coming on for further directions, upon reading the said orders and verdicts, the counsel for the defendants desiring that the bill might be dismissed,

It is ordered by the court, that the said bill, and the said defendants, be absolutely dismissed this court.—[*Decree Book.*]

In an action of the case upon a feigned action, upon a bill in equity, and an order for a trial at law, the question was, whether such lands were discharged of tithes as having belonged to Fountains Abbey in Yorkshire, which was of the Cistercian order; and it was held, *per curiam*, clearly that the council of Lateran, which freed that order from payment of tithes, was a general law received in England. And if these lands were discharged of tithes from the time of that council, that no after covenant or contract made by the abbot to pay tithes, could dispense with this privilege, or make them liable to tithes; for once discharged by this council, and always discharged; for this council is as forcible as an act of parliament, which concludes all parties; and the court were also of opinion, that if there were any such agreement for payment of tithes before the council, that yet this council, as a general law, which includes all men's consent, had dissolved it, and the lands were discharged.—[*Hardres.*]

E. 1657. Scacc.

*Sheffield v. Serjeant* and others. [Hardr. 102.] 2 Gw. 502.

UPON a bill in equity to be relieved for customary tithes, in London, the case was, that the plaintiff's title was under a sequestration by parliament, and an order thereupon by the committee for plundered ministers; and the question was, whether he was relievable according to the decree confirmed by the 37 H. 8. concerning tithes in London, by which the Mayor of London must be first addressed to: and the decree mentions only the parson, vicar and curate, and whether he that is in by sequestration be within it, not being parson *de jure*, was the question; and it was urged by the defendant's counsel, that he is relievable there, and therefore not here, because he comes in under the parson's title, and as his lessee; the same law is of an impropriator, who is not within the words of the decree; and that so it was lately ruled in Chancery, which the court agreed to, but yet were divided in this case; and it was afterwards by consent referred to compromise.

Chancery, that an impropriator was relievable before the Mayor of London, though not within the words of that decree, and therefore not within that court.

1657.

The court of Exchequer were divided in opinion, whether he that is in by sequestration be relievable for customary tithes in London, according to the decree confirmed by the stat. 37 H. 8. c. 12: but it was said that it had been ruled in Chan-

Tr. 1657. Scacc. *Brittaine v. Lord Coventry*. [1 Wood, 83.]

Gloucestershire, 17th June, 1657.

THE plaintiff, as vicar of the church of Bishley, in Gloucestershire, exhibited his bill, shewing, that the parsonage of the said church was a rectory impropriate, and held and enjoyed by the defendant Lord Coventry; that within the said parish there was an ancient vicarage by an ancient ordination

Certain tithes of a manor within a parish, and tithes of a different description in the rest of the parish, and the

the of the tithes of the corn of the rector decreed to a vicar, according to his endowment; and might retitle the tithes, the farmers were ordered to set them out in kind for the purpose.

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or composition endowed with an ancient house, and with all the oblations and obventions within the said parish; the small tithes called *minuta decime* of the said parish; the tithes of corn, wool, and lamb of all the lands called the manor of Worlands; the herbage of the churchyard; the tithes of hay, lamb, and wool, besides that of Worlands, throughout the whole parish; and the tithe of the tithe of corn belonging to the said Lord Coventry, which were to be retithed; that the plaintiff and his successors should have and receive all the said tithes and retithing of the tithes aforesaid, for which they are to officiate in the cure, and to bear all burthens and charges, saving synodals and wine to be communicated to the people at the sacrament, which the said Lord Coventry at his costs was to pay for and provide; that the parish of Bishley was a great parish, and had within it divers chapels of ease, and consisted of a great number of communicants; that the gift of the said vicarage had always been and still was in the crown; and that he, the plaintiff, about twenty years since, was lawfully presented, &c. thereto, and continued vicar thereof, and accountable for the first-fruits and tenths; that the defendant Lord Coventry endeavoured to infringe on the said plaintiff's right to the said tithes, by letting leases thereof to the other defendants, by reason whereof the plaintiff could not have the retithing of the tithes of corn, the same not being tithed; that the parishioners and inhabitants of the parish having compounded with the said defendant or his lessees or farmers, set not forth any of their said tithes; but that he received the whole benefit thereof, and the plaintiff was disabled to pay his tenths and first-fruits: and thereupon he prayed relief of the court.

The defendant, Lord Coventry, answered, and said, that he was, and for twenty years past had been, owner of the manor and rectory of Bishley, and of all the tithes thereunto belonging; that he knows not whether there be any ancient vicarage therein: and denies that, in right of the said rectory, he had ever claimed any lands, tithes, and other duties but such as of right belonged to him (besides such part and proportions as belonged to the plaintiff); but he confessed, that for several years past the plaintiff had held the curacy or vicarage aforesaid, but by what right he knew not; and said, that he did not hold any part of the said rectory or lands in his hands, but leased the same, and whether the tenants had or had not permitted the plaintiff to receive the said tithes he knew not. He also denied that he let the said rectory for three hundred pounds per annum, being charged with several yearly payments, and a fee-farm rent of thirty-three pounds per annum; and all knowledge whether the said rectory and curacy were anciently within the diocese of Worcester, but believed it did heretofore belong to the college of Stoke, near Clare, in the county of Suffolk, before the dissolution of monasteries. He further said, that the plaintiff's four predecessors did never receive or claim more than the fifteenth part of the tenth of the tenth or tithe for corn, hay, wool, and lambs, and the whole tithe corn of the glebe land, or land belonging to the said rectory, and two parts yearly of the Easter book, or else all the Easter book, and the then rector received the whole of the Easter book the third year. He also confessed, that the said parish was very large, but knew not of divers chapels of ease in the said parish; but believed that there was one church or chapel of ease in the town of Stroud, and that some allowance was yearly given by the said defendant to the minister there; that he knew not whether the gift of the said vicarage had always been in the crown, or whether the plaintiff was lawfully inducted, &c. therein; and denied that he infringed on the plaintiff's right. He also confessed that he had made several leases to the other defendants, but knew not whether he or his tenants have or ought to find the communion wine, but believed all was provided on his part which he ought to provide.

The other defendants put in their answers as tenants to the defendant Lord Coventry, and, admitting the plaintiff to be vicar, alleged, that they had not neglected at any time to set forth the tithes which belonged to the said plaintiff.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides.



The cause came on to be heard in last Easter term, when it was referred to the defendant Lord Coventry to settle the differences between the parties without prejudice. But as the reference did not take place,

The cause now came on again; and upon reading the order of the ninth instant, and of the composition, ordination, or endowment of the said vicarage, extracted out of the registry of the bishop of Worcester, and also the depositions taken in the cause,

The court declared, that they were satisfied of the validity of the said composition, ordination, or endowment; and therefore ordered, adjudged, and decreed, that the plaintiff shall, for ever hereafter, have all the tithes of wool and lamb, the Easter book, and all and singular the minute tithes of and within the said parish of Bishley, and the titheable places thereof, and all and singular other the tithes, retithings, and profits whatsoever mentioned and expressed in the said composition, ordination, or endowment, according to the purport, true intent, and meaning of the same; and to the end the plaintiff may hereafter, for the time to come, have, hold, and enjoy all such tithes, as are or shall be due to him, of the corn and hay coming, growing, and renewing within the said parish and the titheable places thereof in kind, the defendant and parishioners are hereby ordered to set forth their tithes; and the said Lord Coventry, his tenants and farmers, are to retithe, and set apart the tenths of the tithes so set out, to the intent the plaintiff may duly take and carry away the same; and lastly, it is referred to the auditor of the said county (who is to have a commission) to examine and cast up the value of the tithes, retithings, and all other dues which the said plaintiff ought to have received since his induction into the said vicarage of Bishley, and to return his certificate to the court.

The auditor returned his certificate; and upon reading the same, and the said decree,

It is ordered by the court, that the defendant, Lord Coventry, shall forthwith satisfy and pay to the plaintiff the arrears of the said tithe of wool and lamb arising within the said parish and parsonage of Bishley, and detained from the plaintiff since his institution, being fifteen years in arrear, amounting to six hundred pounds, at the yearly sum of forty pounds, as the said tithes appear to be worth by the said proofs and the auditor's certificate.

NICHOLAS, *Baron.*  
PARKER, *Baron.*  
HILL, *Baron.*

M. 1657. Scacc. *Sheffield v. Pierce and Others.* 1 Wood, 38.  
2 Gw. 503.

London, 12th November, 1657.

THE bill stated, that by the judgment of the late parliament of England, assembled at Westminster, on the third of November, 1640, the rectory of Saint Swithin's, in London, stood sequestered from Richard Owen to the use of A. Menlius, an orthodox divine: and that, he relinquishing the same in the year 1647, it was, by the same parliament, in the same year, afterwards ordered, that the same rectory should from thenceforth stand sequestered to the use of him the plaintiff, and that he should officiate the same, and have to his use the parsonage-house, glebe lands, and all the tithes, rents, duties, and profits whatsoever of the said rectory to his own use till further order should be taken in the premises; that by virtue of the said order of parliament he entered, and officiated in the cure, and performed his duty therein in all things, and ought to have had the tithes, offerings, profits, and commodities, of what kind soever, belonging to the same as rector and parson there, as the former ones had heretofore had received and enjoyed the same. The bill then set forth the statute and the decree, confirmed by act of parliament in the thirty-seventh year of Henry the Eighth, touching the payment of tithes by the citizens of

A plea and demurrer (to a bill in the exchequer for tithes in London) that the plaintiff had not pursued the way directed by the decree confirmed by the statute, 37 H. 8. c. 12. and that therefore the court of exchequer had no jurisdiction, overruled. The rate ordered by that decree to be paid on the rent of

houses in London in lieu of tithes, is assessable according to the several rents paid at the time for the same.

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London, after the rates of every ten shillings a year rent one shilling and fourpence halfpenny, and for every twenty shillings the sum of two shillings and ninepence, and so on : and that the greatest part of his parishioners have and still do continue payment of all kind of tithes, offerings, duties, and profits to the plaintiff, or some recompense for the same ; but the defendants have for five years refused the payment of the same. The plaintiff therefore prays, that the defendants may make a full discovery of the messuages, &c. they held for the same years, and the yearly rent, and that the tithes and duties due for the same may be decreed to him accordingly.

The defendants put in a plea and demurrer, setting forth, that the plaintiff entitled himself to the tithes in question by an order of the late parliament begun and held at Westminster, in 1640, but made his title by act of parliament made in the thirty-seventh year of Henry the Eighth, and of a decree made thereupon ; and that it was doubtful whether the plaintiff, coming in by sequestration, were relievable before the mayor of the said city of London ; and therefore the said defendants for plea said, that the said act of parliament and decree only provided for the recovery of tithes in London ; and that in and by the said decree it was decreed, " that if any variance, controversy, or strife, " did or should arise in the said city for any payment of tithes, then, upon the " complaint by the party grieved to the mayor of the said city, he shall, by " advice of counsel, call the parties before him, and make an end of the same ; " and if he should not within two months after the complaint, the Lord " Chancellor of England, within three months after complaint made to him, " should make an end of it ; " that the said plaintiff ought to have pursued the way directed by the said decree ; and that if the plaintiff were not relievable within the said decree by the said lord mayor of London and lords commissioners of the great seal of England, as he said by his said bill he was, much less could this court take cognisance or jurisdiction of a case of this nature whereby to relieve the said plaintiff.

Upon reading the plea, and hearing counsel on both sides, on the twenty-fourth of November, 1655,

It was ordered by the court, that the said plea and demurrer should be overruled, and that the said defendants should answer the said bill.

The defendants answered, and denied that they knew that the plaintiff was ordered to officiate the cure of the said parish as rector there, and have the profits, or that he had officiated there ; and that if he had any title thereto, they did not conceive him to be entitled to two shillings and ninepence in the pound for his tithes according to the rents of their houses, it being not the intent of the said statute and decree to pay tithes according to the improved rents, but according to the old rents as they were before the said statute ; they confessed that they were inhabitants, and set forth the houses, &c. and the rents they paid for the same ; and that when the said plaintiff first came to officiate there, he agreed to accept of one hundred and twenty pounds per annum with some of the parishioners in lieu of tithes and duties there, which had been constantly paid to him.

The plaintiff replied ; the defendants rejoined ; and witnesses were examined on both sides.

Now upon full hearing and full debate, and reading the proofs in the cause, and the said order of parliament begun and held at Westminster aforesaid, on the third of November, 1640, bearing date the thirtieth of December, 1647, it appears to the court, that it was ordered that the said rectory of Saint Swithin should from thenceforth stand sequestered to the use of the said plaintiff, and he to officiate the same, and to have all the tithes, duties, and profits whatsoever of the said rectory to his own use ; and also it appears, that the said plaintiff, by virtue of the said order of parliament, did ever since officiate the said cure, and perform his duty therein in all things, and therefore ought to have had the tithes, offerings, profits, and commodities, of what kind soever, belonging to the said rectory, as rector and parson there, as the former ones there heretofore had had and received the same ; and that the said defendants had not paid

paid the tithes due to the plaintiff for the several years complained of in the bill to be behind and unpaid.

And as for the composition, pretended to be made between the said parishioners and the said plaintiff, to accept of one hundred and twenty pounds per annum in lieu and satisfaction of all tithes and duties due and payable to him within the said parish, it appears to this court, that the said composition was to continue for the space of three years next after the said plaintiff's coming to officiate there, and no longer; and there not being sufficient proof made on the said defendant's behalf that the said sum of one hundred and twenty pounds was paid to the said plaintiff any longer than the said three first years:

The court is therefore fully satisfied, for the reasons before alleged, that the defendants ought to have satisfied and paid their several and respective tithes, due and payable by them, to the said plaintiff for the years aforesaid complained of by the bill, according to the rate of two shillings and ninepence in the pound for their several houses, shops, &c. which they held within the said parish, according to the several rents; and the said plaintiff being present in court, and willing to accept the several sums heretofore paid by the said defendants for their several houses, &c. for tithes, as mentioned in the said decree, in full satisfaction of all tithes due and payable to the plaintiff by the said defendants; and that the said defendants shall continue payment of the same as long as he continues rector thereof, and they continue inhabitants within the said parish; and if any differences arise between the said parties touching the payment of the tithes according to the several rates and proportions in the decree mentioned, it is referred to the auditor of his highness's revenue within the city of London to cast up the same upon view and perusal of the said pleadings, and certify to this court his doings and proceedings therein with all convenient speed; and that upon return of the said certificate the said defendants shall thenceforth satisfy and pay to the said plaintiff all such sums of money as shall be certified by him to be due to the plaintiff. And it is ordered, that the said defendants shall satisfy and pay to the said plaintiff ten pounds for his costs and charges by him sustained in the said cause.

NICHOLAS, *Baron.*  
PARKER, *Baron.*  
HILL, *Baron.*

M. 1657. Seacc. *Coe v. Mason.* 1 Wood, 41.

Hertfordshire, 26th November, 1657.

**T**HE plaintiff, as vicar of the parish-church of Braughinge, exhibited a bill, setting forth, that he, on the first of June, 1648, by an order of the committee for plundered ministers appointed by authority of parliament, was nominated and appointed to officiate the cure of Braughinge (being at that time under sequestration for the delinquency of William Archer incumbent), and to hold and enjoy the vicarage-house and the glebe lands, and also to take, receive, and enjoy, all and singular the tithes, benefits, and profits thereof, as had been before received by his predecessors; and that he had fully performed the cure, whereby he was entitled to have and receive all manner of small tithes; that from time whereof the memory of man is not to the contrary, or otherwise, by some ancient endowment, the vicar of the said parish-church, for the time being, has received and taken, and was entitled to take, receive, and enjoy, all and singular the tithes of hay, hops, lamb, wool, and woods, and all and singular the minute and privy tithes yearly from time to time coming and growing, &c. within the said parish and titheable places thereof, and which had always been paid in kind; that the defendant, for divers years past, had been an inhabitant therein, and for two years was occupier or possessor of divers lands, meadow and pasture, parcel of and belonging to the manor of Braughingbury and the titheable places thereof, and planted hops, and cut down wood, and did keep and depasture upon the said grounds sheep, from which he had lambs, and sheared the same, and had wool, and also cut down grass, and made

Tithes decreed to the vicar according to usage, although excepted in the endowment.

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made the same into hay; the tithes of all which amounted to a large sum, and all which said tithes were due to the said plaintiff, and ought to have been paid in kind, or some composition made to him for the same; which the said defendant did detain from him, and refused the said tithes. He therefore prayed a discovery of his said tithes, and the values thereof, an account and satisfaction for the same.

The defendant by his answer said, that it might be true, but that he knew not that the plaintiff was appointed to officiate the cure of the said parish; that he believed the plaintiff for eight years past might have officiated the cure there, and have a right to all tithes formerly of right paid to the vicar; but he denied that time out of mind, or by ancient endowment, the vicar ought to have all tithes of hay, hops, and wood, and all minute tithes. The answer also stated, that for three years past he had inhabited in the said parish, and been farmer of lands there, parcel of the said manor; and he set forth his titheable matters, and the values thereof, and that he had paid no tithe at all to the plaintiff, conceiving there was none due to him, for that all the lands he occupied had been and were demesne lands of the said manor, which had been parcel of the possessions of the priory and canons of the Holy Trinity, in London; that the church of Braughinge was long since appropriate to the priory and canons, and confirmed to them by the bishop of London, being bishop of that diocese; and that by an endowment (1) made in the year 1218 it appears, that the vicar of Braughinge, in the name of the vicarage, "should wholly receive and fully possess all obventions of the altar, with the tithes" and the vicarage-house, and all the land to the said church then belonging " (except the croft called Ealdebery), and except the tenants and their tene-ments which in the portion or dividend of the canons should remain;" that, by virtue of the said endowment, the vicar there never could claim to have any small tithes of the tenants and occupiers of the said lands which the defendant held within the said parish, the same being excepted from payment of any minute tithes to the vicar by the same endowment, the said lands, and also the minute tithes, being the portion or dividend of the said canons; that he never heard that any minute tithes, or any tithes at all, were ever paid or given to any of the vicars of Braughinge for any of the lands in his occupation; neither did he conceive, that the said vicar had any right or title to the same, either by prescription, endowment, or otherwise; that about thirty years since the owners or occupiers of Braughingeberry, whereof the lands in the defendant's occupation were parcel, did, for some years, give to the vicars thereof for the time being, five marks a year by way of gratuity, though the vicars pretended it an ancient payment in lieu of small tithes; and therefore insisted on his right to refuse to pay tithes.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides.

The cause came on; and upon opening the pleadings and reading a copy of an endowment extracted out of the principal registry of the late bishop of London, dated at Fulham, in the year 1618, and proved to be a true copy, which seemed to explain the right of the vicarage tithes in question. The court took time to consider of the same; whereupon the barons being attended with copies, the cause came on to be further heard this day; and upon full and deliberate hearing, and upon long debate of the matters in question, and touching the meaning of the said endowment; and upon reading the several depositions for the plaintiff touching the payment of the tithes in question to the vicar of Braughinge for the time being; forasmuch as it appears to the court, by the depositions of several witnesses, that the small tithes of hay, hops, wool, and other small tithes, have been paid in kind, or by composition, to the plaintiff, as vicar of Braughinge, and to his predecessors vicars there; and for that

(1) The following is an extract from the endowment: *Qui quidem vicarius, nomine vicarie, omnes obventiones altaris cum minutis decimis et menagio, et tota terrâ ad eandem ecclesiam tunc pertinente (exceptâ croftâ illâ*

*quæ vocatur Ealdeberi, jacentis a parte australi menagii prelatati, et exceptis tenentibus et eorum tenementis quæ in portione canonicorum remanebunt) integre percipiet et plenarie possidebit.*

it is also proved by the plaintiff that the said defendant for the said years had the aforesaid tithes of hops, wood, hay, wool, and lambs, the tithes of all which amounted to 7*l.* 4*s.* 8*d.*; and the court being of opinion, that by the said endowment the said plaintiff is entitled to all the small tithes arising within the said parish; it is thereupon finally ordered, adjudged, and decreed by this court, that the said defendant shall forthwith pay unto the said plaintiff, or to his assigns, the said sum of 7*l.* 4*s.* 8*d.* for the value of the said tithes by him detained from the said plaintiff.

PARKER, *Baron.*  
HILL, *Baron.*

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COR. V. MASON.

M. 1657. Scacc. *Hele* and others v. *Pronte*. [1 Wood, 45.]

Devonshire, 16th November, 1657.

THE bill stated that the plaintiffs, ever since the 25th March, in the year 1653, had been the lawful owners of the rectory impropriate of North Petherwin in Devonshire, with all tithes and profits thereunto belonging; that, time out of mind, all the tithes of corn and grain growing therein, and the titheable places thereof, had been always paid to the rectors and owners thereof in kind, or a composition for the same; and that the defendant had been yearly owner of twenty acres of arable land within the said rectory, and did yearly mow wheat, barley, oats, and other grain, and carried the same away without setting out the tithe thereof regularly. The bill therefore prayed a discovery of the quantity and the value, and that the defendant might be decreed to pay the same.

A bill in equity lies to be relieved against the subtraction of predial tithes, notwithstanding the statute 2 and 3 Edw. 6. c. 13. gives an action at law.

The defendant appeared, and put in a *demurrer* and answer.

And for *demurrer* he set forth, that between the 25th of March, 1653, and the 25th of December in the said bill mentioned, he was owner of twenty acres of arable land within the said rectory, sown with wheat, barley, oats, and other grain, and did yearly mow the same, and converted the same to his own use, and that the tithes thereof yearly were worth £5; but that he was advised that the subtraction of predial tithes by the not setting out of the tithe from the nine parts, and the unequal division thereof, are matters which may be relieved at law upon the statute 2 & 3 Edw. 6. c. 13; and therefore the plaintiffs ought not to prosecute any suit in equity for the same; the said plaintiffs not having set forth any certain title to the tithes, or shewed how long since their estate therein might commence since the subtraction of the said tithes. The defendant also set forth the titheable matters, and denied any fraud in setting out their tithes.

The plaintiffs replied to the answer; the defendant rejoined; and witnesses were examined on both sides.

And upon opening the pleadings, and reading the evidence, and upon full debate,

It is ordered by the court, that the defendant shall pay to the plaintiff 7*s.* 6*d.* proved to be due and detained for tithes complained of by the said bill, and shall at all times hereafter duly tithe and set forth the tithe of corn and grain arising, &c. in the said parish and titheable places thereof by itself, so that the said plaintiffs or their servants may for the future take and carry away the same without any trouble or denial from the said defendant, or any claiming by or under him.

By ALL THE BARONS.

M. 1657. Scacc. *Mills* v. *Edbroke*. [1 Wood, 47.]

Somersetshire and Devonshire, 16th November, 1657.

THE bill stated, that the late King Charles was seized of the forest of Exmore lying in the counties of Somerset and Devon, with the precincts, members, and appurtenances thereof, in his demesne as of fee, in the right of the crown of England; which said forest lies out of all parishes and out of

Tithes decreed to the king for the cattle agisted and depastured on the

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extra parochial  
lands lying  
within the forest  
of Exmore,  
though in his  
own possession.

all titheable places belonging to any church or chapel whatsoever; that by reason the said forest lies not within any parish or titheable place, the said late King Charles and all his progenitors, by the laws of this nation and by their prerogative royal, in and by all the time whereof the memory of man is not to the contrary, have, and used to have and enjoy all manner of tithes whatsoever happening, &c. within all and every part of the said forest, and within the metes and boundaries thereof; that the said King, being so seised, by letters-patent dated the first of July, in the ninth year of his reign, in consideration of two hundred marks paid by George Cottington, did give and grant to him, his heirs and assigns, in fee-farm, all those his tithes happening, &c. within the said forest, in places without any parish, to hold them for ever, yearly yielding a fee-farm rent of 13*l*. 5*s*. 8*d*. by force whereof he was lawfully entitled to the tithes of all the said forest, and was seised thereof in fee simple, and had and enjoyed the same accordingly; and being so seised, and his right and title to the said tithes being confirmed by the decree of this court against divers persons that opposed the same, he, by indenture made between him and John Mills, (the plaintiff's late father,) dated the first of May, in the eleventh year of the late King, did grant the same to him and his heirs for ever, which said indenture is enrolled in Chancery; by virtue whereof the said John Mills, in his lifetime, was seised, and received the tithes, and soon after died, and the same descended to the plaintiff as his heir, who became seised therein; and he averred and maintained, that the tithes of the said forest of Exmore of right did belong to the late King Charles, and then belonged to him, and not to any church or chapel, or parson, vicar, or proprietor whatsoever, or their farmers; yet nevertheless the defendants, being inhabitants near the said forest, having for divers years past agisted and depastured several hundred of bullocks, horses, &c. within the forest, absolutely refused to pay to him his agistment tithes for the same, though the said George Cottington recovered tithes by the decree of this court. He therefore prayed a full discovery and relief in the premises.

The defendants answered, and set forth a prescription to be exempted from payment of tithes; and the number of cattle they depastured on the forest; but denied that any tithes in kind were ever paid for wool and lamb.

The plaintiff replied; and said, that he had good title in law to the said tithes, and that the said letters-patent were good and valid; and traversed, that the inhabitants of the hundred adjacent, which had agisted their sheep and cattle in the said forest, had, time out of mind, or at any time, at a certain rate payable to the King or his farmer, in consideration thereof, or for other consideration, been discharged from the payment of tithes, or had paid any thing in lieu thereof; and that what was paid in satisfaction of agistment could not also be paid in satisfaction for tithes, which are of common right payable, for discharge whereof no person, not ecclesiastical, can prescribe to a non-payment, as the said defendants pretend.

To which replication the defendants rejoined, and said, the plaintiff had made no good title to the tithes, nor did any thing pass by the letters-patent; that their ancestors and predecessors, which had agisted cattle in the said forest, had been discharged from payment of tithes, or any thing in lieu thereof; and that the payments of the rates set forth by their answers was and might be a good and reasonable custom, and discharge for tithes within the said forest.

Issue being joined, and witnesses examined on both sides, the cause came on to be heard the sixth day of June last, when it was objected by the defendants' counsel, that the plaintiff had not, by his said bill, set forth a title to himself.

The bill was accordingly ordered to be amended; and thereupon the court further proceeded to an hearing; and upon debate of the prescription set forth by the answers, by counsel on both sides, the court declared, that the prescription, as the same was set forth, was a void prescription in law to discharge the defendants from the payment of tithes for their sheep and cattle depasturing within the said forest of Exmore.

And for that this court could not then further proceed in the cause, by reason

reason of the defects in the bills and answers upon the prescription set forth by them, the defendants' counsel prayed they might amend; and to the end the cause might receive a speedy termination, it was ordered, on the eighth of June, that the plaintiff should amend his bill throughout in relation to the plaintiff's title and the conveyance set forth to be made by the plaintiff's father; and by consent on both sides, the answers were to be amended as to the prescription therein set forth without oath; and the custom of the said prescription was referred to a trial at law to be had at the bar of this court by a jury of the county of Dorset, and one action to determine the whole; and that a commission should issue to examine witnesses on both sides.

The bill and answer were amended.

The answer was amended in the following manner, that is to say, "That the forest of Exmore is an ancient forest, wherein sheep and other cattle have used to be depastured; that within the said forest there is an ancient custom and usage, by all the time whereof the memory of man is not to the contrary used, that no tithes have or ought to be paid for sheep and cattle agisted and depastured in the said forest for such time as the said sheep or cattle have been there agisted and depastured; and that they and all other the inhabitants, within the counties of Devon and Somerset, which dwell and inhabit within the hundreds adjacent and near to the said forest of Exmore, and their respective ancestors and predecessors, who have from time to time agisted and depastured their sheep and other cattle in and upon the said forest of Exmore, by all the time whereof the memory of man is not to the contrary, had used to pay a certain rate or price in money, payable and to be paid to the King's Majesty for the time being, his farmer, tenant, or lessee of the said forest for the time being, at or upon the feast-day of Saint James the Apostle, in every year, at a certain place known and used, viz. at the village of Withypoole, viz. two shillings for every score of sheep, and after that rate for any greater or lesser number; twopence the summer and twopence the winter for a horse, mare, or gelding; and twopence for a bullock; and after these rates for a greater or lesser number; and that, in consideration of the premises, they and every of them have respectively, from time to time, during all the time aforesaid, whereof the memory of man is not to the contrary, been discharged, exonerated, and acquitted of the payment of any other sum or sums of money for the agistment of their respective sheep and cattle; and also of and from the payment of any sum or sums of money for tithe, or other thing in lieu of, or satisfaction for tithes, or any other sheep, cattle, or beast, agisted or depastured in and upon the said forest of Exmore, and of wool of the same sheep."

The plaintiff thereupon declared upon the custom, &c.; and the action at law coming on to be tried, the jury, without going from the bar, gave a verdict for the plaintiff.

The cause now came on for further directions on the equity reserved; and, upon reading the said orders and the verdict, and hearing counsel on both sides, the plaintiff's counsel desired the court would be pleased to decree the said tithes for the plaintiff, and refer it to the auditor to cast up the values accordingly.

The defendants' counsel thereupon objected, that the plaintiff had not by his bill made any good title to himself of the tithes demanded by his bill, whereupon this court could ground a decree, for that no tithes passed to the said George Cottington by the letters-patent; for that it is set forth in the bill, that the King was seised of the forest of Exmore, and he could not have tithes out of his own lands: and further, that the demand of tithes for agistment of cattle agisted or depastured in the said forest was not good, for that tithes are to be paid of things in possession; and the King, being in possession of the forest, could not have tithes of the cattle agisted in the said forest.

To which objections, and what else was offered by the defendants' counsel, the plaintiff's counsel did give their answers, wherewith the court was fully satisfied; and after a long and serious debate,

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v.  
EXMORE.

The court declared, that the letters-patent were good and sufficient in law; and that the tithes were grantable by the late King, and had well passed to the said George Cottington, and from him well come to the plaintiff; that he had well entitled himself to sue for the said tithes in this court; and that there is sufficient matter in the said Bill for this court to ground a decree upon.

It is thereupon ordered by the court, that the plaintiff shall have the tithes of all such sheep and cattle as have been agisted and depastured by the defendants within the forest of Exmore during the fourteen years mentioned in the said bill, for the time of their agistment in the said forest; and that it be referred to the auditors of the said counties to cast up the values and return their certificate.

NICHOLAS, *Baron.*PARKER, *Baron.*HILL, *Baron.*

The auditors, having been attended therein, made and delivered in their certificate; which, together with the decree, being read, the plaintiff's counsel prayed, that the auditor's certificate might be decreed and confirmed, unless cause shewn to the contrary.

It was thereupon ordered by the court accordingly; and no counsel appearing for the defendants, the above order was made absolute by the court.

Tr. 1658. Scacc.

*Langham v. Baker*, and others, Parishioners of St. Helen's, London.  
[Hardr. 116.] 2 Gw. 511.

1658.

A bill lies in the exchequer for non-payment of tithes in London, according to the decree in 37 H. 8. c. 12. for the act has no negative words, it is not said, "before the Mayor of London and not elsewhere;" besides in the case of the King and his farmers, tithes were determinable in that court *ab antiquo*.

THE plaintiff, as farmer of the impropriate rectory of the said church, prefers his bill here against the defendants for not paying their tithes in London, according to the decree in 37 H. 8. to which the defendants pleaded the same decree, and that the plaintiff has his remedy before the Mayor of London, by the act of parliament, which settles the decree; and demand judgment whether or no this court will take cognisance of the matter.

And it was held clearly that the court has jurisdiction in this cause; for that it appears by the very decree itself, and the act in 37 H. 8. and by *Lindwood de decimis*, that tithes were payable in London before the said act for houses, but the *quota* was doubtful, which is remedied by the said act and decree; and the act has no negative words; it is not said before the lord mayor of London, and not elsewhere, vide *Scudamore's case*, 5 Jac. cited Co. Mag. Chart. upon 2 E. 6. and tithes were determinable here *ab antiquo*; as appears by 38 Ass. *Selden de decimis*. 4 E. 4. and by *Articul. Cleri*, cap. 4. In case of the King and his farmers, the cause follows the person and his privilege: and this case is not to be resembled to cases where justices of the peace are empowered by act of parliament; and for that cause justices of *oyer and terminer* have nothing to do, nor justices of gaol delivery; and so *vice versa*, 11 Rep. Dr. *Foster's case*. For they have but a limited jurisdiction. And the King's farmer has, in respect of the revenue, the same personal privilege that the King has; and without question the King may sue here. And it was ruled that the defendants *respondeant ouster*.

M. 1658. Scacc. *Button v. Honey*. [Hardr. 130.] 2 Gw. 511.

In a bill by a vicar, he did not set out how the tithes became due to him, whether by endowment or prescription, as he ought to have done; an exception at the hearing, after answer and depositions, was over-ruled, inasmuch as by his answer, the defendant had admitted his title; *quod nota*; for it has often been ruled contrary.

IN an English bill for vicarage tithes in some towns in Kent, the plaintiff did not set forth in his bill how they became due to him, whether by prescription or endowment, as he ought to have done, and exception was taken to this at the hearing, after answer and depositions. And the exception over-

ruled,

as he ought to have done; an exception at the hearing, after answer and depositions, was over-ruled, inasmuch as by his answer, the defendant had admitted his title; *quod nota*; for it has often been ruled contrary.



ruled; because the defendant does by his answer admit him to be vicar, and that the tithes in question are his due; but insists only upon payment and satisfaction, *quod nota*; for it has been often ruled contrary, it being the ground and foundation of the plaintiff's title. But the bill was afterwards dismissed upon the merits, with 40*s.* costs.

1658.  
BUTTON:  
v.  
HONEY.

## M. 1658. Scacc.

*Langham v. Sparstowe, and Others.* [Hardr. 130.] 2 Gw. 512.

**T**O an English bill for tithes of certain houses in London, according to the act of 37 H. 8. and to have a discovery of the improvements of rent; the defendants in their answer set forth a customary payment in lieu of all tithes. And exception was taken to their answers, because they do not discover their rents, but rely upon their answer, *de modo decimandi*. And the court held that the *modus* being alleged no otherwise than by way of answer, they ought likewise to have set forth the particulars of their rents, and answer to all the parts of the bill; but if the defendants had pleaded it, they needed not have answered to any other matter, and so it was ruled, though objected, that if the proofs were against them upon the *modus*, they might then answer upon interrogatories to the particulars.

If a *modus* be alleged only by way of answer to a bill, the defendants must answer to all parts of the bill; but if it be pleaded, they need not answer to any other matter.

Tr. 1659. Scacc. *Doble v. Potman.* [Hardr. 160.] 2 Gw. 512.

**U**PON a cross bill against a parson to discover what sort of tithes in particular he claims to be due to him; for that the parson in his bill one while demanded one manner of tithing, and another while another; the court held, that in such a cross bill the plaintiffs need not entitle themselves to the jurisdiction of the court, because the cross bill is grounded upon another bill here in court; as if a man be sued here in the office of pleas, he may have an English bill to be relieved against the plaintiff without setting forth matter of jurisdiction.

1659.  
In a cross bill in the exchequer the plaintiffs need not entitle themselves to the jurisdiction of the court.

Tr. 12 Car. 2. Scacc. *Holbeck v. Taylor.* [1 Wood, 60.]  
Warwickshire, 18th July, 1660.

**T**HE bill sets forth, that William Pawlett, esquire, in the month of May, 1658, was seised, in his demesne as of fee, of and in the rectory, impropriation, and parsonage impropriate of Filonghley, in Warwickshire, and of all manner of tithes of corn, grain, hay, and coppice woods, and of all manner of herbage and herbages whatsoever to the said rectory or impropriation belonging or appertaining, that is to say, two shillings for every pound rent in land by the year for the herbage thereof, then held with other lands of the late King Charles, his heirs and successors, by knight service in *capite*, under the yearly fee-farm rent of six pounds, three shillings, and tenpence; that the said William Pawlett did demise the said rectory, and tithes, and herbages, from year to year, until 1650; that the farmers or tenants thereof did quietly hold and enjoy, as well the tithes of corn and hay, as also the said yearly sum of two shillings, payable as aforesaid for herbage belonging to the said rectory; that the said William Pawlett did afterwards, by indenture, dated the 8th of May, 1650, demise and grant the same to the plaintiffs, to hold for three years, at the rent of ninety pounds a year; that being so possessed, the said plaintiffs did, for the most part, quietly hold, receive, and enjoy, all and singular the said tithes, herbage, and sums of money due and payable for the same; that the said defendant enjoyed and occupied in possession pasture ground at eleven pounds per annum, during the said term of three years, for which the said defendant ought to have paid to the said plaintiffs the yearly sum of twenty-two shillings, after the rate of two shillings for every pound rent of the land due and payable as aforesaid for herbage; but that he refused to pay the same as the former occupiers of the said ground had done. The

Agistment tithe at the rate of 2*s.* for every pound rent of land, decreed.

1659.  
HOLDEN  
v.  
TAYLOR.

bill therefore prayed; that the plaintiffs might be relieved concerning the said payment of two shillings in the pound for herbage.

The defendant appeared and answered; the plaintiffs replied; and witnesses were examined on both sides.

And, upon long debate had thereof, for that it appeared to the court, as well by the depositions of witnesses, as also by several very ancient accounts of 10 & 11 E. 4. that the said rate of payment of two shillings in the pound for herbage of such pasture ground which the said defendant occupied and enjoyed during the said three years, was due, and ought to be paid to the said plaintiffs;

It is ordered by the court, that the defendant shall satisfy and pay to the plaintiffs the several sums of sixteen shillings, twenty shillings, and twenty-two shillings, according to the rate of two shillings for every pound rent so due to the plaintiffs for herbage of the pasture ground which the defendant held and enjoyed during the said term, and according to the proofs in the cause.

BRIDGEMAN, *Chief Baron*.  
TURNER, *Baron*.

M. 12 Car. 2. Scacc.

*Wilson v. Redman and Others.* [Hardr. 174. 190. 1 Wood, 63.]

Yorkshire, 26th November, 1660.

1660.

Tenant in tail, who has an estate of inheritance in lands formerly belonging to the Cistercians, is within the privilege of that order, and the reversioner shall have it, because it was not interrupted but suspended only, while in the hands of particular tenants, but tenant for life or years is not privileged.

THE bill stated, that Henry Wilson, deceased, was, on the 29th of August, 1639, seised in fee of some estate for one or more life or lives in being, of the impropriate rectory of Horton, in Ribblesdale, and of all the glebe lands, and tithes thereto belonging; and also of certain lands, tenements, and tithes, with the appurtenances, in Becroft, Horton, and Ribblesdale; and being so seised, by will, dated the 29th of August, 1639, devised all his interest therein to the plaintiff and his heirs for ever, with a payment out of one hundred pounds to H. Power; that the said testator soon after died, seised of the premises; that the plaintiff being then an infant, the said H. Power entered at the end of three years after the testator's death into the premises, for want of payment of the said one hundred pounds, and enjoyed the same until the 2d of February, 1656; that the plaintiff being so entitled to the said rectory and tithes, he and the said H. Power yearly received the profits and tithes of most of the inhabitants there; and that the plaintiff ought still to receive the same. The bill then set forth the custom of tithing there to be, "every tenth stack of corn; for the offering of every inhabitant, three halfpence; every tenth calf; for the milk of every cow renewed, twopence; for every fowl, one penny; swarm of bees, one penny: for the milk of every tenth ewe, one penny; every tenth lamb; and for every six lambs, half a lamb, or the value thereof, and a whole lamb for seven; and more, the rector paying back so many halfpence as the number falls short of ten, and the inhabitants to pay one halfpenny for every lamb under six." It also stated the like tithing for fleeces of wool, and after the same rate for greater or lesser numbers of the titheable things there renewed. It also stated, that "hemp and flax paid the tenth part in kind; for every seventh, eighth, and ninth chicken, one penny; and after the same rate for eggs, geese, ducks, and pigs; for every garden, one penny; for every plough, one penny, called plough penny: and certain sums in lieu of tithe hay, which he could not particularly set forth. It then alleges, that the defendants had been for twelve years past inhabitants thereof; that they had great store of corn, lamb, wool, calves, and other titheable things yearly renewed there; but that they refused to pay tithes for the same, or to make any satisfaction for the same. The bill therefore prayed, that the defendants might account for their tithes for the said years, and pay the plaintiff the values and arrears thereof.

The defendants denied the plaintiff's title, as also the custom as stated; but alleged, that if any thing be payable for hay, milk, plough, garth, fowls, kine, penny offerings, eggs, or chickens, the said is due and payable to the vicar of Horton, and not to the impropriator. They also denied having in their hands any books, rentals, or other writings belonging to the rectory; and stood upon their

1660.  
WILSON  
v.  
REDMAN  
AND OTHERS.

own right to be discharged against the plaintiff for payment of tithes renewed upon their lands; and they set forth the time they severally held their particular messuages and tenements; all which several premises so held by them they alleged, had, time out of mind, been part of the *demesne* of the manor of Horton, (except the defendant Horton's tenement); that the manor, rectory, and water-corn-mill of Horton were all heretofore parcel of the possessions of the late dissolved monastery of Jervaux, in the county of York, which was of the Cistercian order; that the several abbots of Jervaux were, time out of mind, seised in fee of the said manor, rectory, and premises, and held the same in their own hands together; and that the late abbot being so seised, the same monastery came to King Henry VIII. by the dissolution of monasteries; who, being so seised, by letters-patent, dated about the thirty-sixth year of his reign, granted the same to the Earl of Lenox and his wife, and their heirs, at eighty pounds, nine shillings, and eightpence, yearly rent reserved to the crown; and from the said Earl of Lenox the defendants derive their tenements; and they set forth the same, and the quantities of their titheable matters.

The plaintiff replied; and witnesses were examined on both sides; and upon full hearing,

Forasmuch as the defendants do, by their answer, confess the subtracting of the tithes demanded by bill, and insist upon a discharge; for that the lands they held are pretended to be parcel of the *demesnes* of the late abbot of the late monastery of Jervaux, and that the said monastery was of the Cistercian order, this court does not think fit to decree the said tithes to the plaintiff, until a trial at law be had thereupon; but in the mean time this court thinks fit that the defendants shall give security for the values of the arrears of their tithes for twelve years past, in case a verdict shall go against them, according to the several particulars in their answers mentioned and proved in the books, according to the custom of tithing set forth in the bill.

It is ordered by the court, that the plaintiff shall bring his action against Lawrence Burton, one of the defendants, by consent, upon the statute 2 & 3 E. 6. c. 13. for not setting forth his predial tithes for the years 1659 and 1660; at which trial the said defendant is, by consent, to admit the plaintiff to be proprietor of the tithes, and that he the said defendant, is occupier of the land in question, and that he has refused to set forth the tithes in the said years, and to insist only upon the said discharge; and as the trial shall go for or against the said defendant for the said great tithes, all the defendants (except Roger Procter) are thereby to be concluded for all the tithes in question. The equity of the cause to be reserved; and the defendants to give security for double the value of their tithes, except the defendant Procter.

A trial at law was accordingly had, and a verdict given for the defendants; and, upon the prayer of the defendants' counsel, and upon reading the said order, *postea*, and depositions taken on the plaintiff's part, and some of the defendants' answers,

It is ordered by the court, that all the defendants (except Procter) shall be dismissed this court of and from the said bill, and their recognizances discharged; and that the defendant Procter pay to the plaintiff sixteen shillings for his tithes confessed in his answer to be due for the same.—[*Decree Book.*]

Upon a bill in equity, the question was, whether certain lands were discharged of tithes, as having been part of the possessions of an abbey of the Cistercian order; and the court held, that a tenant for life (1) or years is not within the statute, but that a tenant in tail, who has an estate of inheritance, is discharged *quandiu propriis manibus, &c.*

Upon a bill in equity for tithes, and a trial at law directed to try whether or no the lands of which tithes were demanded, had belonged to any order of religion that claimed to be discharged of tithes *quandiu in propriis manibus, &c.* it was held clearly by the court, that if at the time of the dissolution, such lands were in lease, or an estate for life or in tail were out upon them, yet the reversioner should have the benefit of the discharge after the determination of those estates; for that the discharge was not interrupted, but suspended only

(1) *Vide tamen, Hett v. Meeds, post.*

1660.

WILSON

v.

REDMAN  
AND OTHERS.

during the time that they were in the hands of particular tenants. *Vide Dy. 277. b. Accord.* But if an escheat had happened, it was doubted then whether they should have been discharged, having been parted withal by a feoffment made before the statute of *quia emptores terrarum*, by an abbey to hold of them by certain services; otherwise it is in case of a discharge by unity, for that must be perpetual, and continue so at the time of the dissolution. *Vide 11 Rep. Harper's case*, and 2 Rep. the Archbishop of *Canterbury's case*. (1) [*Hardres.*]

(1) *Ante*, 113.H. 12 Car. 2. Scacc. *Burgis v. Diamond*. [1 Wood, 65.]

Devonshire, 7th February, 1660.

Agistment tithes are due of common right, for barren and unprofitable cattle, which yield no tithes, unless they are reared and employed for the plough, the pail, the saddle, or spent in the family in the same parish.

**T**HIS was a bill touching tithes for the depasturing of barren and unprofitable cattle upon the lands in the defendant's occupation within the parish of Aishprington.

The cause came on to be heard this day; and upon reading the bill, and the depositions of divers witnesses, and upon much debate,

The court was of opinion that tithes, of common right, are due to the plaintiff for the pasturage of such barren and unprofitable cattle as yield no tithes, unless they are reared and employed for the plough, the pail, the saddle, or spent in the family, in the same parish.

But because the plaintiff by his bill, demanded the tenth part of the profit made upon the sale of such barren cattle so depastured, upon pretence of a custom which he has not at all proved,

It is therefore ordered by the court, that the said defendant be, and he is hereby dismissed out of this court of and from the said bill, and the matters therein contained, with twenty pounds costs.

M. 12 Car. 2. Scacc.

*Phillips v. Kettle*. [*Hardr. 173.*] 2 Gw. 513.

In debt upon 2 E. 6. a general allegation in the declaration, without shewing a title, is sufficient, although a rector claim tithes out of his own parish.

It was not stated that the defendant was *subditus domini regis*;

but the exception on this account was not allowed, for the statement that he was *occupator terre*, implies it.

**I**N debt upon the statute of 2 E. 6. for tithes, the plaintiff declares that he was rector of St. Martin's All-Saints, and that by reason thereof he ought to have the tithes of 100 acres of land in the said parish of St. Martin's All-Saints, and the tithes of eighty acres of lands in the parish of St. Martin's Genesee, without shewing how he became entitled to the tithes of lands out of his parish; and this was held by the court to be well enough after a verdict; besides that, a general allegation without shewing a title, is well enough in this action. Another exception was taken, because it was not alleged that the defendant was *subditus domini regis*, as the statute requires; *sed non allocatur*, for that it is alleged that he is *occupator terre*, which implies that he is *subditus*. *Vide Cro. 2 Rep. Kippar's case*, which seems to the contrary in this point.

E. 13 Car. 2. Scacc.

*Sir John Langham, Bart. v. Sir Edward Lawrence and others.*[*Hard. 180.*]

1661.

A trial at law was directed upon a bill for tithes in the Exchequer: the plaintiff filed another bill to have the use of certain leger-books in the custody of the defendant. A demurrer was overruled; for upon the trial at law, the former proofs are only evidence, and other and contrary evidence may be given: besides, these books concerning both the plaintiff and defendants, are like court-rolls, which belong both to lord and tenants, and copyholders; and therefore they may have bills one against another, to have the use of them, as well as against strangers.

**T**HE plaintiff preferred a bill, as farmer of the impropriate rectory of St. Helen's, London, against the defendants, parishioners there, to have the use of the Leger-books in their custody, which concern himself and the parish, at a trial to be had at law concerning divers payments pretended by the parishioners to be payable to them in lieu of their tithes, and directed by this court to be tried at law upon a former bill exhibited by the plaintiff against the parishioners;

rishioners: and the defendants demurred to the bill because it was only to provide himself with supplemental proof after the hearing of the cause; and because it appears of the plaintiff's own shewing, that the books belong to them as well as to himself: but *per totam curiam*, the demurrer was over-ruled, because it was not to have supplemental proof in the same cause, in the same way of proceeding, but collateral to it, to wit, upon a trial at law, where the former proofs are only evidence, and may be credited or not; and other and contrary evidence may be given, to induce the jury to give their verdict one way or other. And it is like the case of deeds or records, discovered afterwards, which may clear the matter in question, and are fit to be used, and do not impugn or contradict, in point of testimony or oath, any thing that has been proved before; which is the reason why subsequent proofs are not admitted; besides, these are common evidences which appertain to the plaintiff as well as to the defendants. And they are like to court-rolls, which belong both to lord and tenants, and copy-holders; and therefore they may have a bill one against another to have the use of them, as well as against strangers.

1661.  
LANGHAM  
v.  
LAWRENCE  
AND OTHERS.

E. 13 Car. 2. Scacc.

*Cage v. Warner and Lucy.* [Hardr. 182.] 2 Gw. 513.

**T**HE bill charged that the plaintiff, in the month of May, 1658, became incumbent of the church of Bearested, in Kent, and that the defendants in June, 1658 and 1659, by colour of an order of sequestration, made by the committee in the county of Southampton, as they pretended, had seized divers tithes of divers parishioners within the plaintiff's parish, due to the plaintiff; and to discover the particulars of the tithes so taken, and their values, and to have them paid to the plaintiff, was the scope of the bill; to which the defendant demurred, because it is a matter determinable at law, and a criminal matter: but the court put the defendants to their answer, because it is matter of discovery: as in the case where a man, by colour of a title, enters into a house or lands, and possesses himself of the goods and profits. It may be impossible for the plaintiff to discover the particulars without such a bill; nor is it a charge by way of trespass, but under colour of title: so where a will is proved, and administration to another revoked, such a bill is necessary, and usual for the goods, and yet there was, in strictness of law, a trespass; so here.

Where tithes have been seized under pretence of title, the Court (of Exchequer) will compel a discovery of particulars and values.

E. 13 Car. 2. Scacc. *Holbeech v. Whadcocke.* [Hardr. 184.]

**I**N a suit by English bill for the tithes of the herbage of barren cattle and others, the Chief Baron said, that tithes for barren cattle were due *de communi jure* according to the value of the land after the rate of two shillings per pound; for that they cannot be otherwise valued or accounted for, because the profits of the lands for which they are paid, are perceived by the mouths of beasts; but by custom or prescription such tithes may be paid in other manner, as by the acre, and for all manner of cattle, barren, and for the plough, and the pail; but of common right, tithes are not due for cattle bred for the plough and the pail, to be used in the same parish; but if they belong to another parish, tithes are due for them; and of that opinion was the whole court: and when tithes are payable by custom, they shall be paid, though the lands are not rented, or lie fresh.

of cattle, whether barren, or for the plough, or pail; but for these, of common right, no tithes are due, if used in the same parish: and when tithes are payable, by custom they shall be paid, though the lands are not rented, or lie fresh.

Tithes for barren cattle are due of common right, according to the value of the land, after the rate of 2s. in the pound; but by custom or prescription agistment tithes may be paid in other ways, as by the acre, and for all manner

1661.

Agistment tithes of lands formerly parcel of the possessions of the Cister-tians, are payable by the owner of the cattle; for the land is not in *proprio manibus*.

E. 13 Car. 2. Scacc.

*Pory v. Wright* and others. [Hardr. 184.] 1 Eq. Ca. Ab. 367. 5.

**UPON** a bill in equity for tithes of pasture ground, parcel of the possessions of the Abbey of Fountain, being of the Cistercian order, it was held *per curiam* that tithes for the agistment of cattle are payable by the owner of the cattle; for the cattle take the profits and herbage of the soil: so in the case of commoners: and it cannot be said that the profits are taken by the owner of the soil, or that the ground is in *proprio manibus*. The Chief Baron said the owner of the soil might pay them, but clearly the agister is compellable to pay them.

The Ch. B. said the owner of the soil might pay them, but clearly the agister must.

E. 13 Car. 2. Scacc.

*Randal v. Head* and others. [Hardr. 188.] 1 Eq. Ca. Ab. 34. 2.

Where an exemption is insisted upon (as by denial of a custom to pay tithes of conies, which are not due of common right), the defendant in his answer need not set out quantities and values; for there being a full answer given to the thing in demand, till that be tried, the defendant is not bound to discover; and if it should be otherwise, the defendant, by a feigned suggestion, might be forced to discover any thing; but if in such case the matters be found against the defendant, he shall be examined afterwards upon interrogatories.

**IN** a bill for tithes of conies *per custom* (*inter alia*) to pay the tenth cony, or the value of it. The defendants by their answer deny the custom, but do not discover how many conies they killed, or the value of them, as the bill requires; to which exception being taken, the court held that a discovery needed not where there is a full answer given to the thing in demand; and that till that be tried, the defendants are not obliged to discover; otherwise any plaintiff might, upon a feigned suggestion, compel a defendant to discover what writings he has, or what goods or other things whatsoever, upon pretence that he is joint tenant with him, and so what he has gained by his trade, which would be strangely inconvenient; but where there is no such great inconvenience, as upon a bill against an executor to discover assets upon a bond or debt, there he must answer, though he deny the debt, because it concerns the act of another person, and assets are presumed; nor is there any inconvenience in the case. But in all such cases the court thought it fit that the defendant, if such matter were found against him, should be examined upon interrogatories, to discover his knowledge; and so it was ordered, and an issue directed to try the custom. Also the demand of tithes of conies being against common right, the court conceived the case for that reason to be the stronger for the defendant.

Where an exemption is insisted upon (as by denial of a custom to pay tithes of conies, which are not due of common right), the defendant in his answer need not set out quantities and values; for there being a full answer given to the thing in demand, till that be tried, the defendant is not bound to discover; and if it should be otherwise, the defendant, by a feigned suggestion, might be forced to discover any thing; but if in such case the matters be found against the defendant, he shall be examined afterwards upon interrogatories.

E. 13 Car. 2. Scacc. *Driver v. Man*. [Hardr. 190.]

A demurrer to a bill for tithes in the Exchequer, because the single value only was not demanded, overruled.

*Quod nota et*

*quare*, because it is contrary to the common usage and practice.

**UPON** a bill in equity for tithes of corn and grain, and a demurrer to it, because the single value was not barely demanded; but it was a bill of discovery only, to enable the plaintiff to recover the treble value: *ad non allocatur*; for that tithes were sutable for in this court before the statute: *quod nota et quare*, because it is contrary to the common practice and usage to have such a bill, without alleging that the plaintiff is contented to receive the single value only.

E. 13 Car. 2. B. R.

*Bernard v. Evens*. [1 Lev. 24. 1 Keb. 5. 21.] T. Raym. 14. 2 Danv. Abr. 621.

Although a lease for tithes cannot be good without deed, so as to pass the right,

yet a parol agreement by way of retainer, is a good bar to an action on s E. 6.

**IN** debt for tithes for four years, the defendant pleads an agreement between the plaintiff and him, that he should retain the land discharged of tithes during the life of the plaintiff, if he so long continued parson: issue (was) on the

the agreement, and a verdict for the defendant, and judgment for him after motion in arrest of judgment. For although, first, a lease of tithes cannot be without deed; and secondly, that it cannot be a good lease for the uncertainty, as Co. Litt. 45. b. and 2 Cro. *Hewkes v. Bregfield*, Owen, 103, Mob. 176. yet this being only a contract for retaining the tithes, it is good according to 2 Cro. *Homicomb* against Sweet. (1) And by the whole court, judgment was for the defendant. [*Levins*.]

An agreement (for a *modus decimandi*) parcel is good to excuse a man from the penalty of 2 Ed. 6. 13. of tithes, and such a one whereupon an action upon the case may be grounded, though it do not actually transfer the interest of the tithes; and it is the constant custom in the western parts to plead such an agreement in bar against the statute. And by *WINDHAM*, an agreement to hold for life is a good agreement, though without livery it transfers not the estate; *a fortiori*, here, for so long as the defendant shall be parson. [*Keeble*.]

(2) *Ante* 327.

E. 13 Car. 2. B. R. *Anon.* [1 Keb. 253.]

**NOTA**, that trial, whether land of which tithes are sued for in the spiritual court is barren and not arable, must be at common law, and prohibition awarded accordingly.

The trial whether land be barren or not must be at common law.

Tr. 13 Car. 2. Scacc.

*Sir William Waller and Wife v. Farmor.* [Hardr. 202.]

**I**N an English bill for tithes, a *modus decimandi* was in issue, and a trial awarded by the court, *ad informandam conscientiam* in the county of Oxford; and after a verdict against the plaintiff, and against the directions of the court to the jury, as appears by affidavit, it was now moved to have a trial at bar, because the plaintiff was a counsellor at law; *sed non allocatur*, because here the matter of the issue is local, and not transitory; then a trial was prayed to be awarded in any adjoining county, by reason of the great power and influence that the defendant had in Oxfordshire; and upon this the matter was adjourned; but afterwards a new trial was granted in Oxfordshire, and another verdict against the plaintiff upon that trial too. *For* upon the ground that he was a counsellor at law) was refused, as was a trial in an adjoining county, the matter being local.

After trial of a *modus* upon an issue directed by the court of exchequer *ad informandam conscientiam* in the proper county, and found against the plaintiff, a trial at bar (applied

Tr. 13 Car. 2. B. R. *Tipping v. Grover.* [T. Raym. 18. 1 Keb. 62.]

**D**EBT for rent, brought by executors, the plaintiffs count, that their testator was seised for another's life of certain tithes, and demised them to the defendant for years, rendering rent, and for 400*l.* arrears they bring debt; and on demurrer on this declaration, *Jones* argued it is a rent, and that the executors shall not have this rent, because it appertains to the reversion, for it is a rent, although not in point of remedy, Cro. Jac. 112. (2) and 453. (3)

*Allen*, *contra*. Debt lies upon the contract, which goes to the executors. But he perceiving the opinion of the court to be against him, prayed a discontinuance, which was granted him.—[*Raymond*.]

**I**N debt against lessee of tithes for years, (by the executors of H. lessee to H. and his heirs of a rectory, for three lives, &c. Cro. Jac. 112. (1) 453. (2) rendering rent. Tr. 37 Eliz. *Buskin v. Edmonds*, it was said this is a good rent, and not a sum in gross, and that a demand is necessary to make void such lease, and so it is incident to the reversion, but *per curiam*, it is gone by the death of the tenant for another's life; there being no occupant of tithes, unless as joint with the rectory; and therefore, by *Jones*, for the defendant, here the executors shall not have the rent. *Allen*, for the plaintiff. In *Jewel's* case, it is resolved that rent upon a lease for lives shall go to the executors, and not to the bishop or the heir, Inst. 47. and so should it do in case of a

In debt for rent brought by executors, they declared that their testator was seised *pur autre vie* of certain tithes, and demised them to the defendant for years, rendering rent, and for 400*l.* arrears they brought debt. On demurrer it was held to be a rent, although not in point of remedy, and that the executors should not have it, because it belonged to the reversion.

(3) *Talentine v. Denton*, *ante*, 162.

(3) *Dobbs v. Cursons*, *ante*, 262.

■ ■ ■

lease

1661.  
TIPPING  
v.  
CROVER.

lease for years. And though it be said *spectant rectorie*, yet when the lessor has nothing to do with the rectory, the heir shall not have the rent, for by letting the tithes they are severed from the rectory, and so by the death of tenant *pur auter vie*; only the contract remains, but the rectory vanishes; to which the court agreed. *Jones*. Such a severance for years will not amount to a full severance, but only if it had been for life. — *WINDHAM*. It is said that the lessor was seized of the tithes, which are part of a rectory, and not only incident to it; and of them only an occupant cannot be. But a rectory is like a manor mixed, and an occupant may well be of that: and when tenant *pur auter vie* makes a lease and dies, this determines his interest, but not the lease. But by *TWISSDEN*. This is the act of God, and so may determine the lease, but not so of a surrender. And the court agreed to the case, in *Cro. Jac.* 111. put by *Jones*, that a lease for years is good of tithes, but not for life by such a tenant; but yet that the rent should either follow the reversion, or shall be extinct, being by act of God or of law; but otherwise if the lessor had surrendered, there the rent had been absolutely gone; and after the plaintiff, executor, or tenant, *pur auter vie* discontinued the action. And by the court, this is a good case for a reader of an inn of Chancery. — [*Keble.*]

M. 13 Car. 2. Scacc.

*Breamer v. Thornton*, and others. [*Hardr.* 203.]

A parol agreement to pay 2s. 6d. in the pound rent for tithes, will not bind the parson, but it will excuse the parishioners from the penalties and damages given by 2 E. 6. and from costs till notice given of his dissent from the agreement; and notice given after payment due is too late: and so it is if given after the lands are manured and sowed; because, perhaps, if notice had been given before, they would not have been at so great a charge upon them, or not have sown them at all.

**I**N a bill for tithes for the year 1660. The defendants by their answer set forth an agreement made ten years ago between the plaintiff and the defendants, and other the parishioners of the said parish, to take 2s. 6d. in the pound, for every pound rent of land, within the parish, as long as they should live together, and he continue parson, and that they had constantly paid it accordingly, and that by the said agreement the payment was to be made upon the 1st day of May and the 1st day of November yearly; and it appeared that the plaintiff had not given notice that he retracted the said agreement, or dissented from it, after the 1st day of May, 1660. And *per curiam* this agreement will not bind the parson, being by parol, but it will excuse the parishioners of the penalties and damages given by the statute of 2 E. 6. and from costs till notice given of his dissent from the agreement; and that notice given after payment becomes due, is too late; and that it is too late if given after the lands are manured and sowed, because perhaps if notice had been given before, he would not have been at so great charge upon them, or not have sown them at all; and the court desired the parties to agree. *Et adjournatur*.

1662.

In doubtful cases, the first rule usually is to shew cause why a prohibition should not

E. 14 Car. 2. B. R. *Anon.* [1 Keb. 281.]

**N**OTA, when the cause is doubtful, the court usually, in grant of prohibitions, make the first rule, that parties should shew cause why a prohibition should not go; the next rule is, that a prohibition go, unless cause be shewed; and then the rule is made absolute to have a prohibition. go, the next that it shall go nisi, and then it is made absolute.

E. 14 Car. 2. B. R. *Tradaham v. —*. [1 Keb. 286.]

No new prohibition shall be granted after nonsuit upon

**A**FTER nonsuit on trial of a suggestion, no new prohibition shall be granted, *per curiam*, though such nonsuit were sworn by default of a witness necessarily employed.

trial of a suggestion, though it be sworn to have been by default of a witness.



M. 14 Car. 2. Scacc. *Compost v.* ——— [Hardr. 315.] 2 Gw. 514.

1662.

**I**N an action of debt, upon the statute of 2 E. 6. for tithes of Eltham Park, in Kent, the general issue was pleaded; and upon a trial at bar, it was held upon evidence by HALE, C. B. and the whole court, that the King is not, by virtue of his prerogative, discharged of tithes for the ancient demesnes of the crown; but that he is capable of a discharge *de non decimando* by prescription (because he is *persona mista*) as well as a bishop. Vide 2 Rep. the *Bishop of Winchester's* case. But if the King alien any of the lands that he is so discharged of tithes for, his patentee shall pay tithes; and not only so, but the prescription is destroyed for ever, though the same lands should afterwards come into the King's hands again, by escheat or otherwise.

any of the lands for which he is so discharged, his patentee shall pay tithes; and the prescription shall not revive if the lands should come into his hands again by escheat or otherwise.

The King is not discharged of tithes of the ancient demesnes of the crown by his prerogative, but he is capable of a discharge by prescription as well as a bishop. But if the King alien

M. 14 Car. 2. B. R.

*Holl v. Bradford.* [1 Sid. 88.] 1 Keb. 344. T. Raym. 57.

**D**EBT was brought for fifths, against executors upon the new statute concerning parsons; and by the whole court, this lies well against the executors, for this is a duty and no tort but in the non-payment. So it lies by executors by the words of the statutes.

TWISDEN, J. Action of debt for not setting out tithes lies by executors; but not against the executors of a parishioner, and so it was lately adjudged in C. B.

Debt on 2 E. 6. for not setting out tithes lies by executors, but not against them.

M. 14 Car. 2. B. R.

*Butler v. Yateman.* [1 Keb. 354. 369.] 1 Sid. 89. 1 Lev. 78.

**I**N suit in the spiritual court of the Archdeacon of Berkshire for tithes; the defendant, suggesting they belong to another vill, prayed a prohibition, which WINDHAM denied, by reason the bounds are but incident, and they have consensance of the principal. So FOSTER. *Contrà* by TWISDEN; but the prohibition was granted, *missi*.

*Powis* moved against a prohibition, that it ought not to be granted here, because the bounds of the parish are not in question, but only of the vill. But if it were, yet it could not be tried by suggestion, without pleading; for they having consensance of the principal, this boundary is but collateral, as F. N. B. 50. *Contrà* by *Holt*, for the plaintiff, these parties being not spiritual, but patentees of the King. *Latch.* 116. *Hutton's* case, and *Yelvert.* 92. and so the bounds are properly triable at common law, it being the main question, whether it be within one tithing within the vill or borough, 7 Co. 44. b. or in another without it in the same parish, *Hob.* 296. But by *Powis*, here only the close, out of which, is only in question, not the vill, 13 Car. *Whiskard* against *Fuller*, in *Robert's* case, 12 Co. 65.(1) — TWISDEN saw no difference betwixt the bounds of tithing, and of the parish, but it never was granted upon suggestion of the bounds of a vill, being only incidental, and against common right, and therefore, though question temporal, is triable at common law; which the court (*contrà* MALLET) agreed: And by WINDHAM, should A. sue B. for tithes of a close, and B. say he is not owner of it, this shall be tried in the spiritual court; the court denied prohibition, and the authority of *Yelvert.* 92.

Though the bounds of a parish are not triable in the spiritual court, yet the bounds of vills in the same parish are. (Quere—the difference?—Sid.)

(1) *Whiskard v. Fuller*, cited in *Robert's* case, ant<sup>2</sup>, 194.

1662.

Upon suggestion of barren ground, or unity of possession, prohibition shall go after such plea pleaded in the spiritual court and disallowed, but not before.

M. 14 Car. 2. B. R. *Cookson's Case*. [1 Keb. 387.]

**JONES** moved for prohibition for *Cookson*, administrator of *Pots*, to the bishop's court of *Lincoln*, upon suggestion that the last incumbent was for some time put in 'by the late usurpers, and so by the act of oblivion is to be discharged, for so much in suit there for pension; as in action for tithes, if H. suggest it is barren ground, on 2 E. 6. he shall have prohibition presently; which the court here denied, before this be pleaded in the spiritual court: and it there appears this to be the single issue, whereby the party has tied himself up; and then if the spiritual court will not allow the plea, prohibition shall be granted; as in action for tithes, if the defendant pleaded unity, and so discharged by the statute, then prohibition shall go, but not before.

1663.

The vicar, in a bill for tithes in the exchequer, did not shew how he was entitled to them, but it was held good. *Quod nota*, for it is against many precedents of demurrers for that cause held to be good.

H. 15 Car. 2. Scacc.

*Stone v. Ludlowe*, and others. [Hardr. 321.] 2 Gw. 514.

**I**N a bill for tithes due to the complainant, as vicar and incumbent of in *Essex*, the complainant did not shew how he was entitled to them, viz. by prescription, endowment, or otherwise. And the court held it to be good notwithstanding, as well as in an action at law for tithes upon the statute of 2 E. 6. the plaintiff is not obliged to set forth his title; *Quod nota*: for it is against many precedents in this court, which I have known of demurrers for that cause, held to be good.

H. 15 Car. 2. Scacc. *Page's Case*. [Hardr. 322.] 2 Gw. 513.

To a bill for tithes the defendant answered that the lands were parcel of a priory, discharged by order, without saying more, and held good. *Quod nota*.

**I**N a bill for tithes, the defendant by his answer set forth, that the lands whereof tithes were demanded, were parcel of the priory of , and that the lands belonging to that priory were discharged by order, without saying more. And this was held sufficient; *Quod nota*: because of the uncertainty.

H. 15 Car. 2. B. R. *Parker v. Williams*. [1 Sid. 100.] 1 Keb. 433.

Although the exposition of all statutes and letters-patent belongs to the common law, yet, before prohibition granted, it must be suggested that the plea had been pleaded and disallowed in the spiritual court.

**A** PROHIBITION was prayed to the court of arches, for that one who had gained possession of a church had libelled against J. S. for dissipations, which J. S. entitled himself to be incumbent of the said church by the new statute of 12 Car. 2. concerning parsons; which title the spiritual court refused to allow. — *WINDHAM, J.* Although the exposition of all statutes and letters-patent belongs to the common law, as 12 Co. 66. [*Robert's case*, Register, 58.] yet to have a prohibition, it ought to be suggested, that he had pleaded them then, and that they had refused to allow them; otherwise there is no cause for prohibition.

But *TWISDEN, J.* seemed to disagree, for it would be in vain to plead matters there upon which they cannot judge; as if prohibition be prayed, because the bounds of a parish come in question, without a suggestion that it had been pleaded in the spiritual court; for it would be in vain to plead it there, when they could not try it.

H. 15 Car. 2. B. R. *Anon.* [1 Keb. 454.]

The court doubted whether a prohibition should go upon suggestion of a customary payment of tithe fish, for the spiritual court will allow it; *contra* of a custom of discharge of tithes which they will not allow.

**W**ITHERINGTON prayed prohibition to *Durham*, on suggestion of payment of fish by custom; and so of a toll of a mill, which the court doubted: *contra* on custom to be discharged of tithes, because they will not allow such discharge; but the other custom they will: and so the court only staid proceedings till the suggestion drawn. *Adjournatur*.

E. 15 Car.

E. 15 Car. 2. B. R.

*Westcote v. Harding.* [1 Lev. 96.] 1 Keb. 481. 501. *Rogers v. H.*

1663.

**A** PROHIBITION was granted to the bishop of Sarum, for citing one out of his diocese to appear at his court at Sarum, whereas the party was living in London; but it being a suit for tithes of lands in the diocese of Sarum, the court, on notice thereof, granted a consultation; for the lands lying in the diocese of Sarum, the suit cannot be elsewhere, let the defendant live where he will; and therefore this case is not within the statute: and a consultation was granted.

If the cause of action for tithes of lands arise in one diocese, a defendant may be cited to appear there, though he may reside in

another; and the case is not within the statute.

Tr. 15 Car. 2. Scacc.

*Twiss v. Brazen Nose College and others.* [Hardr. 328.] 2 Gw. 514.

**I**N a bill at the suit of the vicar of Gillingham, in Kent, for tithes of the manor of Uxbury, and other lands belonging to the rectory impropriate of Gillingham aforesaid; the tithes demanded being for eight years last past, and ending in the year of our Lord one thousand six hundred and sixty-one. The case upon hearing appeared to be, that for divers years before the bill exhibited in the times of many vicars, the said tithes had been enjoyed by the said vicars of Gillingham aforesaid: but an endowment was produced, bearing date the seventh of March, in the year one thousand three hundred and sixty-two, mentioned to have been made by Islipp, then archbishop of Canterbury, and preserved in the archbishop's register; by which it did not appear that the vicar was endowed with any tithes of corn or grain; nor in the said instrument of endowment was liberty reserved to the archbishop, as is usual in such cases, to augment or diminish, &c. and it was thereupon insisted that the vicar ought not to have those tithes. But the court held, that where a vicar has used, time out of mind, or for a long time, to take tithes or other profits, he shall not be concluded, by their not being expressed in the endowment of the vicarage; and that it has been often so held and ruled. And it shall be presumed by reason of a long possession of such tithes, &c. that the vicarage has at some time or other been augmented therewith: and the not reserving such a power to the archbishop, is not material; for an augmentation may have been notwithstanding, with the assent of, or upon citing all parties, but not without notice or citation, as it may be when such a power as aforesaid is reserved to the archbishop.

Where a vicar has used time out of mind, or for a long time, to take tithes or other profits, he shall not be concluded by their not being expressed in the endowment of the vicarage, although no liberty was reserved in that instrument of augmenting or diminishing; for it shall be presumed by reason of a long possession of such tithes, &c. that the vicarage had at some time been augmented therewith.

M. 15 Car. 2. Scacc.

*Berke v. Harris and others.* [Hardr. 337.] 1 Eq. Ca. Abr. 39. 1.

**T**HERE was an English bill in the Exchequer against Harris, to shew by what title he held such a meadow, which (as was alleged) appertained to the office of keeper of Gloucester Castle, granted to the plaintiff for life; and against the other defendants, as brewers of the city of Gloucester, every one of which, as the bill suggested, was by custom obliged to pay such an annual sum to the said officer. To which bill the defendants demurred, because the bill is concerning things of several distinct natures, and is brought against several persons, which will occasion several answers and examinations; and if they were suffered to be put all into one bill, each party would be obliged to take copies of what no way concerned his own cause, whereby the charge would be increased to no purpose. And of that opinion was the whole court. As if a person should prefer a bill against several persons, viz. against some for tithes, and against others for glebe, this is naught: but for tithes only, it is well against several parishioners, because they are of the same nature. So in case a lord of a manor would prefer one bill against divers tenants, for several distinct matters and causes, as common, waste, several piscary, &c. this were naught, though the ground and foundation of the suit, viz. the manor, be an entire thing. So here, &c.

A bill against several persons concerning things of several distinct natures, is bad upon demurrer: as if a person should prefer a bill against several persons, against some for tithes, and others for glebe, it would be bad: but for tithes only, it is good against several parishioners, because they are of the same nature.

M. 15

1663.

It was said by **TWISDEN, J.** that although prohibitions had formerly been granted on suggestion that the spiritual court refused proof of a deed, because there was but one witness; yet from the time of **JONES, J.** downwards, no prohibition had been so granted.

M. 15 Car. 2. B. R. *Prince v. Huett.* [1 Sid. 161.]

**UPON** moving for a prohibition to the official of the court of York, for proceeding to try a deed which related to an executor, it was affirmed by **TWISDEN, J.** and not denied by any one, that although in times past prohibitions had been granted upon suggestion that the spiritual court refused to allow proof of the deed, &c. for that there was but one witness, yet from the time of **JONES, J.** to the present, no prohibition has been granted in such case.

M. 15 Car. 2. B. R. *Webb v. Dyer.* [1 Sid. 163.]

After a prohibition nisi granted, and the suggestion put in, the court may overrule the suggestion, without compelling the other party to take issue or demur upon it; and so they did in this case.

**NOTE**, in this case, on a motion for prohibition, it was resolved, that after prohibition nisi, &c. granted, and after the suggestion put in at the day, the court may overrule the suggestion, without compelling the other to take issue, or to demur upon it; and so they did in this case.

overrule the suggestion, without compelling the other party to take issue or demur.

M. 15 Car. 2. B. R.

*Bawdry v. Bushel.* [1 Keb. 602.] 1 Lev. 116.

A custom that all occupiers and tenants inhabiting out of a vill, should pay 4d. an acre in satisfaction of all tithes of land in it, was held unreasonable, and a leaping custom, not fixed to any person certain, nor to the land, nor of any permanence.

**BIGLAND** moved for prohibition to his court, on suggestion of a custom that all the occupiers and tenants of Skegnes, that are inhabitants in any place out of the parish, shall pay to the vicar only four-pence a year for every acre; and alleging that the plaintiff was such occupier, and lived out, and conceived that to be a sufficient prescription, being only in discharge of the occupiers. But *per curiam*, this is an unreasonable custom, and only invented by the country to cheat the parson; also it is a leaping custom, not fixed to any person certain, or to the land, nor of any permanence. And by **KEYLINGE**, there is no precedent of any *modus* so variable and dancing.

M. 15 Car. 2. B. R. *Towerson v. Winget.* [1 Keb. 602.]

Prohibition to a suit for tithes of rabbits without a special custom.

**WILD** moved for prohibition on suggestion of suit in the arches before **Dr. Sweet**, for tithe of conies of a warren, without special custom, which was granted *per totam curiam*, the court having proceeded only on libel, but yet, because the defendant would not swear how many conies there were, being seen in court, without any time, presently excommunicated him.

M. 15 Car. 2. B. R. *Took v. Ledgierd.* [1 Keb. 612.]

A *modus* of 4s. for every day's ploughing of wheat, and 2s. for barley, is void for uncertainty; but if it had been laid as so much for every day's work, with an averment of its certainty, it might be good. But **HYDE** thought wheat could scarcely have been worth so much time out of mind.

**THE** court refused to grant prohibition on suggestion of *modus* to pay four shillings for every day's ploughing of wheat, and two shillings for every day's ploughing of barley, for the uncertainty; but if the *modus* had been so much for every day's work, with averment that it is certainly known, and how much it contains, it might be. But by **HYDE**, wheat could scarcely be of so much worth, time out of mind.

1664.

H. 16 Car. 2. B. R.

*Weekes v. Trussell.* [1 Sid. 181.] T. Raym. 95. (*Wilks v. Russel.*)

**WINDHAM** and **KEYLINGE** were of opinion that an action on

**I**N prohibition the case was, that there was a suit in the spiritual court for double damages, upon the statute 2 E. 6. for not setting out tithes; whilst the suit was pending, the defendant died, and then they sued his executors for double

double damages: and prohibition was prayed upon the common suggestion, that the exposition of statutes belongs to the judges of the common law; and that this was a personal tort of the testator, for which, by the common law, his executors should not answer: and of that opinion were WINDHAM and KEYLINGE. (1)

(1) According to Sir Thomas Raymond's report, the prohibition was denied.

lie against executors, it being a personal tort of the testator.

1654.

WILKINS.

TAVENHILL.

2 E. 6. for not setting out tithes, did not

H. 16 Car. 2. B. R.

*Richardson v. Fauconbridge and others.* [1 Keb. 684. 886. 906.]

1 Sid. 258.

**L**INDLY prayed prohibition to the spiritual court in Carlisle, on suggestion that the tenant of Blackacre prescribed in *modus* of payment of 3s. 4d. in lieu of the fourth part of all hay in another place; and (as Moor, 483. was resolved in the case of the lord of a manor) with a prescription for the fourth cock in that place in lieu thereof, which is but as a profit *appendre*; and the libel is general for taking away so many cart loads of hay, not shewing whether the tithes are of the tenant's lands, or of other: but by the last article it appeared he took away the ninth as well as the tenth part, which must be intended his own. TWISDEN conceived, in regard there was difference in opinion whether such custom were good, that prohibition may be awarded. — WINDHAM. I see not how it can possibly be, that one that is not lord, but a tenant, can make such a prescription. And by TWISDEN, in 1638, in *Eschequer ex relatione Bridgman*, Ch. J. of C. B. it was, contrary to his opinion and argument, adjudged a good prescription, because it ceased to be tithe, but is a profit *appendre*; which HYDE and KEYLINGE denied; for the libel is for tithe, and a retainer would be as good *modus* of this for the lord, who is privity, and so is 44 E. 4. 5. But for the doubt, prohibition awarded, and demurrer thereto.

In a prohibition, the plaintiff declares that the dean and chapter of Carlisle are seised of the manor and rectory of Morlands; and that one Gibson, a customary tenant, prescribes that every tenant of his tenement has used to pay 3s. 4d. to the lord, who is also a parson, in discharge of his rent of the said messuage, and also of the fourth part of the tithe hay in Bolton-field; and *ratione inde* has used to take the fourth part of the tithe of such hay, and therefore prays a prohibition. And by Lindly, if any reasonable beginning may be presumed, it shall support the usage. 15 E. 3. Aid. 33. So 1 Leon. 11. & 1 H. 7. 24. though such customs be not now reasonable, as considered abstractedly in themselves: and in our case the lord might pay money in discharge of this field, and after the union of the manor and the tithe, might impose this charge on this customary tenant. 3 Cro. 587. *Somerton v. Cotton*, (1) where the person claimed lands, parcel of the manor, in discharge of all the tithes of his parish, not saying that his parish is parcel of the manor, yet good. And the like is resolved in the case of *Piggot v. Heron*, Moor, 483. (2) and in the bishop of Winchester's case, 2 Co. 45. 3 Cro. 599. (3) Also admitting this a good prescription in discharge, it is also a good prescription in the pernaney for the fourth part of the tithes, although it had been better to prescribe generally for the fortieth part of the hay, as *decimam garbam*; but in 2 Co. 55. it is said he may sue for this in the spiritual court; but, however, the plaintiff cannot take it of the tenant, yet the discharge is sufficient against the parson. WINDHAM said, that every custom reasonably begun, cannot discharge, for this composition might do it; but it must be of a reasonable and common intent to discharge, which appears not here, but the contrary; for they should have been several, so much for the quit-rent, and so much for the tithe. Also the lord and parson were several, and the acceptance of the lord cannot discharge the parson: and if the lord should grant away the impropriation, it cannot appear what the parson shall have. Also, although the lord might pre-

A suggestion by a copyholder of a dean and chapter, that all the tenants of their manor have been discharged of a fourth part of the tithes of all their lands (wheresoever lying), upon payment to the lord of so much for a quit rent for Blackacre, is bad; for it can not be that lands held of others can be discharged by a payment to their lord, it not appearing besides that this payment was any other than a rent, or if it were, that he had any title to receive it. Although the lord might prescribe in such discharge, yet a copyholder cannot, especially for lands not belonging to his copyhold.

(1) *Antd.* 141.

(2) *Antd.* 135.

(3) *Antd.* 119.

scribe

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acquit in such discharge, yet not a copy-holder, especially for lands not belonging to his copyhold. *Adjournatur.*

The prescription to pay money as well for the copyhold rent as for tithes, cannot be good, because the parson cannot libel for the rent, nor the lord for the tithe; and though the parsonage be united to the manor now, yet it may be separated, *et non constat*, what each should have; and therefore *Pemberton* prayed a consultation, which the court fully concurred to grant, as well for the former reason as for that. *Boltonfield*, on 3 Cro. 587. cannot be intended parcel of the copyhold, as it might have been of the manor in such prescription by the lord: also, *per curiam*, the parson must have a satisfaction, else no prescription can be in discharge; and here it is uncertain what the parson shall have. Also, by *KEYLINGE*, it does not appear this is copyhold. Also, by *WINDHAM*, all appropriations are preternatural, and the church during such time is in bondage, and therefore by presentation is made presentative. Also, by *TWISDEN*, the plea is pregnant that the manor and rectory were, time out of mind, held *simul et scilicet*; for he should have said, they are and were always so held; for else, though they were so held anciently, they may now be severed. Also the lease hereof is not said to be by deed, which being on demurrer to the prohibition, is ill. Consultation awarded.

### H. 16 Car. 2. B. R. *Anon.* [1 Keb. 688.]

It was made a rule of court in B. R. that all moving for prohibitions, should inquire if such motions had before been made in C. B. and inform the court of the success thereof, but they did not regard the Exchequer, conceiving they had no power to grant any.

**NOTA** *pro regula*, such as move for prohibition here, ought to inquire and inform the court whether such motion has been before made in the C. B. that the court may the more consider it; (and the like rule is given in the C. B. on motions there, if it have been before moved in any other court) and to relate truly the success thereof, when moved for before this time in B. R. But because the court conceived this *commune placitum* within Magna Charta they did not regard the exchequer, conceiving they had no power to grant any.

### E. 16 Car. 2. B. R. *Anon.* [1 Keb. 716.]

A *modus* of one penny for a calf, so for a horse and cow in discharge of tithes of all gross cattle is bad.

**WINNINGTON** prayed a prohibition, suggesting a *modus* by paying one penny per annum for a calf, so for a horse and cow, in discharge of the tithe of all gross cattle; and by *KEYLINGE* it is ill, which the rest agreed.

### M. 16 Car. 2. Scacc.

#### *Grant v. Hedding and Ball.* [Hardr. 380.] 2 Gw. 515.

Tithes shall be paid for trees sold from a nursery, whether they yield fruit which pays tithes or not, and although they are transplanted in the same parish. If the owner sell them and pull them up himself he shall pay the tithes, but if he sell them particularly, the vendee shall pay them. So if corn be sold standing, the vendee shall pay the tithe, but if sold after severance the vendor shall pay it.

**I**N a bill in equity for the tithes of a nursery sold; upon hearing of the cause, divers doubts and questions were made; as,

First, Whether tithes should be paid, if they yielded no other fruit.

Secondly, Whether tithes should be paid for those trees, that yield fruit, which pay tithes.

Thirdly, If some yield fruit and others not, whether or no those that yield fruit, privilege and exempt the others that yield none, when they are all sold together.

Fourthly, Whether tithes shall be paid for them, when they are sold and transplanted within the said parish.

Fifthly, Whether the vendor or the vendee shall pay the tithes.

In this case were cited, 1 Cro. 2 Cro. *Co. Magna Carta.*

and *Doctor and Student.*

And the court was of opinion, that if the owner sell them and pull them up himself,

himself, he shall pay the tithes; but if he sell them particularly to another, the vendee shall pay the tithes. As in case of tithes of corn; if corn be sold standing, the vendee shall pay the tithes: but if he sell it after severance, the vendor must. *Et adjournatur.*

But afterwards tithes were decreed in all such cases.

M. 16 Car. 2. Scacc.

Sir William Ingleby, Bt. v. Wyvell and Ullethorn. [Hardr. 381.]  
2 Gw. 516. 1 Wood, 73.

**I**N trover and conversion for a lamb and a sheaf of wheat, upon not guilty pleaded, a special verdict was found to this effect, viz. That the abbey of Fountains had been time out of mind of the order of Cisteraux, which order was exempted from payment of tithes for their lands, *quas propriis manibus excolunt*; that before the council of Lateran, this abbey was seized of the territory and grange of Hemmingford within the prebend of Skedale, and the parish of Rippon: that betwixt the years 1216 and 1261, there was a composition between the abbot and convent, and the prebendary of the said prebend under their common seals, that the abbot and convent should for ever be free from the payment of any tithes of their lands which they tilled at their own charge in Hemmingford and belonging to their grange of Gulgach, within the territory of Winkesley, Anno Dom. 1216. And that they should pay tithes for all other lands, there and elsewhere, out of the said grange of Hemmingford; and that the said abbot and convent should pay annually to the said prebendary and his successors the sum of five marks, by equal portions, the one moiety to be paid at Easter, and the other moiety at Michaelmas: they further find, that upon the 13th of November, Anno Dom. 1359, there was another composition made betwixt them under the seal of the convent and the prebendary, ratifying the former composition (but they do not find that it was confirmed by the patron and ordinary); and by this latter composition, the prebendary and his successors for all time to come were to have their election yearly, either to receive tithes in kind of corn and grain arising within the places aforesaid, as well of lands in the hands of the abbot and convent, as in the hands and manurance of their tenants, or else to receive five marks to be paid by the said abbot and convent in lieu thereof, so as such election were notified to the abbot, or to any of the monks resident within five miles of the abbey, or to the porter of the abbey, upon or before the feast of St. Thomas the Martyr, in the presence of a prebitor or of two good men; and for those years in which the prebendary should chuse to receive tithes, the five marks should not be paid, *et contra*. And that when no election was made, the prebendary and his successors should be contented with the said five marks, saving the right of the tithes of lamb and wool which were to be paid as formerly: then they find that the possessions of the abbey came to the crown by 31 Hen. 8. and that at the time of the trover, &c. the defendants were proprietors of the lands in Hemmingford, and that the plaintiff was seized in fee of the prebend, and that a lamb and sheaf were then removed upon the lands, and whether or no tithes in kind should be paid for these lands, was the question.

Sir Francis Goodrich *pro quer.* First, He considered that this last composition was good, though not confirmed, because it was for the melioration of the church; and gave them a benefit, which they had not by the first. And the rule is, that a parson, prebend or other sole ecclesiastical corporation, *potest meliorare, sed non peiorare conditionem et statum ecclesie*. Vid. Bro. Corporat. 68. 2 Inst. 343. 2 Gro. 252. And if a confirmation in this case were requisite and necessary, it shall be intended that there was one. *Es: distantes tempore omnis premissum solenniter esse acta.*

Secondly, He considered, whether this privilege to be discharged of tithes, be such a personal privilege, as that it cannot be released. And he conceived it might be released and waived; for that *Quilibet potest renunciare juri pro se introducto*. 2 Inst. 252. Dyer, 249. Dr. Goodman's case. Also here the corporation

Where by a composition a prebendary and his successors were to have their election to take tithes in kind of certain lands belonging to an abbey of Cisterians, or five marks yearly, upon giving notice to the abbot, &c. the court held, that after the dissolution of the prebend and the abbey, the power of election was gone, as it could not then be made according to the composition.

Hale, C. J. held, that an abbot of the Cisterian order might well renounce the benefit of his privilege.

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position being extinct; the privilege is gone, and the tithes are revived, as *Bro. Corp. 78. Golds. Rep. 4. Hob. 40, 42, 44. Andrew and Cooper's case, (1) 3 Cro. 675. 2 Inst. 491. 2 Leon. 71.* But the King's farmer shall enjoy the privilege, because it does not consist with the King's dignity to occupy lands himself: *Vid. Popham's Rep. 158.*

Object. The Bishop of *Winchester's case, 2 Rep. (2) and Inglefield's case, 7 Rep.* concerning personal privileges not transferable.

Resp. An appropriation cannot be granted over, and yet it may be disapproved by a presentation; *2 Ed. 3. 8. N. B. 35. Hob. Rep. 152. 3 Cro. 176.* and so he concluded for the plaintiff.

*Pro defendente.* First. The composition here is well rooted and settled, and is in the nature of an exchange, as appears *2 Rep. 45. 2 Inst. 490. Hob. Rep. 42.* Secondly. It seems not to be destroyed by the second; for the second is, only by way of collateral agreement and sounds in covenant: there are no words in it of grant or release. And it cannot here be deemed an eligible inheritance, because it does not pass from both parties. And by a release of five marks, the whole would be discharged; so that it is not reciprocal, *44 Ed. 3. 5.* Also the corporation being dissolved, the second composition falls of itself. And it shall not be presumed, that this composition was confirmed, unless it be shewn, because the former, which is more ancient, was confirmed. So he concluded for the defendant.

HALE, Ch. B. By the first composition the abbot only is discharged, *quoad sua propriis manibus, &c.* but by the latter the abbot and his tenants are discharged of tithes of corn and hay only; so that there is a great difference betwixt these two compositions. But he conceived, first, that the first composition was good, although the abbot were discharged by his order, *quoad sua, &c.* Secondly, That the abbot may well renounce the benefit of his privilege. Thirdly, That there may well be a relinquishment of the former composition, and that it may be released or discharged. But the doubt in this case is, whether or no the second composition be good in law without a confirmation, and an annual election, according to the composition; and who must make this election, and how, now that the prebend is dissolved; and by whom, and to whom the notice must be given. There was one *Southwell's case, in 44 Eliz.* where an abbot had had a certain quantity of wood, to be taken yearly in such a wood, or else a certain sum of money yearly at his election: And it was held in that case, that the election was transferred to the King, by the statute of dissolution of monasteries: and that it should go along with the land to the King's patentee. But here this prebend came to the King by the statute of 1 E. 6. of chantries, &c. and whether the election in this case remains or not, may be a question.

Afterwards in Trin. Term Anno 17 Car. 2. it was argued again by Serjeant *Hardres*, for the plaintiff.

First, There has been a question stirred, but not much insisted on by the defendant, viz. Whether or no this privilege of the abbey, to be free from payment of tithes, may be waived or not. I shall not dwell upon that, for I take it to be very clear, that it may be waived. First, Because it was but a particular indulgence granted to the order of Cisterrians, and for their benefit and advantage; and therefore it may be waived by them, in like manner, as an exemption from serving upon juries, &c. may be waived at one time, and resumed at another; as is very usual and frequent.

Secondly, It is a rule in law, that whatever is created may by some means or other be dissolved and extinguished, though some things cannot be granted over: As in *Lampett's case, 10 Rep.* a possibility of a term, though not grantable over, yet may be released to the tenant in possession, *Hob. Rep. 307.* an appropriation, though not grantable over, yet may become inappropriate by a presentment. *N. B. 35. 8 H. 7. 12. 21 Ed. 4. 58. b.* A covey uncertain in an abbey, though not grantable over by the founder, yet may be released and extinguished by him. So here.

But the second and more difficult point is this; viz. Whether this second

(1) *Cooper v. Andrews, antd, 240.*

(2) *Antd, 119.*

composition



composition be good or no, because not confirmed by the patron and ordinary. And I conceive that it is good notwithstanding, as our case is, and that for these reasons.

First, The second composition is wholly for the benefit of the prebendary and his successors, and is an enlargement of the former; because by this second composition he has an election, to take either his five marks or his tithes in kind, which he will; whereas by the first composition, he is tied up to his five marks: and in such cases, successors are bound though without confirmation; 44 Ed. 3. 21. 22. in *Octavian Lombard's* case, tenant in tail charged the land with a rent charge, for a release of the right of a stranger; and held that this shall bind the issue in tail notwithstanding the stat. of Westm. 2. 48 Ed. 3. 11. b. the like of a recovery in value by the tenant in tail; because the issue is at no loss by it. Perk. 17. Tenant in tail may determine his election, as to so many acres or a rent charge, and the issue shall be bound by it. So here, no loss, but a profit accrues to the succeeding prebendary; and it is a rule in law, Co. Lit. 102. b. 341. a. Mag. Car. 3. a. that a parson without his patron and ordinary may *meliorare statum ecclesie sue*. And so in our case.

Secondly, The second composition was made only for a further explanation of the former, and by way of superoperation, and is a surcharge upon the abbot and his successors, without any diminution to the prebend. And in that case a confirmation is not requisite. If there be composition confirmed betwixt a parson and his parishioner, by which the parishioner is to pay £5 in lieu of his tithes for ten years, and afterwards another composition is made, whereby the parishioner agrees to pay £6 for those ten years; this second is good without a confirmation, because it is an enlargement of the former, and more for the parson's advantage than it was.

Thirdly, The same may be proved by the parallel, betwixt a parson of a church and an infant: for our authorities resemble them two to one another. As appears Co. Lit. 341. a. Mag. Cart. 3. a. *ecclesia infra aetatem existit et fugiatur vice minoris*. Now Co. Lit. 337. *minor statum suum meliorare potest non deteriorare*. And therefore if an infant submit to an award, which is made for his advantage, he shall be bound by it, 13 H. 4. 12. 10 H. 6. 10: so if an infant make partition or assign dower, if it be equal and just, he shall be bound and concluded by it: the like of a parson.

A third thing is this; viz. admitting that the second composition is good, whether or no it be now possible to be performed, because no election can now be made in form as directed by the composition: because now the abbey is dissolved, and the corporation extinguished, and the prebend also with all its possessions is given to the crown, the one by 31 H. 8. the other by 1 E. 6. and yet I conceive all this is no hinderance, but that tithes in kind may be recovered.

First, As for the dissolution of the abbey and extinguishment of the corporation, that will create no impediment, because it comes by the act of the corporation itself; to wit, by their surrender: for the act of 31 H. 8. vests nothing in the King, but what the abbey themselves surrendered since 27 H. 8. as appears by the statute; and it is a rule in law, that *res inter alios acta alteri nocere non debet, sed prodesse potest*. If a lessee for years charge his estate with a rent, and then surrender; yet the charge continues as long as the term would have lasted, if it had been suffered to run out in time. 5 H. 5. 10.

Secondly, As for the accession of the prebend to the crown by the statute of primo Ed. 6. it is there enacted, That all tithes and hereditaments appertaining to any hospital given to the King, shall be in him in as ample manner as in the hospital, and as if they had been particularly named: and it is also enacted, that the King shall enjoy all profits, commodities, &c. appertaining to any hospital by any assurance, composition, or otherwise. So that all is preserved for, and reserved to the King, that did appertain to any hospital. And unity of possession in the King of the abbey and the prebend, breaks no squares; for tithes and a composition for tithes, are collateral to the land, and revive by severance, as appears in 11th Rep. *Harpur's* case.

, And where there can be no election, there the party that is to have the benefit



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of it, shall have and enjoy the thing for which the recompense is given, without any election: *Southwell and Ward's case*, Mich. 33 & 34 Eliz. Ro. 229. per Popham, Fenner and Clinch, in manuscript, and printed in Popham's Rep. 91. and: *Adjudge* 36 & 37 Eliz.

Object. The prior of St. Faith's, 13 E. 4. made a grant of 200 faggots or focals to the hospital of St. Giles's, in Norwich, or of twenty shillings in lieu of them, at the election of the hospital, with a clause of distress, reasonable notice of the election being given; and the hospital covenants, to give notice in the church belonging to the hospital. Afterwards the hospital comes to the crown per 1 E. 6. who grants over the hospital, with the said rent, and the grantee distrains for the focals: and it was there adjudged, first, that the focals pass by the grant of the hospital, and the rent of twenty shillings, though the focals be not expressed in the grant. Secondly, that there needs no election, because the thing granted was the focals, and the twenty shillings are but by way of recompense for it, and as an allowance and satisfaction for the same. And a difference was taken where the election was precedent, and where subsequent to the grant. If a man grant to another a robe, or twenty shillings, there the election is precedent to the interest of the grantee, here it is not so; *vide* 2 Rep. Sir Rowland Heyward's case. Now this case of the prior of St. Faith's resembles our case in all respects: for here is a composition for tithes in kind, or else for five marks in lieu; and the hospital there came to the King by 1 E. 6. as ours does here, and yet the election remained.

But in our case there is a clause, that when there is no election made, the prebendary shall content himself with the five marks. But to that I answer, that this clause must have a reasonable construction and intendment; viz. that as long as there may be an election made by any reasonable way or means, so long there shall be an election, or else only five marks due. But here there can be no election made at all, according to the composition, by reason that the abbey is dissolved, and that by their own act; and it is a rule in law, that *impossentia excusant legem*; and *lex non cogit ad impossibilia*, 42 E. 3. 5. If a man covenant to leave lands in as good plight as he found them, and trees are blown down by tempest, he is excused, 5 Rep. 20. Sir Anthony Maine's case. A lessor covenants to make a new lease to the lessee upon surrender of the former; if afterwards he grant the reversion to another for term of years, the covenant is broken, though no surrender be made, for that he has disabled himself to take a surrender: so in this case, it being vain and impossible to make an election through the abbot's own default, the prebendary, &c. shall have the same advantage that he would have had, without making an election.

Thirdly, If an election be necessary, the plaintiff has made his election; for he has preferred his bill for tithes, and brought the cause to hearing; which is the same thing as if he had declared at law; and that does amount to an election, as when a man brings a writ of annuity, and counts upon it, 5 Hen. 7. 33. F. N. B. 152. Or the bringing of a writ of dower, and counting upon it, 12 E. 2. Dower, 158. And the bringing of an assize amounts to a continual claim, 9 E. 2. Age, 141. So I conclude, that the second composition is a good composition, that it remains in force for the benefit of the prebendary, and all claiming under him; and that no election is requisite, *quis vult et inutile*; and that if an election must be made, the plaintiff here has made his election, and prayed judgment *pro quer.*

Afterwards the court delivered their opinions, that the second composition did not affect the successors of the prebendary, and therefore that the abbot was not bound by it. The reason seems to be, because by the first composition the prebendary and his successors were bound only *quandiu propriis manibus, &c.* and by the second composition the five marks go in recompense of all, whether in *propriis manibus*, or in the hands of the tenants. But to this it may be answered, that it is still at the successor's election to take the five marks, or tithes in kind, and therefore that he is at no prejudice.

The court likewise held; that the power of election is gone; because it cannot now be made according to the composition; and that therefore the first composition

composition should stand, *quoad terras in propriis manibus*; and for the others, that tithes in kind may be taken, as before; for that the election is destroyed. And judgment was given *pro defendente*.

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M. 16 Car. 2. B. R.

*Wright v. Beal*. [1 Lev. 141.] 1 Sid. 223. 1 Keb. 781. 783. 792. 923.

**A**SSUMPSIT, that where the defendant was indebted to him for such tithes arising from the vicarage of Dale; he the defendant promised to pay, &c. After verdict on *non assumpsit*, it was moved in arrest of judgment, 1. That tithes are in the realty, of which an *assumpsit* does not lie any more than for a rent. 2. That the vicar is to have and not to pay tithes. 3. 'Tis not said, sold and delivered to him. But answered by the court, as to the first, It may be intended tithes severed. To the second, An abbot or other person might have had a portion of tithes out of a vicarage, which is now come to the plaintiff. Third. The *indebitatus* implies sold and delivered, otherwise he could not be indebted; and they gave judgment for the plaintiff.

Tithes may be due to a parson out of a vicarage, for an abbot or other person might have had such a portion, which might have come to the claimant.

E. 17 Car. 2. B. R. *Lush v. Webb*. [1 Sid. 251. 2 Keb. 57.]

1665.

**A**FTER rule for a prohibition *nisi*, &c. it was moved that the suggestion was bad. 1. Because a *modus* is suggested, and it is not stated, that they tendered the plea there, and that it was refused; but it was ruled good notwithstanding, for the court will not intend that they will allow a *modus* there. But *quere*, whether they cannot demur for form? But not substance.

Where a *modus* is suggested, it need not be stated that it was pleaded and refused below, for the court will not intend that they would allow a *modus* there.

2. The suggestion is a *modus* for a farm, and the libel is for tithes and offerings, so that the suggestion does not extend to the offerings. Wherefore it was ruled by the court, that the prohibition should be but *quoad*. And so it was ruled in the case of *Coleman v. Gilbert*, upon my motion in a late term. [Siderfin.]

A prohibition may be to part of a libel.

*Jones* prayed a consultation on a prohibition, P. 17 Car. 2. granted on suggestion, that the occupiers of such a farm paid 20s. yearly in discharge of tithes of that and another farm on 2 E. 6. cap. 13. proved at Oxon, before Justice MONTAGU, as 3 Cr. 306. by two witnesses, which was not within six months by reason of the plague, and the proof was only that the tenants of those farms paid 40s. in lieu of the tithes of one farm; and for this cause he prayed a consultation, which the court would have granted, but the parties agreed to amend, and make the *modus* 40s. and so to trial. [Koble.]

Where a *modus* of 20s. is suggested and one of 40s. proved, the court would have granted a consultation, if the parties had not amended by consent.

H. 18 Car. 2. B. R. *Reeves v. Bould*. [1 Keb. 945.]

1666.

**C**OLEMAN prayed a prohibition to suggesting the lands in question are within the precinct of a free chapel within the said parish, which being excepted for tithes, and belonging not to the parson, it is all one as the bounds of a parish, which are triable at common law: *sed curia contra*; and by KEYLINGE, C. J. this is all one as a vill in the same parish, which is triable in the spiritual court: but *contra*, by WINDHAM, of a distinct vill from the vill of the parish, for here the right of a third person comes in question; but in the case at bar the chapel belongs to the parson, and by the same reason the right of each particular farm would be triable at common law, which without particular custom shall never be; and here only the right of tithes is questioned: also a pension payable by constitution to a chapel is not payable at common law, and a prohibition was denied by the whole court.

No prohibition will be granted on suggestion that lands lie within the precincts of a free chapel, and that the bounds thereof are triable at common law, as the bounds of a parish are.

1666.

A custom to pay less than a tenth part for tithes of fish, which are not due without custom, may be good, but to pay less for things of which tithes are due of common right, is not good without other matter.

E. 18 Car. 2. B. R.  
*Penrose v. Shepherd.* [2 Keb. 2. 73.] 1 Sid. 278. 1 Lev. 179.

**WILD**, the King's Serjeant, prayed a prohibition to the bishop's court of Excester, on suggestion that the farmers of such a house, whereof the plaintiff is seised, have always paid the twentieth part of all milk and other things, (as fish, &c. for which a special custom was alleged by the parson,) in lieu of the tithes: but the libel being only for the twentieth part, according to the *modus*; the court (*WINDHAM presente*) conceived the suit there good enough, and the court conceived that in a suit for tithes in kind, that are due of common right, such a *modus* as this is not allowable, but of fish which is not due without custom this *modus* is well enough; the court staid the suit for a fortnight, but would grant no prohibition.

*Masters* shewed cause against a prohibition to Excester, on libel for tithes of corn, &c. in Cornwall, due of common right; and the suggestion is of a custom to pay the twentieth part in lieu of the tenth, which he conceived ill, this being for tithes due of common right; but of other things such a custom may be good in this manner; which the court agreed, being of the same thing in specie; whereupon the court discharged the rule for a prohibition.

E. 18 Car. 2. B. R. *Ledgar v. Langley.* [2 Keb. 25. 36. 1 Sid. 283.]

By the custom of England, tithe corn shall be set out in the sheaf, and if it be by the tenth stich or stook, it is by custom, and may be laid in discharge of other tithes, as rakings, &c.

Keylinge said hops were a small tithe, and payable by the pole; but Twisden stated, that it was not then known, whether the tithes of hops should be paid by the tenth pole or by measure.

**EDKINS** prayed a prohibition on libel for a *modus* of setting forth tithes in hattsacks, to which the defendant there pleaded that he set forth his tithes in kind, and that there was no such custom, which, as Hob. 247. is triable at common law, Tr. 17 Jac. Rot. 506. at the end of the year the same cause came to trial in C. B. on the custom, and no consultation was granted, but the parson has lost his tithes; which the court agreed if no consultation be granted; but this is unreasonable he should lose them, whether they were any way set out or not; and therefore he may begin here a new action on 2 E. 6. and then the party is estopped hereby to allege this *modus* against the parson, and a prohibition was awarded, *nisi*.

*Lindley* opposed the prohibition, because after the former rule the party agreed to proceed in the spiritual court; which *per curiam* is nothing, though sentence be thereupon, for consent gives no jurisdiction. 2d. As in *Steward's* case, 2 Car. 1. and Hob. 248. the *modus exponendi*, as here the setting forth in stooks is triable in spiritual court, *per Whitlock*; but *modus decimandi* is triable at common law: but *per curiam*, the custom of England is to set forth in sheaves, but each country has several ways, as of hops, which, by *Keylinge*, is a small tithe, and payable by the pole, and a prohibition *nisi*. [*Keble.*]

A libel in the spiritual court was for tithes of corn in stooks and hattsacks, by the custom; the defendant pleaded there, that he was ready to pay his tithes according to the common law, and that there was no such custom; and because they disallowed this, prohibition was prayed, and after two motions granted; for tithes of corn shall be paid in the sheaf, and if it be by the tenth stich or stook, it is by custom, and may be laid in discharge of other tithes, as rakings, &c.

But *Twisden*, J. said it had been doubted, and was not then known how the tithes of hops should be set out, viz. whether by the tenth pole, or by measure: — [*Siderfin.*]

E. 18 Car. 2. B. R.

*Hutchinson v. Atkinson and The Archbishop of York.* [2 Keb. 2.]

A *modus* of 1d. for all agistment and working and barren cattle is void.

**WINNINGTON**, on 2 Cro. 47. excepted against prohibition obtained: on suggestion of a *modus* to pay tithes in kind for all arable land, and one penny for all agistments and cattle *laborantibus, operantibus, et infructiferis*, because this is a void *modus*; to which the court inclined as well as if it had been one penny for all grass, &c. but would do nothing without pleading; but per *Twisden*, you may safely demur.

E. 18

E. 18 Car. 2. B. R. *Buickley v. The Bishop of Chester*. [2 Keb. 6.]

1666.

**PAULET** prayed a prohibition in suit for tithes, suggesting a plea of an agreement for a year, pleaded in the ecclesiastical court of Chester, and not allowed, which being by way of contract, and not in bar, as an agreement for life or many years; but *per curiam* all is one, and both are triable by the spiritual court, if the suit be for tithes in kind; but contrary, if the suit were for the money, then a prohibition would lie, and so 2 Cro. 7. must be intended.

An agreement for a year, as well as for life or years, is triable in the spiritual court, if the suit be for tithes in kind;

but if for money, prohibition would lie.

E. 18 Car. 2. B. R. *Prodger v. Venning*. [2 Keb. 22.]

**I**N evidence to a jury at bar, in trespass of tithes in Hatfield Chase, **WINDHAM**, J. said that of hay mown to feed the deer, no tithes are paid; but *per Glyn and Finch*, they are due of common right, and shall be paid, unless there be a custom to the contrary; and they are payable to the King if extra-parochial.

Tithe of hay mown to feed deer, is due of common right, and shall be paid unless there be a custom to the

contrary. Extra-parochial tithes are payable to the King.

E. 18 Car. 2. B. R. *Owen v. Evans*. [2 Keb. 34.]

**E**RROR of a judgment in debt on 2 E. 6. c. 13. in C. B. — *Williams* said the plaintiff had not well counted, because he only avers the defendant had not compounded with the farmers, and says nothing of the parson, proprietor, &c. but *per curiam* this is needless, for the defendant must shew he has compounded; and the plaintiff need not allege any composition, but it is a sufficient contempt that he did not set forth his tithes. 2d. It is said the stat. was made 4 Nov. 2 E. 6. whereas it was made another day, as 1 Cro. *sed non allocatur*. Judgment affirmed.

In an action on 2 E. 6. the plaintiff need not aver that the defendant had not compounded with the farmer, parson, &c. for the defendant must shew the

composition, and it is a sufficient contempt that he has not set out his tithes.

E. 18 Car. 2. B. R. *Minors v. Hunson*. [2 Keb. 44. 71.]

**I**N trespass for entering into his close, and taking away corn, the defendants justify, as servants to the parson, and that the corn was tithes, severed from the nine parts; to which the plaintiff demurred specially, because this amounts but to the general issue of not guilty; but *per curiam* this is a good plea, for as to the breaking the close, such matter cannot be given in evidence; and **TWISDEN** said, Justice **CRAWLY** would not suffer him to give such matter in evidence, on not guilty pleaded in trespass for taking corn only; but *per curiam*, if the trespass had been only taking the corn, this had been but the general issue, and therefore the demurrer good; as in trespass for a horse, it is no justification to say the horse is J. S.'s, and that he as servant took him; for if the property be not in the plaintiff, the defendant may as well in trespass as trover be found not guilty, but for the first exception, *adjournatur*.

In trespass for entering the plaintiff's close and taking away corn, the defendants justified as servants to the parson, and that the corn was tithes severed from the nine parts; and held upon special demurrer to be a good plea, and not amounting to the general issue, for as to breaking the close, such matter could not be given in evi-

In trespass for entering his close, and taking corn, the defendant justifies generally to both, as servant to the parson for tithes, to which the plaintiff demurs, as amounting only to the general issue. — **KEYLINGE**, C. J. said it was well pleaded as could be, the justification going to both; but if the action were only for the tithe, this would be but general issue, which the court agreed. Judgment *pro* defendant.

dence on not guilty, as it might have been if for taking the corn only.

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If timber trees that have been usually lopped, grow scattered in a wood, when the wood is cut these shall only privilege themselves, and the other shall pay tithes, but then the libel ought to be special for such part of the wood only. It is not the parties' application of the wood to a particular use as timber, that will privilege it, if the usage has been otherwise. Wood, usually cut for fire-wood, shall pay tithes, although it be permitted to grow for 25 years, or more; and by *Windham*, pollards of 50 years growth shall pay tithes when felled.

M. 18 Car. 2. B. R. *Cornwall v. Haws and The Bishop of Hereford*.  
[2 Keb. 1. 90. 883. 1 Lev. 189.] 1 Sid. 300.

**BALDWIN** shewed cause against a prohibition upon an affidavit made, that the demand was of tithes of underwood, according to the libel, which the court refused without pleading, because otherwise they cannot take notice of it, and the plaintiff in the prohibition has suggested that it is gross timber and not titheable, above twenty years growth.

*Gregory* moved for a new trial in prohibition for *silva cædua*, the evidence being, that the greatest part of the wood was used as coppice, and employed for firing; yet, because there were some timber trees, the jury found *pro* plaintiff, that no tithe was due, *contra* the direction of *TWISDEN*, the judge of assize, who said, as he had heard Judge *BARCLAY* heretofore say, that if the greatest part were used as coppice, and employed for fire, though it be thirty or forty years growth, yet tithes are due when cut; which the court here agreed now, there being some shrouds of timber in all coppices, and it is not the leaving it a long time that makes it timber: and by *WINDHAM*, there ought to be a new trial on this issue, which was, that the wood was not apt for timber, on suggestion here, that it was timber; but, *per KEYLINGE* and *TWISDEN*, a new trial cannot be upon this libel and suggestion, being general of so many load of coppice wood, but it ought to be particular, that so many acres or loads of wood, whereof so much is timber, &c. and so the spiritual court might have given judgment for that part, and the court would make no rule; but by agreement the suggestion, that all was timber, was to be amended, and made, that so much of it was timber. The court also agreed, that it is not the parties' application of the wood to a particular use, as timber, that will make it so, if it had been used otherwise.—[*Keeble*.]

By the whole court, wood, usually cut for fire-wood, though permitted to grow to twenty-five years' growth or more, shall pay tithes; and by *WINDHAM*, pollards, of fifty years growth, shall pay tithes when felled.—[*Levinz*.]

M. 18 Car. 2. B. R. *Eaton v. Naylor*. [2 Keb. 134.]

In a suit for tithes of mills, the court held that a suggestion that they were ancient, need not be proved within six months, that provision of 2 E. 6. extending only to a *modus*; but they ordered that if the plaintiff did not declare upon his suggestion a consultation should go by the first day of the next term.

**TURNER** prayed a consultation, for want of proof of suggestion within six months; *sed non allocatur*, the suit being for tithes of two mills in Newcastle, and the suggestion is, that they were ancient; and *per curiam* this, or any other suggestion, but only of a *modus*, need not be proved within six months by the statute of 2 E. 6. c. 13. and *TWISDEN* said, he knew it thus ruled heretofore in this court: and this is the course of the court, and this is on a discharge at common law; and on reading the statute, though the words were general, yet the court would not grant consultation for this cause, but ordered, that if the plaintiff did not declare on his suggestion, the defendant appearing thereto, a consultation should go by the first day of the next term.

By the whole court, wood, usually cut for fire-wood, though permitted to grow to twenty-five years' growth or more, shall pay tithes; and by *WINDHAM*, pollards, of fifty years growth, shall pay tithes when felled.—[*Levinz*.]

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An abbot who held land time out of mind discharged of tithes in the hands of himself and his tenants, aliened 18 H. 6. to All-souls' College: after alienation, the common law right to tithes shall revive, for it shall be taken as a personal prescription and not a real composition, unless specially shewn, which may be in evidence although it cannot be pleaded.

H. 19 Car. 2. B. R. *Bowles v. Atkins*.  
[2 Keb. 28. 60. 162. 175.] 1 Sid. 320. 1 Lev. 185.

**IN** debt, on 2 E. 6. the jury find a special verdict, that the lands in question were parcel of the abbey of Abington, and held by prescription, discharged of tithes in the hands of him and his tenants, and he, in 18 H. 6. aliened to All-souls' College, who made a lease to the defendant; and by *Holloway*, *pro* plaintiff, this lessee shall pay tithes, none being capable of this immunity but spiritual bodies, as to the persons; and there is another incident inseparable to immunity, which is, that the lands remain parcel of the abbey, and the college cannot prescribe under the abbey, no more than the bishop, whose title, within time

time of memory, Hob. 248. is not sufficient, and 1 Cro. 94. *Morehant against Canning*. *Crook*, pro defendant, that the college is discharged, this case remaining at the common law, and not within the personal privileges aforesaid; and though a layman cannot prescribe in *non decimando*, yet beginning his prescription in a spiritual corporation he may. And 1. a prescription barely is a discharge, being intended by composition, which cannot now be shewed, as *Slade against Drake*; (1) and this title stands alone, as at common law, and needs not the aid of any statute, as the other four do, which sometimes were charged, but by their persons discharged, as *Wright against Hildersham*, Hob. 306. (2) And 2. This prescription shall, though in the hands of spiritual persons, suppose a real consideration in its original, as 1 Cr. 422. *Sydowne against Holmes*, (3) F. N. B. 41. and 3 Cr. 206. *Nash against Molins*, (4) and 1 Leon. 240. and therefore shall not die with them; also the verdict does not find they were *imunes*, but that they were discharged. 3. A mere layman, as the *Bishop of Winchester's case*, 2 Co. 44. (5) beginning his prescription in a spiritual person, as 3 Cro. 783. *Crouch against Fryer*, of a copyholder. (6) Seld. Hist. of Tithes, 408 & 409. 32 Ass. 75. the King's patentees may be discharged: but *per curiam* this is meant of farmers not patentees in fee. 4. The college are spiritual persons, and an appropriation may be made to them, and it is here found that the parsonage of Lenknor was appropriated to them; and *Dyer*, 255. Trinity College, in Cambridge, is held within a license to devise to spiritual persons, and 3 Cro. 216. *Cooper against the Bishop of Lincoln*, an interruption did not hinder the prescription, no more does the charge of the corporation, 36 H. 6. 14. 5. in the statute of 2 E. 6. there is a proviso, that none shall be charged to pay that have by prescription been discharged. — *Twisden* said, in the case of the forest of Savernack, it was agreed, that the King's patentees should pay tithes, which the court agreed, and said that the case of *Sydowne against Holmes*, 1 Cro. 422. pl. 502. has been agreed for law in all the courts of Westminster; but *per curiam* if the college can be maintained to be a spiritual corporation, they may thus prescribe in discharge. *Adjournatur*.

In debt on 2 E. 6. on not guilty, they find specially, that the abbey of Abington was seised, discharged, and 18 H. 6. granted to the college of Allsouls and their successors; and whether the college shall hold discharged or not, is the question, and *Powis pro* plaintiff conceived they shall not. 1. When a spiritual person aliens to a lay corporation, such a prescription does not pass it is true, 3 Co. 44. 3 Cr. 785, that the lessees of such spiritual person shall hold discharged, because the greater fines are paid for it. 2. Where a temporal person has any discharge, he must plead it specially, but not generally, 8 E. 4. 14. but that in cases of inheritance such prescriptions do not pass is evident, because thereby the lay person might claim an immediate discharge to himself, Co. Entr. 464. 2. No person is capable of a discharge, but such as are capable of a grant of tithes themselves. 3. When the cause, which is some spiritual service, ceases, the effect thereof also ceases; and as a temporal person cannot do the service, he shall not have the benefit; and this must be intended a lay corporation, nothing being found to the contrary. 2. The grant of one spiritual person to another spiritual person does not, as 35 H. 6. 26. pass this prescription of not tithing, which is merely personal, as the frankalmoin of the Templars, Hob. 296. *Dyer*, 277. and 2 Co. 46. *Archbishop of Canterbury's case*, (7) where the several causes of discharge are enumerated, but the discharge by prescription is but a consequent of some of the former, 1 Cro. 423. and for this reason, the most general discharge, which is personal, shall be intended, which is not grantable over: and 3. hereby a discharge would be let in from all the smaller abbeys, and the prior of St. John's of Jerusalem, which would be a great prejudice to the church of England: Hob. 309. is answered, in that no lands are negatively discharged of tithes, but only privatively, and is an opinion by inference, and contrary to Hob. 297. and other authorities. 2. This can be intended neither discharge by composition, nor by special grant, neither of which can turn to a prescription in *non decimando*, but must be presumed to spring out of the personal discharges, else any layman may prescribe in *non decimando*. 3. The object in 3 Cro. 217. makes against

(1) *Ante*, 316.(2) *Ante*, 399.(3) *Ante*, 383.(4) *Ante*, 400.(5) *Ante*, 119.(6) *Ante*, 149.(7) *Ante*, 113.

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the defendant, for being once interrupted, is destroyed; Selden's History of Tithes, 409. is of lessees for life or years, who must so commence their prescriptions in spiritual persons, 1 Cro. 422. *Sydowne* against *Holmes*, (1) he relied on *pro* plaintiff, and 2 Cro. 57. *Cornwallis* against *Sparting Bridgman*, 32 Hob. 248. (2) *Baldwin*, *pro* defendant, in Seld. 351. a grant before the council of Lateran, 17 of King John, as 7 E. 3. 5. by *Parning*, might be made by any of their lands and tithes to whom they would, that were spiritual persons; therefore it shall be now intended, that some lay-owner did grant these lands *cum decimis* to the abbey, and so he held them discharged; whence may be inferred, that this discharge is inherent in the land, which prescription is not aided by any statute, as the other personal prescriptions are, 1 Cro. 94. must be intended of a discharge by prescription, for the King could not have the tithes in any other way, like Kell. 107. pl. there being no prejudice to any person whatsoever, especially this being so far an ecclesiastic corporation, that it is capable of tithes, 7 E. 3. *Qu. impedit*, 19. because an appropriation, 5 Co. 10. may be made to it, as St. Mary's, in Oxon, is appropriate to Oriel College, 6 H. 7. 13. 11 H. 7. 19. 11 H. 4. 47. and in *Alden* against *Tothill*, 6 Car. 1. a grammar-school was capable of an appropriation, the end thereof being spiritual, for the advancement of learning, Dyer, 255. is express: but *per curiam* this is mistaken, and the book is rather contrary, being said such only in equity, not within the express letter. 2. If this prescription do not pass, then the tithes remain with the abbey till the dissolution, and consequently came to the King, who has made no special grant thereof to the parson; so the plaintiff has no title: also the grant is found only by *dedit*, *confirmavit*, without finding any livery of the meadow out of which; but *per curiam* all this argues the tithes are still due of common right, and this prescription being generally found, shall *in favorem ecclesie*, be intended a personal prescription; and in the case of the *Archbishop of Canterbury* it is lately adjudged, that upon an exchange between a prior and the archbishop, that thereby the prescription was destroyed; and they said, that in one *Savernack's* case, 1 Roll. Abr. 655. which is the *Marquis of Hertford's* case, it was resolved, that the patentee of the King in fee shall pay tithes. *Adjournatur*.

In debt by special verdict it was found, that the abbot of Abington was seised of the lands, out of which the tithes are demanded, discharged of tithes time out of mind, for him and his tenants; and that in the time of 18 H. 6. he conveyed to Allsouls College, under whom the defendant claimed as tenant to be discharged: and *per Wilde*, *pro* plaintiff, tithes being distinct, as Moor, 913. differs from 2 Cro. 58. and being collateral to the land will not pass with it, therefore cannot be intended any discharge by real composition upon the stat. of 27 H. 8. for *Sydowne* against *Holmes*, 1 Cro. 422. and F. N. B. 47. a layman on such composition may prescribe to be discharged, but this shall be, 3 Cro. 578. intended a discharge personal. (2) *Finch*, *pro* defendant, that the discharge continues, the jury having found the prescription inherent in the land; for it is not found the abbey of Abington was an ancient abbey, nor that he and his predecessors held discharged; and albeit the court, on 1 H. 7. 19. know this abbey, to be time out of mind, yet the lay-gens cannot so intend it, and 3 Inst. 173. the tithes of abbeys were discharged only by bull; also there is nothing found that any tithes were ever demanded before or since the stat. of the college of Allsouls, and had the lands been aliened to a mere lay-hand they would be discharged, albeit a layman cannot prescribe *in non decimando*; for this rule was brought in by the canons, and took place when the prelates were judges here, and is not founded on the common-law; and since the common law has received this rule, yet it has been pared most strictly, and Hob. 297. calls this an anomalous rule, and the common law allows a *modus* of one penny for 1,000 acres, Hob. 42. & 247. and 2 Co. 44. the *Bishop of Winchester's* case, and the King as a mixed person may prescribe *in non decimando*, and so may a layman in some particular things; also not only the farmers, but Mich. 42 Eliz. *Crouch* against *Frier*, 3 Cro. 704. differs from *Yelvert*. 2. and Moor. 618. pl. the copyholders of the *Bishop of Winchester* prescribed *in non decimando*, and so may any laymen that derive by spiritual; also as they are

(1) *Ante*, 383.(2) *Ante*, 157.



prebendaries, and a corporation, they are lay, albeit not so as aggregate, and this prescription shall avail the defendant; for if, as 42 E. 3. 3. divine service itself may be inherent in the land, much more may the reward of that service; also the nearest discharge to this is a *modus*, which is not gone by disparking, being inherent, and so in *Goodlack's* case, Moor, 913. also here the discharge cannot be personal in the abbot and his predecessors, for then all his demesnes would be discharged; also a non-charge by prescription is, Hob. 329. intended a real discharge, which answers the case of *Sydowne* against *Holmes*; also a college is a spiritual corporation, being capable of tithes in pernaney, and there may be also an appropriation to it, as 27 H. 8. 5. to the college of 10 H. 7. 20. to Magdalen College, 4 E. 3. Rot. Romæ, 47. Wickham appropriated to New College. — *Twisden* said, that here had been no question, but by *Hobart's* opinion, in the case of *Wright* and *Gerrard*, against which are all the other judges, that on any prescription, the court will not intend any real discharge without shewing, which he and *Windham* agreed; and said, that in the case of *Sydowne* and *Holmes*, which he heard, it was agreed that a prescription, by a mere lay person may be aided by shewing a deed of parson, patron and ordinary, which the rest agreed, and that it is hard to maintain this prescription; also by *Twisden*, it is a subtle distinction, that dean and chapter are lay in their single capacity, though spiritual in their joint. *Adjournatur*.

*Keylunz*, C. J. delivered the opinion of the court; also that the privilege does not continue in the college, but they must now pay tithe; they agreed lands may be discharged by a real composition, if it be shewed, which may be in evidence, albeit it cannot be pleaded, and this point, besides *Sydowne* and *Holmes' case*, has been adjudged in all the courts of Westminster, and judgment pro plaintiff.

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H. 19 Car. 2. B. R. *Webb v. Newman*. [2 Keb. 140.]

*GUIDET* prayed a prohibition to the bishop's court, of Winchester, on libel for tithes of conies, suggesting that they are *fera natura*, and not due but by custom; which the court agreed, and would have awarded a prohibition, but that there was a special custom alleged; whereupon he suggested there was no such custom as alleged, and thereupon the court granted a prohibition.

No tithes are due for rabbits but by custom; and where in a suit in the spiritual court a special custom alleged for them in the libel is denied, a prohibition lies.

H. 19 Car. 2. B. R. *Tucker v. Gorges*. [2 Keb. 177.]

*SAUNDERS* prayed a prohibition in suit for tithes of coal, alleging a special custom, which in his suggestion he denied, and *per curiam* it was granted.

Where a special custom for tithes of coals is denied, a prohibition lies.

E. 19 Car. 2. B. R.

*Cole, the Vicar of Spelsbury v. Box*. [2 Keb. 215. 1 Sid. 392.]

*MASTERS*, on 3 Cro. 136. opposed a prohibition to the spiritual court, in a suit by the vicar for great tithes by prescription, because, as 2 Bulstr. 157. (147.) *Drayton* against *Cotterell*, the *modus* that was alleged to be paid to the parson, cannot come in question; *sed curia contrà*, the parson being the original, and the vicarage extracted out of it, such a *modus* may well be paid to him that has an inherent right: also this is no more than if the parson had sued for tithes, and the parishioner had alleged the *modus*; but where the parson claims tithes out of the vicarage, or, *contrà*, the vicar being endowed by the ordinary, the trial is only proper in spiritual court, but not here; and notwithstanding there had been great delay, the court ordered a prohibition. — [Keble.]

A *modus* for a farm, payable to the parson, may be good as a discharge of tithes to the vicar, for the parsonage being the original and the vicarage extracted out of it, such a *modus* may well be paid to him who has the inherent

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right. Where such a *modus* is pleaded in the spiritual court to a suit for tithes by the vicar, a prohibition shall be granted, for the disputes between parson and vicar shall not draw a parishioner who has a *modus* to a trial where such a plea will not be allowed.

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Cole, the vicar of Spilsbury, libelled for tithes, viz. the great tithes of such a field, and Box, the owner, prayed a prohibition, upon suggestion that the field was part of such a farm, for which he and all those, &c. have paid a *modus* to the parson; and notwithstanding it was objected, that the question, to whom the tithes belonged, is properly to be determined in the spiritual court, especially the parson and vicar, who are spiritual persons, being concerned, yet they granted a prohibition, because their disputes shall not draw a parishioner who has a *modus*, *ad aliud examen*, especially in a case where they will not allow his plea, viz. of a *modus*. See Bulstr. 157. 3 Cro. 71.—[*Siderfin*.]

E. 19 Car. 2. B. R. *Brown v. Haywood*. [2 Keb. 212.]

A custom to pay tithes hay in shocks, in lieu of tithes of broom and other profits of the tenement is bad, for a *modus* of labour of one kind, will not serve for another.

**B**ALDWIN prayed a prohibition on custom, that all the occupiers of Longford have used to pay the parson proprietor of the tithes, all their hay in shocks, which has been in lieu of all broom, and other benefits of the tenement; which the court denied as an unreasonable suggestion, for a *modus* of labour of one kind will not serve for another; also a *modus* paid to the parson, *per* KEYLINGE, C. J. is no discharge against the vicar.

E. 19 Car. 2. Scacc. *Kent v. Webb*, and others. [1 Wood, 79.]

Hampshire, 6th May, 1667.

A *modus* of one acre of wheat, and one acre of barley, standing upon the ground and ready for harvest, in full satisfaction of all tithes of corn and hay arising upon a farm, held good. When some lands had been taken from certain demesne lands alleged to be covered by a *modus*, and some exchanged, the court of exchequer ordered a commission to ascertain the alterations.

**T**HE plaintiff, as farmer of the appropriate tithes of Itchenwell and Sydmontayne, hamlets within the parish of Kingscleere, in the county of Hants, exhibited his bill against the defendant Webb, vicar of Kingscleere, and the defendant Robert Lush, as farmer of Sydmontayne farm. The bill stated, that the Marquis of Winchester, being seised in fee of the said appropriate tithes, with the appurtenances, and all rights, customs, profits, dues, and duties, thereunto belonging, did, by indenture dated the 29th of November, 1665, demise the same to D. Wicherley for ninety-nine years, for three lives, at eleven pounds and sixpence a-year; that the said D. Wicherley became lawfully possessed, and did afterwards, by his deed dated the 4th day of November, 1667, demise the same to the plaintiff for eleven years, who thereby became possessed thereof, and is still entitled to the same, and ought to have received the tithes; that the defendant, Robert Lush, being possessed of several lands, meadows, and pasture grounds, in the said hamlets, denied the payment of the tithes of grass, or herbage, for depasturing barren cattle, and of hay for one year upon meadows called Moor Croft, Broad Mead, Great Oddy Crofts, and Little Oddy Crofts, and the tithes of wheat upon a field called Combeys, and a close called Ox Marsh Close; and also the tithes of barley, oats, pease, wool and lamb, of and from other lands, for five years past, and detained the said tithes from him, and divers other tithes, customs, and rights; and therefore he prayed a discovery and payment of the same.

The defendant Lush answered, and said, that he knew not of the plaintiff's title to the said tithes; and conceived the said meadows and pastures as aforesaid were not liable to the payment of tithes in kind; that the lands whereon the sheep were depastured and the lambs fallen and bred, are part of a farm in Sydmontayne, called Sydmontayne Farm, otherwise Demesne Lands of Sydmontayne; and that, time out of mind, there had been a custom or manner of tithing, that the owner and occupiers of the appropriate tithes of Itchenwell and Sydmontayne, and all those under whom the plaintiff claims, every year successively have had, cut, and taken to their proper use, at their free election, one acre of wheat and one of barley, standing upon the ground and ready for harvest, the acres to be measured by the court measure, viz. each acre to contain one hundred and thirty-two poles, and no more, of the corn and grain of the owners and farmers of the farm, called Sydmontayne Farm, and all those under whose estate the defendant claimed, out, of, and from the aforesaid parcels of land called Combe's Field, Home Field, and Pound's Down Field;

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Field; and in one other parcel of land in Sydmontayne, also parcel of the said farm called Park Field, or in some or one of them, the said acre of wheat to be taken altogether, and standing in one place entirely by itself; and in like manner the acre of barley, in full discharge of all manner of tithes increasing, &c. upon the said farm, and the parcels of land, meadow and pasture, before mentioned; but he denied, that in the said years he did detain any tithes other than the tithes of the said farm and lands which he held by lease.

The defendant Webb answered, and said, that he knew not of the plaintiff's title to the lands in question; and denied those tithes and customs in the said hamlets ought to be paid to the plaintiff, for that they are tithings in the parish of Kingsclere, whereof he is and has been vicar twelve years, and ought to have the tithes belonging to the vicar of Kingsclere, and which have been paid to him, except the manor tithes.

The plaintiff replied; and witnesses were examined on both sides.

Upon hearing counsel on both sides, and reading the depositions of several witnesses, and also an ancient endowment of the said vicarage,

The court declared, that although the said vicarage was endowed, yet the said endowment does not warrant the claim and pretence of the said vicar; and that he cannot ground his claim to all the tithes of lamb and wool upon the said endowment; and that the usage had gone contrary to his claim, and had prevailed against it. And therefore ordered, that the tithes of wool and lamb shall be paid to the plaintiff, saving the right of the vicar, if he have any, for the future, but without costs.

And for that some lands had been taken away from the demesne lands, and some added by way of exchange,

It is ordered by the court, that a commission shall be awarded to ascertain what were the ancient demesne lands alleged to be within the *modus*, what has been taken out, and what added to them by way of exchange; and whether the lands so exchanged are of equal value. And if they shall be found to be of equal value, (if the parties will consent) the same are to be decreed upon the return of the said commission to be within the *modus* pretended by the defendants by their answers; and also to inquire of and set out such lands as were formerly part of other lands which were not demesne lands within the said *modus*, and are now taken into the demesne lands, and where they lie, and are bounded, and what lands are not exchanged (if any such there are).

And as to those,

The court is of opinion that tithes are due in kind.

The commission was accordingly awarded, executed, and returned; and now upon reading the decree and commission, and hearing of counsel, and reading the depositions taken by virtue of the commission, and long debate, forasmuch as the same is proper for a trial at law,

The court ordered, that an action be brought, and the questions to be stood upon at the said trial to be,

First, Whether there be a *modus* for Sydmontayne farm, and what that *modus* is; and, whether that *modus* has been answered to the plaintiff for the time he has been farmer; and if not, how much the plaintiff has been damaged thereby.

Secondly, Whether Broad Mead, More Croft, New Mead, and Cow Field, otherwise called Cow Marsh, now occupied with or as part of Sydmontayne Farm, are to pay tithes in kind.

Thirdly, Whether there was any agreement that tithes in kind of the seventeen acres, formerly parcel of Sydmontayne Farm, and since exchanged from the farm, were, by that agreement, to go in satisfaction of the tithes only of the like quantity of seventeen acres exchanged, or in lieu and discharge of all the tithes in kind of the exchanged lands, being thirty-nine acres.

Fourthly, What other lands the defendant Robert Lush holds within the said farm called Sydmontayne Farm, that are to pay tithe in kind, as not being within the *modus*, or within the agreement, (if any agreement) upon the exchange; and, whether the agreement was made to be perpetual, or only for some limited time.

Fifthly,

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Fifthly, The defendant at the said trial is to confess the ploughing of one acre of New Down, in order to bring it in trial, whether New Down ought to pay tithes in kind or not.

A trial was accordingly had; and the jury have found, as to

The first issue, That there was a *modus* for the tenants of the farm of Sydmontayne to pay to the proprietor of the tithes of the farm one acre of wheat and one acre of barley, in full satisfaction of all tithes of corn and hay; and that the proprietors of the tithes have used and ought to accept the same, in full satisfaction of the tithes of the said farm.

The second issue, That the tenants and occupiers of Broad Mead, More Croft, New Mead, and Cow Field, otherwise called Cow Marsh, have used to pay, and ought to pay, to the proprietor of the tithes aforesaid for the time being, the tithes of all corn and hay thereon yearly growing, and other tithes in their proper kinds.

The third issue, That there was not any agreement made between the plaintiff and Sir William Kingsmill, deceased, that the tithes of the seventeen acres of land, formerly parcel of Sydmontayne Farm, and lately exchanged with the tenants of lands lying in the common fields of Sydmontayne, for thirty-nine acres of land lying in the same common fields, neither were they paid to the plaintiff in lieu and satisfaction of the tithes of the thirty-nine acres.

The fourth issue, That the plaintiff is damnified 15*l.* by the defendants not paying the *modus* in lieu of the tithes of Sydmontayne Farm for three years.

The fifth issue, That the tithes of grain and hay arising out of one hundred acres of land, and sixty acres of meadow in New Down, held by Robert Lush, with Sydmontayne Farm, have time out of mind been used to be paid, and ought to be paid yearly to the proprietor of the tithes in their proper kinds.

The cause now came on to be further heard; and upon reading the order of the 28th of January, and the verdict,

It was ordered by the court, that the defendant shall pay to the plaintiff his tithes, according to the verdict; and that the auditor of the county of Hants shall compute the monies due to the plaintiff for the *modus*, payable in lieu of tithe of the lands of Sydmontayne Farm, lying within the *modus*, according to the verdict, for the time therein mentioned, and according to that rate for all the time since to this time. And as to the tithes issuing out of the lands out of which, by the said verdict, it is found, that the plaintiff ought to have tithes in kind, viz. Broad Mead, More Croft, New Mead, and Cow Field, otherwise called Cow Marsh, and the thirty-nine acres lying in Coombefield, Claythorn, Little South Field, Broad Leaver, the Six Acre Piece, and all the tithes of New Down, the auditor shall compute the value of the tithes of the said several grounds for the several years mentioned in the bill to this time, according to the proofs to be produced before him, and to report the same to the court.

In pursuance of the said order, the auditor returned his certificate.

The cause now coming on to be heard on the said certificate, exceptions were taken thereto; and upon hearing counsel on both sides,

The court ordered, that the defendant, Robert Lush, shall forthwith pay to the plaintiff 75*l.* 7*s.* 6*d.* for the value of the tithes due from him to the plaintiff, according to the certificate of the auditor.

EDW. TURNER.  
TIM. LITTLETON.  
EDW. THURLAND.

M. 19 Car. 2. B. R. *Anon.* [2 Keb. 280.]

1667.

**CARPENTER** prayed a prohibition to the bishop's court of Hereford, on suggestion that all the occupiers of land within such a vill, have used to pay 2s. 6d. in full of all the tithes of the said vill; which *per curiam* is not reasonable, there being no remedy to compel any that refuse to contribute; but if it had been that *quilibet occupator* had used to pay, it had been good; and a prohibition was denied.

being no remedy to compel any that refuse to contribute; but if it had been that any occupier had used to pay, it would have been good.

A modus that all the occupiers within a vill had used to pay 2s. 6d. for all tithes of the vill is bad, there

M. 19 Car. 2. B. R. *Weems v. Amerson.* [2 Keb. 293.]

**STOT** prayed a prohibition on suggestion that cattle were brought out of Rue parish, in Northumberland; into another, to agist only for twenty days, during which time there were no lambs fell, nor any tithes due, which was denied *per curiam*, the libel in the ecclesiastical court at Durham being only for a proportion of tithes which is due, albeit the cattle were there but twenty days. fel, nor [wool] tithes became due. A prohibition to a libel for a proportion of tithes for that time was denied.

Where sheep were agisted in a parish for twenty days, during which time no lambs

M. 19 Car. 2. Scacc. *Tabor v. Barker.* [1 Wood, 86.]

Essex, 18th November, 1667.

**THE** plaintiff, as vicar of the parish-church of Easterford Kelbeden, stated, by his bill, that to the said vicarage all small tithes, oblations, and other profits, do belong: that he had been vicar there ever since August, 1660, and performed the cure there; and that in regard thereof he ought to receive all small tithes, oblations, and other profits arising therein; that by an ancient custom and agreement, the annual sum of three shillings had yearly been paid to the plaintiff's predecessors, for the herbage of every pack-horse and saddle-horse fed within the parish, and ought to have been paid to the plaintiff; that the defendant had depastured within the parish two pack and saddle horses for three years, and ought to have paid the plaintiff eighteen shillings; that he also ought to have paid, for himself and family, ten pence for Easter offerings by the year; that he also sold quantities of cherries growing in the orchards; and sold coriander seed; but that he refused to pay the said eighteen shillings for the pack and saddle horses, and the said Easter offerings, or to discover the quantity of the cherries and coriander seed, pretending that there is no such custom, nor any such tithes due. He therefore prayed a discovery and satisfaction of the same.

A customary payment of 3s. for the herbage of each pack horse and saddle horse fed within a parish decreed.

The court of Exchequer refused to decree tithes of cherries grown in orchards and coriander seed, but left the vicar to his remedy in the spiritual court, if he could make the same to appear due to him.

The defendant answered, and said that the plaintiff was vicar, and had officiated there; and that the small tithes and other duties were due to him; that he is an inhabitant in the said parish, and had lived there three years, and used the trade of a chandler, and had kept one horse, sometimes for the saddle and sometimes for the pack, which he had used for carrying his wares belonging to the trade, which had been kept during some time at pasture in other parishes, except for two months, one month thereof the said horse was kept and depastured in the grounds of the plaintiff, for which he did give him satisfaction; that no tithe is due for the herbage of any horse which the owner used about his trade; and he denied, that by any custom or agreement whatsoever, there had or ought to have been paid yearly to the plaintiff, or his predecessors, the sum of three shillings yearly, or any sum whatsoever, for the tithes of the herbage of any saddle or pack horse. He also denied that he ought to pay for himself and family, for Easter offering, ten-pence, or any other sum, except two-pence for every person in his family being above the age of sixteen; and that for the three years last past, he had paid for himself and wife to the said plaintiff sixpence, having no more in his family. He also denied the rest of the bill.

1667.

TABOR  
V.  
BARTER.

The plaintiff replied; and witnesses were examined on both sides; and upon reading the depositions of several witnesses; for that the plaintiff had remedy in the ecclesiastical court for the non-payment of his tithes for the cherries and coriander seed, if the same be made appear to be due to him.

The court did not think fit to give the plaintiff any relief therein; but being willing to relieve the plaintiff for the tithe of the herbage for saddle and pack horses, it is ordered by the court, that the defendant shall pay to the plaintiff six shillings for the herbage of his horse for two years, with forty shillings costs of suit.

EDW. ATKINS.

CHR. TURNOR.

RIC. RAINSFORD.

H. 20 Car. 2. Scacc.

*Rushworth and others v. the Countess of Pembroke and Currier.*

[Hardr. 472.]

1668.

In debt upon s. E. 6. brought by a proprietor of tithes, after a verdict for the lessee or present proprietor, the reversioner shall have advantage of it and give it in evidence, for he could not be an immediate party, for that must be prosecuted by the lessee or present tenant.

But as a reversioner can be made a party to a suit in equity, it is otherwise with depositions where he was not so.

Depositions in another cause cannot be read for a defendant where they could not have been read against him.

THE case was thus; viz. Currier preferred a bill in the Bachequer Chamber, against the plaintiffs and others, tenants of a manor of the Countess of Pembroke, for suit to his mill, which he claimed by prescription; many witnesses were examined on both sides: and now upon this bill preferred against the Countess and Currier, a trial at law being directed to try the title, the countess would make use, at the trial betwixt Currier and herself, of the former depositions taken, *ut supra*; and that being denied her, she now appealed to the court for directions in the matter, and prayed a new trial. The court was of opinion, that the former depositions ought not to be made use of at the trial, because the countess was not a party to that suit; and as they could not be read against her, no more could they be read for her: and because she was not bound by them, not having been a party to the suit; nor was she in a capacity of examining any witness in it, or preferring interrogatories in it; for that reason also she could not make use of the depositions of any that had been a witness in it. And it is not like to the case of an ejectment, brought by a reversioner, or debt upon the statute of E. 6. brought by a proprietor of tithes, after a verdict at law for the lessee or the present proprietor: for true it is, that such a reversioner of lands or tithes shall have advantage of the verdict, and give it in evidence; but the reasons are, because they cannot be immediate parties to the action or suit; for that must be prosecuted by the lessee or present tenant: and likewise because they may give any thing in evidence to the jury, as well as the plaintiff himself: and kindred or affinity to the reversioner, is a good cause of challenge; but it is otherwise in case of depositions. For there only parties to the suit can examine or interrogate. Likewise the reversioner or the seignores might have been made a party to the original suit in equity, though not at law. And it was ruled accordingly, that the depositions should not be made use of.

H. 20 Car. 2. B. R. *Townsend v. Clerk.* [2 Keb. 306.]

In debt for subtracting the tithes of seventy loads of peas and beans, without distinguishing how many of each, the court refused to stay judgment.

IN debt for subtraction of seventy loads of peas and beans, and did not distinguish how many of each; for which cause *Sympton* prayed judgment might stay; *sed non allocatur*, for it is the same as *marcoeline*. (1) 2. It is for selling so many acres *fabiarum*, and on *nil debet* pleaded damages entire, which is ill, and should be *fabiarum*; *sed non allocatur*, the value of the peas and beans being joined; and so if it signify any thing, damages are given for it; if nothing, damages are given for the other; and this was a case which all the justices agreed in the case of *Tate* against *Farnaby* in *trover*, *pro duodenis fili*, &c. to avoid such niceties of mistake; but had the value or damages been several, it would be ill for the beans; and judgment affirmed *per curiam*.

(1) *Miscellane, F. or Meslin, mixed corn.*

H. 20

H. 20 Car. 2. B. R. *Gandy v. Smith.* [2 Keb. 311.]

**O**N libel for tithes praedial, *Holt* prayed a consultation for not proving suggestion (that the lands were in C. and not within the parish) within six months, 2 Inst. 662. 1 Cr. 208. *Stroud* against *Hoskins*, the words of the statute being general, and this an affirmative suggestion, that the lands lie in Claxton, and not in the parish in the libel; but *per curiam* the ground of this suggestion is the negative, that the lands are not within the parish, as 2 Inst. 662. and not that they are in another parish; and *per curiam* no consultation.

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A suggestion that the lands lie in C. and not in the parish in the libel, is in the negative, and therefore need not be proved within six months.

H. 20 Car. 2. B. R. *Tatham v. Symons.* [2 Keb. 317. 391.]

**A**FTER appeal the defendant suggests in the arches specially a release of one of them, they being farmers of the tithes in question; and for not allowing it, *Baldwin* prayed a prohibition, *sed non allocatur*, for the appeal is grounded only on the sentence to affirm or annul the sentence; and the release is collateral, and *per Windham* is void, as in case of churchwardens, and does not bar all; the court gave day to shew cause why they do not admit the release; but *per Windham*, if they judge a release by one insufficient, this court cannot alter it; which was agreed, but they must admit the plea; but they stayed nothing.

In suit for tithes by four proprietors, the defendant pleaded a release of one in bar, and on affidavit of refusal, the court granted a prohibition *visi*, and now *Wassington* brought an affidavit and the act of court, whereby they did allow it, whereupon the prohibition was discharged *per curiam*, for by 32 H. 8. c. 7. § 2. they have power to judge upon it, so they admit it.

by 32 H. 8. c. 7. § 2. they have power to judge of it; and if they admit it, although they hold the release by one insufficient, the temporal court cannot alter it.

In a suit for tithes by four proprietors, the defendant pleaded a release by one; on affidavit of refusal, a prohibition *visi* was granted in B. R. but upon the production of an affidavit and the act of the spiritual court allowing it, it was discharged, for

H. 20 Car. 2. C. B. *Holden v. Smallbrooke.* [Vangh. 197.]

**I**N trover and conversion, and not guilty pleaded, the jury gave a special verdict to this effect, that Doctor Mallory, prebendary of the prebend of Wolvey, founded in the cathedral of Litchfield, seised of the said prebend and one messuage, one barn, and the glebe appertaining thereto, and of the tithes of Wolvey, in right of his prebend, 22 April, 13 Car. 2. by indenture demised to Giles Astly, and his assigns, the said prebend, together with all houses, barns, tenements, glebe lands and tithes thereto belonging for three lives, under the ancient rent of five pounds ten shillings. Astly (being one of the lives) died seised of the premises; at whose death one Taverner was tenant for one year (not ended) of the demise of Astly, of the messuage, barn, and glebe lands, and in possession of them; whereupon the plaintiff entered into the messuage and glebe, and was in the possession of the same and of the tithes as occupant. And afterwards Francis Astly, the relict of the said Giles Astly enters upon the messuage, and claims the same as occupant, *in hæc verba*, Frances Astly, widow of Giles Astly, enters upon the house, and claims the same, with the glebe and tithes, as occupant; Taverner attorns to Frances Astly, and afterwards grants and assigns all his estate in the premises to the plaintiff; afterwards Conquest, the Husband of Frances Astly, took one sheaf of corn in the name of all the tithes, and afterwards demised the tithes to the defendant: the tithes are set forth, and the defendant took them; whereupon the plaintiff brought this action.

Before I deliver my opinion concerning the particular questions before opened, arising upon this record, I shall say, somewhat shortly, of Natural Occupancy and Civil Occupancy.

First opening what I mean by those terms, then briefly shewing their difference, as far only as is material to the questions now before me,

I call Natural Occupancy the possession either of such natural things as are immoveable, fixt, and permanent; as land, a pool, river, sea, (for a sea is capable of occupancy and dominion naturally, as well as land, and has naturally

*Qu.* Whether there can be an occupant of tithes by reason of occupancy of a messuage, barn and glebe, demised together with the tithes.

A rectory is the church parochial, whereof the incumbent takes cure and seisin by his induction after institution, which is his charge, and without other seisin than of the ring or key of the church door; by the induction into the rectory the parson is seised of all the possessions belonging to the rectory of what kind soever.

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been in occupancy, as is demonstrated in Mr. Selden's *Mare Clausum* at large,) which lie unpossessed, and in which no other has prior right.

Of things natural and moveable, either animate as a horse, a cow, a sheep, and the like, without number, or inanimate, as gold, precious stones, grain, honey, fruit, flesh, and the like, numberless also, wherein no man, until the possession thereof by occupancy, had any other right than every man had, which is as much as to say wherein no man had right, for that which is equally every man's right, is no man's right.

Whence it follows (for I shall not speak of the usage or extent of such a possession by natural occupancy, it being a subject too large, and not necessary for my present purpose)

1. That there can be no occupancy natural of any thing wherein another than the occupant has right: for by the definition made, natural occupancy is the first right.

2. A claim, without actual possession, cannot make a man a natural occupant: for,

1. When a claim is, cannot be possibly known to all concerned in the occupancy of a natural thing, and what cannot be known, is (as to all effect of right) as if it had not been; nor is there any character of a natural claim, but the possession and use of the thing, but civilly there may, either by word or other sign, agreed on.

2. The end of a natural right, to any natural thing, is the separate use of the thing to a part of mankind, which cannot be used by all mankind; but if claim only would give a right to the things of nature, they might still remain, as much without use after the claim as before; which agrees not with the end of nature in giving a right to natural things.

3. If claim could give a natural right, one might claim all things in the universe, not already appropriated, and might have done so in the beginning of time, when nothing almost was appropriated.

4. A natural occupant has no estate of fee, freehold, or the like, which are estates formed and raised by municipal laws, but has only a bare possession to keep or forsake.

5. That land possessed by a natural occupant must be without any sort of vassalage of service, rent, condition, or other charge whatsoever; for those servitudes upon the land cannot be conceived without a former right in him that laid them, but natural occupancy of things wherein none had any former right, or having any, have deserted it; for naturally a man can have nothing against his own will.

6. Two or more cannot, at the same time, have severally plenary possession, that is, occupancy, of the same thing; therefore none can have right to that by reason of possession, whereof another is already possessed; for then there would be two plenary possessors severally of the same thing at the same time, which is impossible.

And although every nation has, by consent and agreement among the people of it, its proper laws to guide and determine men's properties to all things capable of property and ownership, yet the ancientest nations of the world have no other right against each other to their own countries and territories, than this original and natural occupancy; and that nation that will not admit a right by occupancy to another nation in the land so possessed by it, must at the same time confess they have no right to their own, which they hold but in like manner.

They who would be further satisfied concerning this kind of occupancy, may resort, for exactness above other books upon this subject, to Mr. Selden's *Mare Clausum*, lib. 1. and to Hugo Grotius, *de Jure Belli et Pacis*, lib. 1. c. 3. *de acquisitione originariâ rerum*; and c. 4. *de derelictione præsumptâ, et eam secutâ occupatione*, &c.

1. By Civil Occupancy, I mean such an occupancy either of things immoveable, as lands; or of things moveable, as is according to institution and the law of the place, and particularly according to the law of England, as to the decision of the question before us.

2. By



2. By the law of England, there is no occupancy by any person, of any thing which another has a present right to possess; wherein the law of the land agrees with that of natural occupancy.

Occupancy by the law must be of things which have natural existence, as of land, or of other natural things, not of things which have their being and creation from laws and agreements of men; for there is no direct and immediate occupancy of a rent, a common, an advowson, a fair, a market, a remainder, a dignity, and the like.

There can be no occupant of any thing that lies in grant, and cannot pass without deed, because every occupant must claim by a *que estate*, and aver the life of *century que vie*. (1)

And in this the civil occupancy with us of land agrees with natural occupancy, which must be of a thing that has natural existence, and not only legal.

But although the occupancy be always of a natural thing, yet the occupant does thereby by the law enjoy several things, many times, that have their being by law only; as an occupant of land may thereby enjoy a common, occupant of a house *estovers*, of the demesne lands of a manor, the services and advowsons appendant, which are not themselves natural things, but things created by law; nor are they immediately and by themselves capable of occupancy, but with reference to, and as adjuncts of the land; and herein the civil occupancy differs from the natural.

And the reason is clear, because the occupancy of the land, which ought not to lie void, does not sever or separate any thing from the land which the law has joined with it; and if it do not separate from it that which is joined with it by law, though that be not capable of occupancy in itself, as an advowson or common, it must follow that such things continue joined or belonging to the land as before, notwithstanding the occupancy of land.

In civil occupancy, the land in occupancy is charged with all the servitude imposed by the first lessor or by the law. As 1. To the payment of rent; 2. To be subject to waste; 3. To forfeiture; 4. To other conditions, wherein it differs from land whereof a man is a natural occupant. (2)

As to the civil occupancy of moveable things, which are commonly termed personal things or goods, there are few of those in our law that have not a proprietor; and consequently no occupant can be of them: those which fall under occupancy of that kind, are for the most part found in things *feræ nature*, whose acquisition is either *per piscationem*, as in fish, or *per aucupium*, as in fowl; or *per venationem*, by hunting: these do *cedere occupanti communi jure*. (3)

1. Hence it follows, by way of inference and corollary, that there can be no primary and immediate occupancy of a tithe; for it is not in its own nature capable of occupancy more than a rent or common is, and is in truth in its nature but a rent, it cannot pass by itself, but by deed, and as other things which lie in grant.

A second thing that follows out of the former premises, is, that the freehold, *que* freehold, is not the thing whereof there is an occupancy; for the freehold is not a natural thing, but has its essence by the positive municipal law of the kingdom; it cannot, abstract from the land in this matter of occupancy, be either entered into, or possessed. The freehold is an immediate consequent of the possession; for when a man has gotten the possession of land that was void of a proprietor, or other thing capable of occupancy, the law forthwith casts the freehold upon the possessor, to make a sufficient tenant to the *præcipe*. Therefore

As to the first question, whether Holden the plaintiff's entry upon the lessee Taverner's possession, into the house, glebe, and barn, the 1st of March, 1666, and openly saying, I enter and take possession of this house, glebe, and barn, and the ground thereto belonging, and the tithes of Wolvey, in my own name and right, as occupant upon a lease made to Giles Astly and his assigns for three lives, by Dr. Mallory, prebend of Wolvey, did make him occupant of the

(1) Co. Litt. f. 41. b. Cr. El. f. 721. Crawley's C. p. 50. no occupancy of a rent.

(2) Co. Litt. f. 41. b.

(3) Bract. l. 2. c. 1.

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house, land, and tithe, or either of them, the lessee Taverner not having made any claim as occupant to any of them.

I hold clearly, this entry and claim did not make Holden occupant of the house, land, or tithe, or of any of them.

To every occupant of land, or other thing capable of occupancy, two things are requisite. 1. Possession of the land which was void and without owner. 2. The having of the freehold, to avoid an abeyance, which is had as well where the possession is not void, as where it is.

The first, that is the possession, is acquired by the party, and his act, but the freehold is acquired by the act of law, which casts it upon the possession as soon as there is a possessor, or where it finds a possessor when the freehold is in none.

1. This claim and entry was in order to gain the first possession of the land which was void; but that was impossible to be had, for the lessee Taverner had the possession before he held it then; therefore the claim was to no end.

2. Secondly, A man cannot be an occupant but of a void possession, or of a possession which himself has; but here was no void possession, when Holden entered and claimed as occupant, for the lessee was in lawful possession of the house and barn and land, at the time of the entry and claim.

3. Thirdly, If this entry and claim should make Holden a legal occupant, which cannot be without gaining the possession, then there would be two plenary legal possessors of the same thing at the same time, Holden by his entry and claim, and Taverner the lessee by virtue of his lease; but that is impossible there should be two plenary possessors of the same thing at the same time: therefore Holden can be no occupant by such entry and claim.

4. This very case in every point has been resolved in the case of *Skelton and Hay*, 17 Jac. (1) where upon an ejectment brought, a special verdict found, that the Bishop of Worcester made a lease to Sir William Whorehood of certain land for his own, and the lives of two of his sons. Sir William did let the land to John Mallett at will, rendering rent, and died; Mallett continued the possession, not claiming as occupant; one of Sir William's sons entered as occupant, and made a lease to the plaintiff in the action: it was adjudged that Mallett the defendant, being in possession, the law cast the freehold upon him without claim; and had he disclaimed to hold as occupant, keeping the possession, he must have been the occupant; for where one entered to the use of another, he that entered was adjudged the occupant. (2)

Which case proves one may be an occupant against and besides his own intention, and therefore a claim to denote his intention.

5. To be an occupant is not necessary; and tenant for years, as well as at will, is occupant by that case.

Besides claiming to be occupant, is to claim to be in possession, or to claim the freehold, or both; but the law binds not a man to claim that which he has already; and therefore he that has possession, and occupies the land, is not to claim possession, or to be occupant of it; no more is he to claim a freehold which he already has, for the law has cast it where it finds the possession; so having both possession and freehold, the law binds him not to claim what he has.

6. Claim is never to make a right which a man has not, but to preserve that which he has from being lost: as claim to avoid a descent, whereby a man had lost his right to enter; so a man makes no claim to be remitted, when by act of law he is in his remitter.

As to the second question, whether Frances Astly, the relict of Giles, entering the five and twentieth of March, 1667, upon the lessee Taverner's possession, and claiming the house, globe and tithe, as occupant, and the lessee Taverner attorning to her, makes her an occupant of the house, land, or tithe. The question has nothing in it differing from the former, but only the attornment; and it is clear, the attornment of Taverner the lessee, does not disclaim

(1) *Skelton and Hay*, Cro. Ja. 554. b.

(2) *Chamberlayne and Ewes*, 2 Rolle, f. 151. Lett. E.

his possession, but affirms it; for attornment is the act of a tenant, by reason of his being in possession. Besides, admitting the tenant a perfect occupant, he might, contraining so, attorn to whom he pleased, as well as Astly might have done in his lifetime, yet still continue the estate that was in him.

It follows then that Taverner was the undoubted occupant, after Astly's death, of the house, land, and barn; but whether he had the tithe of Wolvey by such his occupancy, whereof Astly died seised, is the difficult question.

Another question will arise, when Taverner the lessee, who had by lease the house, barn, and land, and so found, and was occupant certainly of those, when afterwards Taverner the lessee, *concessit et assignavit totum statum suum de et in premisis* to Holden the plaintiff, and gave him livery and seisin thereupon, what shall be understood to pass by the word *premissis*; if only what was leased, and his estate therein as occupant, and likewise the tithe, if the tithe accrued to him by reason of being occupant of the land.

For if he were occupant of the tithe by act in law, by being occupant of the land, it follows not that if he past all his estate to Holden, in the house and land, and gave him livery, that therefore he past his estate in the tithe, nor is such passing found to be by deed.

To clear the way then towards resolving the principal question.

1. At the time of Giles Astly's death, the tithes and the house and lands were severed in interest; for the lessee Taverner had a lease of the house, glebe, and barn, and the tithe continued in Astly.

2. This severance was equally the same, as if the tithe had been demised to Taverner, and the house and land had remained still in Astly's possession.

3. Though the freehold of both remained still in Astly at his death, notwithstanding the divided interest in the land and tithe; yet the freehold being a thing, *quatenus* freehold, not capable in itself of occupancy, nor no natural, but a legal thing, which the law casts upon him that is occupant, that will not concern the questions, either who was occupant, or of what he was occupant.

4. I take it for clear, that a naked tithe, granted by itself *pur auter vie*, and the grantee dying without assignment, living *cestuy que vie*, is not capable of occupancy, more than a rent, a common in gross, and advowson in gross, a fair, or the like are, it being a thing lying in grant equally as those others do. Co. Litt. 41 b. there can be no occupant of any thing which lies in grant, and cannot pass without deed. I cited the place at full before, with other authorities against occupancy of a rent.

5. If a man die seised of land which he holds *pur auter vie*, and also die seised of rent held *pur auter vie*, or of an advowson or common in gross, held by distinct grants, *pur auter vie*, and the same *cestuy que vie*, or the several *cestuy vies* (for that will not differ the case) living: though the grantee died seised of a freehold in these several things, I conceive that he who enters into the land first, after his death, will be occupant of the land which was capable of occupancy, but neither of the tithe, advowson, nor common, which are not capable of occupancy, and have no more coherence with, dependence upon, nor relation to, the land, than if they had been granted *pur auter vie*, to another, who had happened to die in like manner as the grantee of the land did.

And that which has intricated men in this matter, has been a conception taken up, as if the occupant had for his object in being occupant, the freehold which the tenant died seised of, which is a mistake; for the subject and object of the occupant are only such things which are capable of occupancy, not things which are not, and not the freehold at all, into which he neither does, nor can enter; but the law casts it immediately upon him that has made himself occupant of the land or other real thing whereof he is occupant, that there may be a tenant to the *præcipe*. But, as was well observed by my brother WILLMOTT, no *præcipe* lies for setting out tithe at common law; and I doubt not, by the statute of 32 H. 8. c. 7. though Sir Edward Coke in his Litt. f. 159. a. seems to be of opinion, that a man may at his election have remedy for withholding tithe, after that statute, by action, or in the Ecclesiastical Court; by that statute doubtless he has for the title of tithe as for title of land, or for the taking of them away, but not, perhaps, for not setting them out.

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6. When a severance therefore is once made of the land and tithe, it is as much severance of them, though the tithe remain in Astly's possession, as if he had leased the land to Taverner, and the tithe to another; if then, Taverner, becoming occupant of the land, should have had nothing in the tithe leased to another, as the land was to him, no more shall he have the tithe remaining in Astly himself at his death.

Still we must remember the ground insisted on, that no occupancy begins with the freehold, but begins by possessing the land or other real thing, which was void and ownerless; and that by act of law the freehold is cast upon the possessor, either entering where the possession was void, or being in possession when tenant *pur auter vie* died, either as lessee for years, or at will to tenant *pur auter vie*; for the law equally casts the freehold upon him, as was resolved in *Chamberlayne* and *Eures'* case, reported by Serjt. Rolle and others. Second Part, f. 151. Letter E. and in *Castle* and *Dod's* case, 5 Ja. Cro. f. 200.

Therefore, after such severance made by the tenant, *pur auter vie*, the land and tithe are as distinct and sundered from each other, as if tenant *pur auter vie* had held them by distinct grants, or leased them to distinct persons.

In the next place I shall agree,

That the occupant of a house shall have the estovers, or way pertaining to such house; the occupant of the demesne of a manor or of other land, shall have the advowson appendant, or villein regardant to the manor or common belonging to the land, and the services of the manor not severed from the demesne before the occupancy.

For a possessor of a house, land, demesne of a manor, as occupant, does not by such his possession sever any thing belonging to the land, house, or demesne, more than the possessor by any other title than occupancy does; and if they be not severed, it follows they must remain as before to the possessor of that to which they pertain.

So if a manor, being an entire thing, consisting of demesnes and services, which are parts constituent of the manor, the possessing and occupancy of the demesnes, which is one part, can make no severance of the services from the entire, and therefore the occupant has all. And these things, though primarily there can be no occupancy of them, being things that lie in grant, and pass not without deed; yet when they are adjuncts, or pertaining to land, they pass by livery only without deed.

Whatsoever passeth by livery of seisin, either in deed or in law, may pass without deed; and not only the rent and services, parcel of the manor, shall, with the demesnes, as the more principal and worthy, pass by livery without deed; but all things regardant, appendant, or appurtenant to the manor, as incidents or adjuncts to the same, shall, together with the manor, pass without deed, without saying *cum pertinentiis*.<sup>(1)</sup> And if they pass by livery, which must be of the land, they must likewise pass by any lawful entry made into the land; and such the entry of the occupant is.

But as by occupancy of the demesne lands of a manor, the services are not severed, so if they be severed at the time when the occupancy happens, that shall never of itself unite them again.

Now in the case before us, the tithe is neither appendant nor appurtenant, or any sort of adjunct to the glebe or house, nor are they to the tithe; nor will a lease and livery of the glebe simply with the appurtenances, pass the tithe at all, nor a grant of the tithe pass the glebe; nor are either of them constituent parts of the prebend or rectory, as the services are of a manor; for a total severance of the services and demesne destroy the manor; but a severance of the tithe or glebe will not destroy the rectory, more than the severance of a manor, parcel of the possessions of a bishopric, will destroy the bishopric; for the glebe and the tithe are but several possessions belonging to the rectory.

But it is true, that in the case before us, and like cases, a grant of the prebendary or of the rectory, *una cum terra glebali, et decimis de Woolney*, the tithe which alone cannot pass without deed, passes by livery of the rectory; and so

(1) Co. Litt. f. 181. § Sect. 185.

passes,

passes, that though the deed mention the tithe to be passed, yet if livery be not given, which must be to pass the land, the tithe will not pass by the deed; because the intention of the parties is not to pass them severally, but *und cum*, and together. (1)

Therefore the tithe in such case must pass in time by the livery, which did not pass without it, though granted by the deed.

Yet it is a question whether in such case the tithe passes by the livery or by the deed; for though the passing it by deed be suspended by reason of the intention to pass the land and tithe together, and not severally, it follows not, but that the tithe passes by the deed where livery is given, though not until livery given.

If a man be seised of a tenement of land, and likewise of a tithe, and agree to sell them both, and without deed give livery in the tenement to the bargainee in name of it, and of the tithe; I conceive the tithe does not pass by that livery.

But a prebendary or churchman cannot now, by the statute of 13 El. 10. make a lease of the possessions of his prebend without deed.

A prebend or rectory is in truth neither the glebe nor tithe, nor both; for the one or the other may be recovered, and might at common law have been aliened, the rectory remaining. But the rectory is the church parochial, whereof the incumbent takes the cure and seisin by his induction after his institution, which is his charge, and without other seisin than of the ring or key of the church door. By induction into the rectory, the parson is seised of all the possessions belonging to his rectory, of what kind soever.

But though by the name of the rectory, the possessions belonging to it, of what nature soever, actually vest in the incumbent upon induction, and may pass from the prebendary, by livery of the prebend or rectory, to his lessee, according to the parties' intention,

Yet it follows not that therefore an occupant, who can be occupant but of some natural and permanent thing as land is, should, by being occupant of that whereof occupancy may be, have thereby some other thing heterogene to the nature of land, and not capable of occupancy, as a tithe is, being neither appendant nor appurtenant, nor necessary part of that whereof he is occupant; nor will it follow, that because by giving seisin of the rectory, the tithe and glebe belonging to it will pass, that therefore giving livery of the glebe will pass the tithe. For it is observable, that if a man be tenant in tail of a manor to which an advowson is appendant, or of a tenement to which a common is belonging, and discontinue, the issue in tail shall never have the advowson or common until he has recontinued the manor or tenement.

But if a man be seised in tail of a rectory, consisting of glebe and tithe, and discontinue it, after the death of tenant in tail, the heir in tail shall have the tithe which laid in grant, but must recover by formedon the rectory and glebe. This was agreed in this court in a case between *Christopher Baker* and *Searl* (2) in ejectment, upon a demise by the Earl of Bedford of the rectory of D. and *de decimis inde provenientibus*, for lives of three other persons; and that case seems to admit an occupancy of the tithe, the question being concerning the tithe only.

The next question will be, that if Taverner, being occupant of the house and land, shall not have the tithe whereof Astly was in possession at the time of his death, What shall become of this during the lives of the *Cestuy que vies*? Which is the hard question.

And as to this question,

If a rent be granted to A. for the life of B., and A. die, living B. I conceive this rent to be determined upon the death of A. equally as if granted to him for his own life. I say determined, because it is not properly extinguished, nor is it suspended.

For extinguishment of a rent is properly when the rent is absolutely con-

(1) Brown, 2 f. 201. *Rowles* and *Mason's* case.

(2) Cro. El. f. 407, p. 19. *Baker* and *Searl's* case.

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veyed to him who has the land out of which the rent issues, or the land is conveyed to him to whom the rent is granted.

And suspension of a rent is when either the rent or land are so conveyed, not absolutely and finally, but for a certain time, after which the rent will be again revived.

The reasons why it is determined are, because a thing so granted, as none can take by the grant, is a void grant, that is, as if no such grant had been. Therefore a grant to the bishop of L. and his successors, when there is no bishop in being at the time; or to the dean and chapter of Paul's, or to the mayor and commonalty of such a place, when there is no dean or mayor living at the time of the grant, is a void grant; that is, as if it had not been; though such a grant, by way of remainder, may be good. By the same reason it follows, that when any thing is so granted, that upon some contingent happening, none can take by the grant, nor possibly have the thing granted, both the grant and thing granted, must necessarily determine; for what difference is there between saying that rent can no longer be had, when it is determined by his death for whose life it was granted, and saying none can longer have this rent when it determines by the death of the grantee *pur auter vie*? For there is no assignee, occupant, or any other, can possibly have it; and it is therefore determined.

In an action of trover and conversion, brought by *Salter* against *Boteler*, (1) the defendant justifies for that one Robert Bash was seised in fee of twenty acres in Stansted, and granted a rent-charge to another Robert Bash, his executors and assigns, during the life of Frances, the grantee's wife, of sixteen pounds per annum. The grantee dies, and Frances his wife, takes letters of administration; and the defendant, as her servant, and by her command, took a distress in the said twenty acres, for rent arrear, and impounded them; and traverses the conversion and taking in other manner.

Upon demurrer to this plea, all the court held the plea to be bad, and gave judgment for the plaintiff.

1. Because the rent was determined by the death of the grantee, because no occupant could be of it.

2. Because the feme was no assignee by her taking of administration.

3. None can make title to a rent to have it against the terre-tenant, unless he be party to the deed, or make sufficient title under it.

The same case is in *Moore*, 907, reported to be so adjudged, because the rent was determined by the death of the grantee. And *POPEHAM* said, that if a rent be granted *pur auter vie*, the remainder over to another, and the grantee die, living *Cestuy que vie*, the remainder shall commence forthwith; because the rent for life determined by the death of the grantee: which last case is good law; for the particular estate in the rent must determine when none could have it; and when the particular estate was determined, the remainder took place.

And as the law is of a rent, so must it be of any thing which lies in grant, as a several tithe does, whereof there can be no occupant, when it is granted *pur auter vie*, and the grantee dies in the life of *Cestuy que vie*.

This is further cleared by a case in 20 H. 6. f. 7. A man purchased of an abbot certain land in fee-farm, rendering to the abbot and his successors, twenty pounds yearly rent: if all the monks die, this rent determined, because there is none that can have it. It lies not in tenure, and therefore cannot escheat; and though new monks may be made, it must be by a new creation wholly.

This case agrees exactly with the grant of a rent or other thing which lies in grant, *pur auter vie*, the grantee dying, the rent determines, though it were a good grant, and enjoyed at first, yet when after none can have it, it is determined. So was the rent to the abbot and his successors a good rent, and well enjoyed. But when after all the convent died, so as none could have the rent, for the body politic was destroyed, the rent determined absolutely. (2)

(1) Cro. El. 901.

(2) In vacancy of a parson or vicar, the or-

dinary, *ex officio*, shall cite to pay the tithes. Fitz. N. Br. Consultation, G.

By this I hold it clear, that if a man demise land to another and his heirs, *habendum pur auter vie*, or grant a rent to a man and his heirs *pur auter vie*, though the heir shall have this land or rent after the grantee's death, yet he has it not as a special occupant (as the common expression is); for if so, such heir were an occupant, which he is not, for a special occupant must be an occupant; but he takes it as heir, not of a fee, but of a descendible freehold; and not by way of limitation, as a purchase, to the heir, but by descent; though some opinions are that the heir takes it by special limitation; as when an estate for life is made, the remainder to the right heirs of J. S. the heir takes it by special limitation, if there be an heir when the particular estate ends. But I see not how, when land or rent is granted to a man and his heirs, *pur auter vie*, the heir should take by special limitation after the grantee's death, when the whole estate was so in the first grantee, that he might assign it to whom he pleased; and so he who was intended to take by special limitation after the grantee's death, should take nothing at all.

But to inherit as heir a descendible freehold, when the father or other ancestor had not disposed it, agrees with the ancient law, as appears by *Bracton*, which *obiter* in argument is denied in *Walsingham's* case.

*Si autem fiat donatio sic, ad vitam donatoris donatorio et heredibus suis, si donatorius premoriatur, heredes ei succedent, tenendum ad vitam donatoris, et per annis mortis antecessoris recuperabunt qui obiit ut de feodo.*(1)

Here it is evident that land granted to a man and his heirs for the life of the grantor, the grantee dying in the life of the grantor, the heirs of the grantee were to succeed him, and should recover by a writ of *mordancester* in case of abatement (which infallibly proves the heir takes by descent), who died seised as of a fee, but not died seised in fee.

1. Hence I conclude, that if a man die seised, *pur auter vie*, of a rent, a tithe, an advowson in gross, common in gross, or other thing whereof there can be no occupancy, either directly or by consequence, as adjuncts of something else by the death of the grantee; in all these cases the grant is determined, and the interest stands as before any grant made.

2. If any man die seised of land, *pur auter vie*, as also of many of these things in gross, *per auter vie*, by distinct grant from the land, the occupant of the land shall have none of these things, but they are in the same state, and the grants determine as if the grantee had died seised of nothing whereof there could be any occupancy.

But I must remember you, that in this last part of my discourse, where I said, that if a rent, a tithe, a common or advowson in gross, or the like, lying in grant, were granted *pur auter vie*, and the grantee died, living *cestuy que vie*, that these grants were determined; my meaning was, and is, where such rent, tithe, or other things, are singly granted, and not where they are granted together with land, or any other thing out of which rent may issue, with reservation of a rent out of the whole.

For although a rent cannot issue out of things which lie in grant, as not distrainable in their nature, yet being granted together with land, with reservation of a rent, though the rent issue properly and only out of the land, and not out of those things lying in grant, as appears by *Littleton*; (2) yet those are part of the consideration for payment of the rent, as well as the land is.

In such case when the rent remains still payable by the occupant, it is unreasonable that the grant should determine as to the tithe, or as to any other thing lying in grant, which passed with the land as part of the consideration for which the rent was payable, and remain to the lessor as before they were granted; for so the lessor gives a consideration for paying a rent which he enjoys, and has notwithstanding the consideration given back again.

And this is the present case, being stript and singled from such things as intricate it: that *Dr. Mallory*, prebendary of the prebend of *Woolney*, consisting of glebe land, a house, barns, and tithe of *Woolney*, and thereof seised in the right of his prebend, makes a lease to *Astly* of the prebend, *una cum* the

(1) *Bract* l. 2. *de acquirendo rerum dominico*, c. 9.

(2) *Co. Litt.* f. 142. a. 144. a.

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glebe, house, barn, and tithe for three lives, rendering the accustomed and ancient rent of 5*l.* 12*s.*: Astly demised to Taverner the house, glebe, and barn for a year, reserving twenty shillings, and dies, the *cestuy que vies* living.

As I concluded before, Taverner is occupant of the house, barn, and glebe-land, and consequently liable to pay the whole rent, being 5*l.* 12*s.* yearly, though the land, house, and barn be found of the yearly value of twenty shillings only; but because the rent cannot issue out of the tithes, or things that lie in grant, it issues only out of the house, barn, and land which may be distrained on.

2. If Taverner, being occupant of the land, shall not have the tithes which remained in Astly, according to his lease for three lives at the time of his death, and whereof by their nature there can be no direct occupancy: It follows, that the lease made by Dr. Mallory is determined as to the tithes, for no other can have them; yet continues in force as to the land and house, and all the rent reserved, which seems strange, the land and tithes being granted by the same demise for three lives, which still continue: yet the lease to be determined as to part.

3. Though the rent issue not out of the tithe, yet the tithe was as well a consideration for the payment of the rent, as the land and houses were; and it seems unreasonable that the lessor, Dr. Mallory, should by act in law have back the greatest consideration granted for payment of the rent, which is the tithe, and yet have the rent wholly out of the land by act in law too, which cannot yield it.

4. Though Dr. Mallory could not have reserved a rent out of the tithe only, to bind his successor upon a lease for lives, more than out of a fair, though it were as the ancient rent, and had been usually answered for the fair; as is resolved in *Jewell*, bishop of *Salisbury*'s case: yet in this case, where the tithe together with land, out of which rent could issue was demised for the accustomed rent, the successor could never avoid the lease, either in the whole, or as to the tithe only.

This seems clear by the statute of 13 Eliz. cap. 10. which says, all leases made by any spiritual or ecclesiastical persons, having any lands, tenements, tithes or hereditaments, parcel of the possessions of any spiritual promotion, other than for one and twenty years, or three lives, whereupon the accustomed yearly rent, or more, shall be reserved, shall be void.

Whence it is apparent, this statute intended that leases in some sense might be made of tithes for one and twenty years, or three lives, and an ancient rent reserved; but of a bare tithe only a rent could not be reserved, according to *Jewell*'s case: for neither distress nor assise can be of such rent, though an assise may be *de portione decimarum*, as is clear by the Lord Dyer, 7 E. 6. (1) and the difference rightly stated.

Therefore a lease of tithe and land, out of which a rent may issue, and the accustomed rent may be reserved, must be good within the intention of the statute, or tithe could in no sense be demised.

5. Taverner the lessee being occupant here by his possession becomes subject to the payment of the rent, to waste, to forfeiture, conditions and all things that Astly the lessee, or his assignee, if he had made any, had been subject to: also

He must claim by a *que* estate from Astly, he must aver the life of *cestuy que vie*, so as he becomes, to all intents, an assignee in law of the first lessee.

6. Without question, the occupant being chargeable with the rent, shall by equity have the tithe, which was the principal consideration for payment of the rent, when no man can have the benefit of the tithe but the lessor, Dr. Mallory, who gave it as a consideration for the rent, which he must still have. Therefore,

I conceive the reason of law here ought necessarily to follow the reason of equity; and that the occupant shall have the tithe, not as being immediate occupant of the tithe whereof no occupancy can be, but when by his possession

(1) *Jewell*'s case, 5 Rep.



of the land he becomes occupant, and the law casts the freehold upon him; he likewise thereby becomes an assignee in law of Astly's lease and interest, and consequently of the tithe.

An ancient rent reserved within the statute of 1 or 13 of the Queen upon a lease of one and twenty years, or three lives, is by express intention of that statute a rent for public use and maintenance of hospitality by churchmen, as is resolved in *Elsmere's case*, the 5 Rep. and therefore if the lessee provide not an assignee to answer the rent to the successors of the lessor for the ends of that law, the law will do it for him, and none fitter to be so than the occupant, in case of a lease *pur auter vic*, as this is.

And if the occupant, being assignee, have passed all his estate and interest to the plaintiff, the plaintiff has good cause of action for the tithe converted by the defendant.

E. 22 Car. 2. judgment for the defendant. Three justices against the chief justice.

H. 20 Car. 2. B. R.

*Croucher v. Collins.* [1 Sa. 136.] 2 Keb. 319. 4 Gw. 1576.

Southampton } **B**E it remembered, that heretofore, to wit, in the term of  
to wit. } the Holy Trinity last past, before our lord the King, at  
Westminster, came Henry Croucher, of the parish of Corhampton, in the  
county aforesaid, esquire, who sues in this behalf as well for our lord the King  
as for himself, by Charles Ballett, his attorney, and brought here into the court  
of our said lord the King then there, his certain bill against William Collins,  
esquire, proprietor of the rectory of the parish-church of Corhampton aforesaid,  
as he asserts, in the custody of the marshal, &c. of a plea of trespass and  
contempt; and there are pledges of prosecuting, to wit, John Doe and Richard  
Roe; which said bill follows in these words, that is to say: Southampton, to  
wit, Henry Croucher, of the parish of Corhampton, in the county aforesaid,  
esquire, who sues in this behalf as well for our lord the King as for himself,  
complains of William Collins, esquire, proprietor of the rectory of the parish-  
church of Corhampton aforesaid, as he asserts, being in the custody of the  
marshal of the Marshalsea of our lord the King, before the King himself, of a  
plea, wherefore he prosecuted a plea in the court-christian, after his said Ma-  
jesty's prohibition(1) to the contrary thereof first directed and delivered to  
him,

A custom that underwood cut and used for fencing of corn in general, whereof tithes are payable, and not sold or otherwise disposed of, should be discharged from payment of tithes, is void and unreasonable; *secus* if it were used for fencing the party's own corn.

(1) This action is, in notion of law, founded upon an attachment against the defendant, for a contempt in proceeding after a writ of prohibition has been served upon him. But it is a mere fiction, used for the purpose of trying with greater certainty, whether the inferior court ought to proceed farther in the suit. The defendant is not in fact served with a writ of prohibition, and therefore has not in fact incurred any contempt for a disobedience of it. But this matter is alleged for form's sake, to entitle the plaintiff to demand damages of the defendant, and thereby to give the action the requisites of a suit. The supposed contempt however is the reason of its being a *qui tam* action; because it is an established rule, that in every case of a contempt to the king, the action must be as well to answer the king as the party suing. Moor, 64. This fiction seems to have been derived from the ancient practice in prohibition. For it is said, that formerly the courts of common law could not grant a prohibition in any case, unless the party were in contempt for proceeding after he was served with an original writ of prohibition out of Chancery, and an *alias* and *pluries*, directed to him. In that case an attachment sur probi-

bition issued against him returnable in the K. B. or C. B. (see the form Reg. 33. b.) whereon the party, who sued out the writ of prohibition, might declare to recover the damages he had sustained by the defendant's obstinacy. 12 Rep. 58. *Langdale's case*. Sir Edward Coke in the same report says, the attachment is only a judicial writ; but this appears to be a mistake; it seems certain that it is an original writ. It begins, as original writs do, with '*si A. B. fecerit te securum, &c. tunc pone, &c.*' Reg. 35. a. 1 Bosan. and Pull. 131. *Jefferson v. Bishop of Durham*. But the modern practice is to file a suggestion in court, stating the nature of the case, and the proceedings in the court below, and concluding with a prayer for a prohibition. See the Books of Entries, tit. Prohibition, *passim*. If the suggestion be to stay a suit in the ecclesiastical court for subtraction of tithes or other ecclesiastical dues, it must be proved by two witnesses by virtue of stat. 2 and 3 Edw. 6. c. 13. a. 14. But this statute only extends to tithes payable *de jure*, and not to such as are against common right. 2 Inst. 662. So it is said, that proof is not necessary where the suggestion is in the negative; as that the parsonage is not inappropriate; or that the

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him, for this, to wit, that whereas within the said parish of Corhampton there are, and from time whereof the memory of man is not to the contrary there have been, as well a rector and vicar, as a rectory and vicarage, of the parish-church of Corhampton aforesaid, which said rectory is, and during the whole time aforesaid has been, a rectory impropriate. And whereas within the said parish, and the bounds, limits, and titheable places thereof, there is, and during the whole time aforesaid there has been, a great quantity of arable land, amounting to the number of four hundred acres of arable land, with the appurtenances. And whereas also within the said parish, and the bounds, limits, and titheable places thereof, agriculture now is, and for all the time aforesaid has been, much used and exercised: and whereas in every year, from the whole time aforesaid, a great part of the said land has been used to be sown with corn and grain, and by reason of such agriculture a great quantity of corn yearly, during the whole time aforesaid, has been had and received within the said parish, and the bounds, limits and titheable places thereof, which said corn never would have been had and received unless by the labour and industry of the persons who in form aforesaid exercised agriculture in the parish aforesaid, and who made hedges and fences around the arable lands where the said corn grew, for the safety and defence of the same. And whereas also the tenth part of such corn, yearly growing and arising within the said parish, and the bounds, limits, and titheable places thereof, for the tithe thereof, during all the time aforesaid, has been yearly payable, paid and rendered, to the rector or proprietor of the rectory of the said parish-church, or to his farmer or deputy of the said rectory, or of the tithes thereof, for the time being: and the rector or proprietor of the rectory of the said parish-church, or his farmer or deputy of the said rectory, or of the tithes thereof, for the time being, has for all the time aforesaid received and had the tenth part of such corn growing, arising, and renewing within the said parish, and the bounds, limits, and titheable places of the said parish for the tithes thereof. And whereas there is, and from all the time aforesaid there has been, within the said parish, and the bounds, limits, and titheable places thereof, the following custom of and concerning tithes of frith and wood being *sive cadua*, and under the growth of twenty-one years, sprays and twigs, cut down, cropt, lopt, or topt, off, and from, any trees growing within the said parish, and the bounds, limits, and titheable places thereof, to be applied to or used about the erecting, making, and repairing of the hedges, being ruinous and in decay, within the said parish, and the bounds, limits, and titheable places of the same, for the safety of the corn there growing, and not sold or otherwise disposed of; that is to say, that every person or persons having or possessing any such trees who should cut down, crop, lop, or top the same, or any parcel thereof, and should apply or make use of the same so cut down, cropt, lopt, or topt for the erecting, making, and repairing of the hedges being ruinous and

land does not lie in the parish; or that the parson is not inducted; for the quaint reason that a negative cannot be proved. *Ibid.* So where the suggestion is that the parson has made a contract or agreement for his tithes, no proof is necessary. *Yel. 102. Tanner v. Small, Ibid. 119. Cobb v. Hunt.* However, when the party must prove the suggestion, an entry of the proof which he has made is then drawn out and entered of record. See the form, *Crompt. Prac. 281. 2d edit.* Upon this suggestion, the court grants a rule to shew cause why a prohibition should not issue, which is afterwards made absolute or discharged, according to the circumstances of the case. If it be a nice or doubtful case, the court will make the rule absolute, and direct the party applying to declare, which he does by serving the other side with the rule, without taking out a writ, and then delivering his declaration. *Bul. Ni. Pri. 218.* But as the direction to declare is in favour of the defen-

dant, he may afterwards submit and refuse the declaration, and the court will on his application stay the proceedings without costs. *2 Str. 1149. Gedge v. Jones.* So when the court is of opinion that there should be a prohibition, the party against whom it is prayed has in a manner a right to insist that the plaintiff shall declare; though the person who applies for the prohibition has no such right, when the court is of opinion against the prohibition. *1 Black. Rep. 81. Rex v. Bishop of Ely, 8. C. 1 Burr. 198.* If a verdict be for the plaintiff upon an issue joined on this declaration, the jury only give nominal damages; *Bull. Ni. Pri. 219.* By stat. 8 and 9 W. 3. c. 11. in suits upon prohibitions, the plaintiff obtaining judgment, or an award of execution after plea pleaded or demurrer, shall recover his costs; and if the plaintiff shall be nonsuit or discontinue, or a verdict pass against him, the defendant shall recover his costs.

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in decay within the said parish, and the bounds, limits, and titheable places thereof, for the safety of the corn or grain there growing, by reason that the families of such person or persons exercising and using agriculture within the said parish and the bounds, limits, and titheable places of the same, might and would better exercise and use such agriculture for the procuring corn and grain there; and also that by reason and means of such erecting, making, and repairing of such hedges so being ruinous and in decay as aforesaid, the corn and grain within the said parish, and the bounds, limits, and titheable places thereof, for all the time aforesaid, might be the better defended, kept safe, and preserved from being spoiled, destroyed, and consumed by cattle that might otherwise break in for that purpose: and as the tithe of all the corn and grain growing within the said parish, belonging to the rector or proprietor of the said rectory of the parish-church aforesaid, is made much greater and more profitable; and also for that the tenth part of the corn and grain growing, arising, happening, and increasing within the said parish, and the bounds, limits, and titheable places thereof, yearly during all that time has been severed and divided out from the other nine parts thereof, in kind, upon the lands where such corn and grain grew, to the use of, and been had, received, and taken by the rector or proprietor of the rectory of the parish-church aforesaid, his farmer or deputy; and on that occasion, from time whereof the memory of man is not to the contrary, has and have been acquitted and discharged of and from the payment of any tithes as well of the said trees as of the branches of the said trees growing, cut down, cropt, lopt, or topt within the said parish, and the bounds, limits, and titheable places thereof, and applied to the uses for that purpose above specified: which said tithe of the said corn and grain, in the manner for that purpose above described, so defended, kept safe, and preserved for the rector or proprietor of the rectory of the said parish-church, or his said farmer or deputy, has been every year, during all the time aforesaid, accepted, received, and had in full contentment, payment, and satisfaction, and in the stead and place of all tithes of the premises in form aforesaid, cut down, cropt, lopt, or topt, and applied to and used about the several purposes abovementioned. And whereas also, in the several and respective years of our Lord one thousand six hundred and sixty-two, and one thousand six hundred and sixty-three, eighty cart-loads, and no more, of frith or wood, being *silva cadua*, under the growth of twenty-one years, growing within the said parish, and the bounds, limits, and titheable places thereof, had been cut down by him the said Henry, and had been applied to and used, without any sale or other profit made thereof, about the erecting and repairing of hedges being in decay, inclosing one hundred acres of arable land theretofore sown in those several years with grain, that is to say, wheat, rye, barley, peas, beans, and oats, within the said parish, and the bounds, limits, and titheable places thereof, for the safety of the corn and grain there growing in those years, according to the said custom, and not otherwise disposed of. And whereas by a statute in the parliament of Edward 6. late King of England, at Westminster, in the county of Middlesex, in the second year of his reign, (amongst other things,) it is enacted and established, that no person should be sued, or otherwise compelled to render, give, or pay any tithes for any manors, lands, tenements or hereditaments, which by the laws and statutes of this kingdom, or by any privileges or prescriptions, were not chargeable with the payment of any such tithes, or which had been discharged by any composition real, as by the said act (amongst other things) more fully appears. Nevertheless the said William Collins, proprietor of the rectory of the parish-church of Corhampton aforesaid, as he asserts, not being ignorant of the premises, but contriving, contrary to the due form of the law of the land of this kingdom of England, and contrary to the form and effect of the said statute, and the custom and prescription aforesaid, unjustly to vex, oppress, and aggrieve the said Henry Croucher, and also to disinherit our sovereign lord the King and his royal crown, and to draw the consuance of a plea which belongs to our said sovereign lord the King and his royal crown, and not to the court-christian, to another examination in the court-christian, drew the said Henry into

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the court-christian before the worshipful and excellent Giles Sweet, knight, doctor of laws, lawful official of the court of Arches, for and concerning the subtraction of the tithes of the said wood by him the said Henry so as aforesaid in the said years cut down, applied, and employed, and by the said Henry in the said years supposed to be subtracted and not paid to the said William, and for non-payment of the treble value of the tithes of the said wood in those years, contrary to the said custom and prescription, and the law of this realm of England; and the said William on that occasion unjustly compelled him the said Henry to appear in the said court-christian before the said spiritual judge, and to make answer to the said William of and upon the premises. And although the said William had and received in those years the tithes of the said corn and grain in kind, growing, cut down, reaped, and taken within the said parish in those years in and upon the said one hundred acres of arable land to his own use and behoof, which could not have been had or taken in those years without the labour and industry of the said Henry, so as aforesaid exercising agriculture in the said parish, in full and entire contentment, payment, satisfaction, and discharge, and in the name and stead of all tithes of frith growing, cut down, crompt, lopt, or topt, in the said years within the said parish, and the bounds, limits, and titheable places thereof, and applied to and used about the purposes in manner and form above specified, according to the said custom; and although the said Henry, in the said court-christian before the said spiritual judge, did often plead and allege the said matter in his discharge in the premises there, and offer to prove the same by incontrovertible evidence, yet the said spiritual judge did altogether refuse to admit the said plea and allegation; and the said William doth with all his might endeavour and daily contrive to procure him the said Henry to be condemned in the said premises in the said court-christian, and by a definitive sentence of the said court-christian to compel him to pay the said tithes by the said William in manner aforesaid demanded, in contempt of our said sovereign lord the King; and although the writ of our said lord the now King of prohibition in this behalf to the contrary thereof, on the tenth day of June, in the nineteenth year of the reign of our said lord the now King, at Corhampton aforesaid, in the said county of Southampton, was directed and delivered to the said spiritual judge, yet the said William Collins, after his said Majesty's prohibition to the contrary thereof first directed and delivered in form aforesaid, to wit, on the said 20th day of June, in the nineteenth year aforesaid, at the said parish(2) of Corhampton, in the said county of Southampton, proceeded further in prosecuting the said plea against the said Henry, notwithstanding his said Majesty's writ of prohibition first directed and delivered(3) to him to the contrary, in contempt of our sovereign lord the King, and to the damage, prejudice, impoverishment, and manifest grievance of the said Henry, and against the form and effect of the said custom and statute. Wherefore the said Henry, who sues, &c. as

(2) It does not seem necessary to lay a venue where the defendant proceeded in the suit after he was served with a writ of prohibition, this being an immaterial allegation. The court takes notice of the practice of the inferior court to desist from any further prosecution of the suit, after an application has been made for a prohibition. Indeed the court will take care there shall be no further proceedings, by attaching the judge of the inferior court for his contempt in going on. It is true, that in *Brogan v. Aungar*, Sir T. Raym. 387. Sir T. Jones, 128. 1 Vent. 348. 350. which was a writ of error from K. B. in Ireland in prohibition, where there had been a judgment by default, a writ of inquiry executed, and 100*l.* damages given, the judgment was reversed for want of such venue. But there the point was tried, and the plaintiff recovered large damages against the defendant for proceeding in the suit; and

therefore it was as necessary to lay a venue for the trial of that as of every other material allegation, in a declaration. And Sir T. Raymond takes this difference; that where real damages are given there must be a venue; but where nominal damages only are to be recovered, the want of a venue does not hurt.

(3) The want of this word is immaterial; for where upon a demurrer to the declaration an exception was taken, because it set forth that the defendant sued in the spiritual court *post regiam prohibitionem et prius inde in contrarium direct'*, but did not say *deliberat'*, and that no cause of action appeared, inasmuch as it was not alleged, that the prohibition was delivered; the court overruled the exception, saying, that when you proceed for damages, then a delivery must be alleged, and a venue laid; but it is otherwise when you only try whether a prohibition ought to issue or not. 11 Mod. 263. *Bishop v. Eagle*.

aforesaid,

aforesaid, saith that he is injured, and hath sustained damage to the value of forty pounds; and therefore, as well for our sovereign lord the King as for himself, brings this suit, &c.

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And now here at this day, to wit, on Wednesday next after three weeks of St. Michael in this same term, until which day the said William had leave to impart to the said bill, and then to answer, &c. before our lord the King at Westminster, come as well the said Henry, who as well, &c. by his said attorney, as the said William by Thomas Coward his attorney; and the said William defends the wrong and injury when, &c. and all contempt, &c. and whatever, &c. and saith, that he did not prosecute the said Henry Croucher, who sues as well, &c. in the said court-christian, contrary to the royal prohibition to him for that purpose directed, as the said Henry, who as well, &c. by his said declaration does above suppose; and of this he puts himself upon the country, and the said Henry Croucher thereof likewise, &c.(4): but in order to have a consultation(5) in this behalf, the said William Collins says, that the said declaration in manner and form aforesaid made and declared, and the matter in the same contained, are not sufficient in law to bar him the said William Collins from having the said tithes demanded against the said Henry Croucher in the said court-christian; and that he has no necessity, nor is he bound by the law of the land, in any manner to answer the said declaration in manner and form aforesaid made and declared; and this he is ready to verify; wherefore, for want of a sufficient declaration of the said Henry Croucher, who as well, &c. in this behalf, the said William prays judgment, and his Majesty's writ of consultation to be granted to him in this behalf, &c. Joinder in demurrer, &c.

Prohibition. The plaintiff declared, that from time whereof, &c. there had been a rectory impropriate, and a vicar, within the parish of Corhampton, in the county of Southampton; and that from time whereof, &c. there had been a great quantity of arable land, amounting to four hundred acres and more, within the same parish, and that husbandry had been much used there, and the greater part of the land there had been sown with grain in every year; and that the corn there growing could not be preserved without fencing the lands where it grows; and that the tithes of corn so fenced had been always paid to the impropriator of the rectory of the same parish. And the plaintiff further shewed, that within the parish there is a custom for underwood, that if any person cut his underwood, and use the same for fencing the corn, the tithes whereof are paid to the rector, and not sold or otherwise disposed of, whereby the tithes are preserved, in that case the underwood so used had been discharged from payment of tithes to the said rector. And the plaintiff further said, that he himself cut down wood within the same parish; and that all such wood without any sale, or any other profit made thereof, was used and applied in and towards the making and repairing of hedges inclosing one hundred acres of arable land sown with corn, for the preservation of the corn there growing, and was not otherwise disposed of. Yet the said defendant, being impropriator of the said rectory of Corhampton, had sued the plaintiff in the spiritual court for the tithes of the wood so by the plaintiff cut and used in and towards the fencing of the corn whereof the defendant had the tithes, and endeavoured to condemn the plaintiff there to pay the treble value of the tithes

(4) As this is but a supposed contempt, it is not necessary that any verdict should be taken upon this issue. It is like the not finding of *vi et armis* in an action of trespass, which is held to be immaterial. 1 Str. 482. *Stratford v. Neale*. S. C. 8 Mod. 1. vid. ante, 81. *Lowe v. King*.

(5) So called, because upon consultation had, the judges find the prohibition to be ill-founded; and therefore by this writ they return the cause to its original jurisdiction, to be there determined. If there be either a verdict for the plaintiff, or if, upon demurrer,

the court shall be of opinion that there is a sufficient ground for a prohibition, then judgment shall be given for the plaintiff, and the defendant and inferior court shall be prohibited from proceeding any farther. On the other hand, if the verdict be for the defendant, or the court shall, upon demurrer, be of opinion that there is no ground for a prohibition, then a writ of consultation shall be awarded. And where a consultation is awarded on the merits, there shall never be another prohibition upon the same suggestion.

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of the said wood so used. And although the plaintiff had delivered unto the defendant a writ of prohibition to stay the suit in the spiritual court, yet he proceeded afterwards notwithstanding the said writ, in contempt of the King and to the damage of the plaintiff, &c.

The defendant, as to the contempt in suing in the spiritual court after the writ of prohibition delivered to him, pleaded not guilty; but for having a consultation he demurred to the declaration.

And it was argued by *Jones* for the defendant, that the custom was void and unreasonable, because it is not said that the corn, which was inclosed with the wood cut by the plaintiff, was his own corn. And it would be unreasonable that the rector should not have tithes of the wood, if it were used for the inclosure of other than his own corn; for in that case, one who has three hundred acres or more of wood may cut it down and give it all to whom he pleases to inclose their corn, and by that means the rector would be defrauded of his tithes of wood, which would be a great prejudice to the rector: and therefore he concluded that the prescription was void and unreasonable.

And for the plaintiff it was argued, that this prescription was good enough; for in *East* and *Harding's* case it is said, that if one cut wood for fencing his own corn, he shall not pay tithes for it: and so it is said in the parson of *Mildenhall's* case. And the *Doctor* and *Student*, in the last chapter, says, that a county may prescribe in a *non decimando* for a thing certain, if the parson has other sufficient maintenance. (1) And in 42 Eliz. and Cro. Jac. a prescription that the parson had such land in lieu of tithes is adjudged a good *modus*: and *Piggott* and *Hearne's* case, (2) cited in the Bishop of *Winchester's* case, (3) the lord of a manor paid to the parson 6l. a-year, and for it had the tenth part of the corn: this is a good prescription. All which cases prove, that if the parson has a recompense, it is immaterial whether the party who derives the benefit by the *non decimando*, pays towards it or not. And in the case at bar, it was all one to the rector whether the corn was the plaintiff's own corn, or any other person's, so long as he had the tithes of it; for the rector has no loss by it. Then the plaintiff has no more, but rather less benefit by giving his wood to his neighbours to inclose their corn, than if he had inclosed his own corn therewith. But if he had sold the wood, or made any benefit thereof, it would be reasonable that he should pay tithes of it; but it is expressly averred to the contrary. And so the plaintiff has not any benefit, nor the defendant any loss from the giving of the wood to inclose the corn of which the defendant has the tithes. And if the plaintiff had used the wood towards repairing the fences of his own corn, it is clear that it would have been a good prescription. And this case does not differ in effect from it; for the defendant has the same benefit as he would have had if the corn had been the plaintiff's own corn: wherefore it was prayed that the prohibition should stand.

But the whole court without any regard thereto, adjudged the prescription bad, and that the plaintiff could not give his wood to any other person to inclose corn without paying tithes for it. And it was so adjudged, and a consultation awarded: *Quod nota.*—*Wylde*, serjeant, and *Saunders* of counsel with the plaintiff.

Note, that *Wylde* told me afterwards that it was a case which deserved greater consideration than the court gave it: and that he did not think the court would have given judgment so suddenly.

(1) But there is this distinction, that in things titheable by custom only, and not *de jure*, a county or hundred may prescribe in *non decimando* generally, for it is but insisting upon the old right, against which the custom hath not prevailed: but for things which are titheable *de jure* a county or hundred cannot

prescribe in *non decimando*, any more than a particular person. 2 Salk. 655, 656. *Hick v. Woodson*. 1 Ld. Raym. 137. Carth. 392. S. C. 3 Burn's Eccl. Law, 437. 4th edit.

(2) *Ant.*, 135.

(3) *Ant.*, 119.

H. 20 Car. 2. Scacc. *Fleetwood v. Livesay*. 1 Wood, 93.

Lancashire, 11th February, 1668.

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**T**HE bill stated, that the plaintiff then was, and for thirty years past had been, improprator of the rectory of Blackborne, in Lancashire, and became entitled to all tithes of corn, grain, and hay, and to all small and privy tithes, and all rates, compositions, or sums of money, in lieu of tithes, happening, &c. within the said rectory, and the titheable places thereof; that the defendants had severally occupied and possessed, for several years, arable lands, meadow, and pasture, and had growing thereon corn, grain, and hay, in the said years, of great value; and also had milch cows, sheep, dry cattle, calves, lambs, pigs, poultry, eggs, wool, milk, and several other small tithes, of considerable value; and that the said tithes, for all the same time, had been and still was due; but that they refused to pay their tithes in kind, pretending they were not due, but some rate in money. He therefore prayed a discovery, and to be relieved in the premises.

An issue directed by the exchequer to try whether there was a custom that all the inhabitants, owners and occupiers of land within a township, should pay 3*l.* 13*s.* 4*d.* yearly, in lieu of all tithes of corn and hay within the township.

The defendants answered, and said, they knew not that the plaintiff was improprator; but believed, that she was farmer of the said rectory for the time aforesaid; and that by reason of her being farmer, she had for divers years received all manner of tithes and rates of tithes of all things that have been usually tithed or accustomed to be tithed; but they denied that the plaintiff either had or ought to have received any tithe of corn, grain, wood, and hay, or any other tithes whatsoever in kind, arising in the township of Balderston, in the said parish; for that tithes in kind were never paid within the said township, but that there had been, time out of mind used, a certain custom, or *modus decimandi*, viz. that all the inhabitants, owners and occupiers of lands, within the said township of Balderston, have, time out of mind, paid and used to pay to the rectors and improprators of the said rectory, or to their farmer, an ancient customable or prescriptive yearly rent of 3*l.* 13*s.* 4*d.* in lieu of all manner of tithes of corn and hay in the said township of Balderston; and that for all other tithes whatsoever, happening in the said township, the several rates and compositions or sums of money which are mentioned and contained in a certain book or roll called the Easter Roll, were payable in lieu of their several and respective tithes therein mentioned.

And all the defendants confessed, that they had for several years occupied and enjoyed lands therein within the said township, and had therefrom several quantities of grain and hay, but could not set forth their quantities, they not being to pay their tithes in kind, but the said rate of 3*l.* 13*s.* 4*d.*; and said, they had kept several milch cows and dry cattle, and had several other small tithes, but took no notice of them, in regard they are comprehended in customable rates mentioned in the Easter Book.

And all the defendants, except Burly, said that they had duly, upon demand, paid to the filing of the bill, all the payments and rates for tithes aforesaid; and the accustomed rent of 3*l.* 13*s.* 4*d.* until a few years past, when the same was refused; since which time the defendant and the rest of the inhabitants of Balderston, have yearly, on the 8th of September, being the accustomed day for payment of the said rents, lawfully tendered the same prescriptive and ancient rent in the church-porch of Blackborne, and had been ready to pay the same, the receipt of which was refused.

And the defendant Burly confessed, that for five years he had neglected to pay the rates in the Easter Roll, but was ready to pay them, if the plaintiff would accept the same.

The plaintiff replied, and issue was joined, and witnesses were examined on both sides; and upon opening the bill and answer, and upon some debate, it is ordered by the court, that a trial at law shall be had upon these issues:

First, Whether or no the inhabitants, possessors and occupiers of lands within the said township of Balderston, in the parish of Blackborne aforesaid, time out of mind, have paid and used to pay to the rectors and improprators of the said parish of Blackborne, or to the farmer or farmers of the said rectory,

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for the time being, a certain ancient customable prescriptive yearly rent of 3*l.* 13*s.* 4*d.* for and in lieu of all tithes of corn and hay growing, arising, and renewing within the said township of Balderston, in the said parish.

Secondly, Whether or no, within the said township of Balderston, there is, and time out of mind has been, a certain custom, or *modus decimandi*, namely, that all the inhabitants, owners and occupiers of lands, within the said township of Balderston, time out of mind, have paid and used to pay to the rectors and impropiators of the said rectory, or to the farmer or farmers of the said rectory, for the time being, the several rates, compositions, or sums of money mentioned or contained in a certain book or roll called the Easter Roll, in lieu of and for all manner of small and minute tithes whatsoever, arising, happening, increasing, and renewing within the said township of Balderston, in the said parish of Blackborne.

Unto which action the said defendant Livesay is to confess having detained tithes to the value of 5*l.* in his own hands. The equity of the cause to be reserved until after the said trial; and both parties to give copies of their exhibits.

The defendants now trying the said issues, the cause came on again this day; and upon hearing counsel on both sides, and reading some part of the Easter Rolls, and of the depositions taken in the cause, and on full debate; inasmuch as the defendants, having liberty to peruse the Easter Rolls, proved in the cause concerning the issue directed as to the small tithes, had refused to plead to the said action, so that a trial might have been had upon the said issues,

It is ordered by the court, that the attorneys on each side shall see the Easter Book or Rolls, and extract the rates of such things as are therein mentioned; and what appears to be a *modus* to be answered according to the said Easter Rolls; and that all such small and privy tithes which are not contained in the Easter Rolls or Books shall be paid in kind, and the plaintiff to have good costs.

And it is further ordered, that as to the tithes of corn and hay, a trial shall be had upon the following issue, viz. whether or no all the inhabitants, possessors and occupiers of lands within the said township of Balderston, in the parish of Blackborne, have, time out of mind, paid to rectors and impropiators of the said rectory, or to the farmer or farmers of the said rectory, for the time being, a certain ancient accustomable prescriptive yearly rent of 3*l.* 13*s.* 4*d.* for and in lieu of all tithes of corn and hay, growing, arising, and renewing within the said township of Balderston, in the said parish; and all the defendants are to be concluded thereby; and the equity of the cause, as to the tithes of corn and hay, to be reserved until after the said trial.

And inasmuch as the defendants have not set out the quantities and values of the tithes detained by them from the plaintiff,

It is ordered by consent, that they should set forth, upon their oaths, in writing, before Mr. Baron TURNOR, the respective quantities and values of all their tithes, of what kind soever, till this present time.

MATTHEW HALE.  
CHR. TURNOR.

E. 20 Car. 2. Scacc. *Gavden v. Gilbert*. 1 Wood, 89.  
Caermarthenshire, 28th April, 1668.

Upon an issue at law the jury found that the lands in question, which had been recovered from the sea, were not naturally barren, and that they were not comprehended within the stat. 2 E. 6.

**T**HE plaintiff, by his bill, prayed to be relieved, as farmer and possessor of the impropriate rectory of Langhorne, in the county of Caermarthen, for tithes of several acres of land in Westmarsh, within the said parish, for four years.

The defendant answered, and alleged, that he knew not that all the lands, called Westmarsh, did lie within the said parish; that Westmarsh had, for all the time whereof the memory of man is not to the contrary, until the years aforesaid, been subject to be drowned by the overflowing of the sea, and for all that time had been unprofitable ground; and that, by the statute of 3 E. 6, c. 13. it ought to be free from paying of tithes for seven years.



Upon hearing counsel for both parties, and on full debate, a trial at law was directed upon two issues.

First, Whether the lands in the possession of the defendant in Westmarsh, during the said years, do lie within the said parish of Langhorne, or how much thereof lies within the said parish.

Secondly, Whether the said lands, during the years aforesaid, were naturally barren grounds, and are comprehended within the said statute, or not.

Upon the first issue, the jury found 150 acres, parcel of Westmarsh, to lie within the said parish of Langhorne.

And upon the second issue, the jury found that the said 150 acres were not naturally barren within the said statute of E. 6.; and so gave a verdict in both the issues for the plaintiff.

Upon reading the said order, and the said verdict, and an affidavit; and upon debate; and for that the defendant Anne Gilbert had confessed in her answer that she had in her hands assets sufficient of the said W. Gilbert to pay the plaintiff;

It is ordered by the court, that the defendant shall pay to the plaintiff the value of the tithes in question, unless cause be shewn to the contrary.

And in the mean time, the auditor is to compute the values of the said tithes, according to the lowest values proved by the plaintiff's witnesses, or at a medium between the proofs of the plaintiff and the defendant.

The auditor returned his certificate; and upon reading the same,

It is ordered by the court, that the same be confirmed, and that the defendant do pay to the plaintiff 45*l.* being the value of the tithes in question accordingly.

1668.  
GAWDEN  
v.  
GILBERT.

Tr. 20 Car. 2. B. R. *Angell v. Rolfe*. [2 Keb. 376.]

**I**N ejectment of tithes upon demise of J. S. not saying by deed; for which cause after error brought here on judgment in C. B. after verdict, *Rotheron* prayed for the plaintiff in the first judgment, that it may be reversed; which *Twisden* doubted, but *per curiam* reversed.

A judgment in ejectment of tithes, upon demise of J. S. not saying by deed,

was reversed in B. R. upon error from C. B.

M. 20 Car. 2. B. R. *Cleveby v. Adams*. [2 Keb. 405.]

**P**EMBERTON prayed a prohibition to the bishop's court of Hereford, in suit for tithes, on suggestion of refusal of a plea, that the person that sued had not read the articles according to the statute; which the court granted *nisi* on notice, cause was shewed why it should not stay, *quo usque*, the plea was accepted: but *per curiam* this plea is triable by the spiritual court. to the statute, a prohibition *nisi* was granted *quo usque* the plea was accepted; but, by the court, such a plea is triable by the spiritual court.

Upon suggestion of refusal of a plea that the person suing had not read the articles according

M. 20 Car. 2. B. R. *Mathews' Case*. [2 Keb. 407.]

**W**INNINGTON prayed a prohibition on *modus* to pay fourpence for all hay, and three shillings for every calf, which on evidence appeared to be for cow and calf; yet, a *modus* being proved, the consuance of the spiritual court was ousted, and therefore a prohibition awarded. evidence appeared to be for every cow and calf, granted, for a *modus* being proved, the spiritual court is ousted.

A prohibition, upon suggestion of a *modus* of 3*s.* for every calf, which on evidence

M. 20 Car. 2. B. R. *Bishop v. Corbet*. [2 Keb. 416. 420.] 1 Lev. 253.

**H**UNT prayed a prohibition to the sheriff of Warwickshire, who by *justices* of a plea of 60*l.* in debt, held plea of debt of 20*l.* on 2 E. 6. c. 13. for the treble value of the tithes, but *per curiam* this is cause of error or faux

The court inclined strongly that an action of debt for tithes, on 2 Edw. 6.

would not lie by *justices*, but they directed a writ of "false judgment," rather than grant a prohibition, although they agreed that it might go both before and after judgment; and that the jurisdiction of the sheriff's court might well enough be examined in a prohibition.

1668.

BISHOP

v.

CORBET.

*faux* judgment, but they will not grant any prohibition, because they cannot have all the matter before them. But *adjournatur*.

On Saturday last, after I went into the exchequer chamber, it was said, that the court inclined strongly an action of debt for tithes would not lie by *justicies*, being but a commission, which is always *stricti juris*, and must be understood to give that court power only in actions of debt, arising *ex contractu*, and not *ex delicto*; and the court directed rather to bring a writ of *faux* judgment in C. B. which being depending, the court refused to grant any prohibition otherwise, else they agreed it might be granted as well after judgment as before, and the jurisdiction of that court may well enough be examined in a prohibition.

According to *Levinz*, the court directed a suggestion and declaration in prohibition, that the defendant might plead or demur, so that the case might come judicially before it.

M. 20 Car. 2. B. R. *Clerk v. Townsend*. [2 Keb. 429.]

A suggestion that lands belonged to the Cisterians is not sufficient, without alleging that they were in the hands of that order at the time of the dissolution, and granted over by the King. And *Windham* said, the owner must be always in possession, for lessee of a patentee shall not have the privilege.

**SIMPSON** prayed a prohibition to in suit for tithes, suggesting that the lands belonged to the Cisterian order; *sed non allocatur* without actual suggestion that the lands were in the hands of that order at the time of the dissolution, and now granted over by the King; which being made, the court granted prohibition *nisi*; but *per WINDHAM*, the owners must be always in possession, for lessee of patentee shall not have this privilege.

M. 20 Car. 2. B. R.

*The Bishop of Lincoln v. Smith*. [1 Vent. 3.] 2 Keb. 439.

A prohibition was refused where a bishop sued for a pension by prescription, although the prescription was denied, and the suit before his own chancellor. If one libel for a *modus*, if the spiritual court will allow it, they may try it.

**THE** Bishop of Lincoln sued in the court, holden before his chancellor, for a pension, to which he entitled himself by prescription; and a prohibition was prayed for *Smith* the defendant there, for that being by prescription, that court had no consuance of it: and for that, my Lord *Coke's* opinion was cited, 2 Inst. 491. especially he could not sue for it in his own court.

But it was resolved by *KEYLINGE* and *TWISDEN*, (the other justices being absent) that pensions, though they were by prescription, might be sued for in that court; for having consuance of the principal, that shall draw in the accessory. As if one libel for a *modus decimandi*, if they allow it, they may try it; and *Coke's* opinion they said was not warranted by the books, and *Fitz. N. B.* 524. is against it; and the court being held before the chancellor, and not the bishop himself, he might sue there. Vide *Hob.* 87. Consuance of pleas, granted to be holden before the steward of the grantee, *licet* the grantee *fuert pars*; *sed vide ibid. in pede*, that even an act of parliament to make a man judge in his own case would be void.

M. 20 Car. 2. B. R. *Anon.* [1 Vent. 3.]

A *modus* that the proprietors and occupiers of such a manor, or any parcel thereof, should pay a groat to the parson for herbage tithes is bad, for if a man had but two or three feet of ground in the manor he should pay a groat; but it ought to have been laid, that the proprietors and occupiers of such a manor for themselves and their farmers had paid it.

**A** PROHIBITION was, prayed, to stay a suit in the court-christian for tithes, upon the suggestion of a *modus*, which was alleged in this manner: "That the proprietors and occupiers of such a manor, or any parcel thereof, shall pay a groat to the parson for herbage tithes."

The court held that this could not be, for if a man had but two or three foot of ground in the manor, he should pay a groat; but it ought to have been laid: "That the proprietors and occupiers of such a manor, for themselves and their farmers, had paid four-pence."

H. 21.

H. 21 Car. 2. B. R. *Philips v. Clever*. [2 Keb. 452.] 1 Vent. 5.

**S**YMSON prayed a prohibition to the arches on libel, for tithes of conies in a warren, grounded on the common law *et laudabili consuetudine* used about thirty years last, suggesting a denial of the custom; and *per curiam* a prohibition was granted, this being no custom sufficiently applied to any parish; and TWISDEN said, that where the libel is grounded on a custom, whereof they have original consuance, there no prohibition will lie on denial of the custom; but *contra*, where the thing lies there only by virtue of the custom, and not otherwise, as in libel for tithes of conies, does, (1) or fish; which was not denied by any.

(1) "Doves." Ventris.

the court said was not sufficiently applied to any parish; and by *Twisden*, where the libel is grounded on a custom, whereof the spiritual court has original consuance, no prohibition will lie on denial of it; but *contra*, where it lies there only by virtue of the custom, as in libel for tithes of rabbits, pigeons, or fish, which was not denied by any.

1669.

A prohibition was granted to a libel for tithes of rabbits in a warren (grounded on the common law and laudable custom for thirty years past) upon suggestion of a denial of the custom, which

H. 21 Car. 2. B. R. *English v. Johns*. [2 Keb. 459.]

**I**N debt, on 2 E. 6. 13. for not setting forth of tithes of Great Walsingham, in Norfolk: the defendant pleads that Rowell, last prior of W. and his predecessors, time out of mind, were seised *simul et semel* of the manor and rectory, and by reason of unity was discharged by 31 H. 8. c. 13. and traverses *absque hoc*, that tithes have been, time out of mind, paid to the rector, to which *Shouldham* demurred, because unity of itself is no discharge, but by favour of the statute, as it is joined with prescription, which is here only inferred *ratione unitatis*, which, as 19 H. 6. 26. b. and 2 Cro. 587. Dowsnell, work nothing, but *virtute cuius* what is positively alleged in the premises, being no direct affirmation on which issue can be taken, as Hob. 14. *Priddle* and *Napper's* case. (1) Also it should have been pleaded, that the prior was seised as well of the forty-seven acres in question, as of the rectory, and not to say they were seised of the manor generally; for as Moor, 528. pl. 799. *Benton and Trot*, (2) copyhold and leasehold are not within the statute, and this is as much to be intended copyhold as freehold, Com. 84. and Co. and Hob. 306. this is a general law, and misrecited, omitting (religious) which *per KEYLINGE*, must refer to things not named, but abbeyes and priories are named; which the court agreed, as reciting the statute of burning of houses, whereas houses are not in the statute; yet because the action was brought for a felony, it was held well enough, which the court agreed. The traverse is of the prescription, and not that no tithes were paid in forty years before the stat. *sed non allocatur*. The traverse is of matter of law, as Com. 496. *Grendon* against the *Bishop of Lincoln*. (3) The priory is not said to be time out of mind, but only that the prior was seised time out of mind. *Saunders pro* defendant. Unity in *Knightly* and *Spencer's* case (4) is agreed a good discharge, and the pleading, as Hob. 298. *Slade and Drake* (5) is well enough, and must take a traverse to the payment time out of mind as alleged; and it could be no otherwise; and the question now is not on any custom in the priory, but a prescription in the priors, which need not allege it is an ancient priory; for if this be not proved, the prescription will fail; also the traverse is but immaterial, which after this general demurrer is good enough, 3 Cro. 161. *contra* if the traverse had been omitted. — *KEYLINGE* held, the possession in discharge must be strictly pursued, and therefore general seisin of the manor is not sufficient; but *per TWISDEN* and *MORETON*, this bar is good to a common intent, as the *Bishop of Winchester's* case, (6) and the plaintiff should reply that it was copyhold or leasehold.

In a debt on 2 E. 6. defendant pleaded that a prior and his predecessors were, time out of mind, seised *simul et semel* of a manor and rectory, and by reason of the unity was discharged by 31 H. 8; upon demurrer it was contended that it should have been pleaded that the prior was seised as well of the 47 acres in question as of the rectory, and not that he was seised of the manor generally, for copyhold and leasehold are not within the stat. and this was as much to be intended copyhold as freehold. *Keylinge* held that the possession in discharge must be strictly pursued, and therefore general seisin of the manor not sufficient; but by *Twisden* and *Moreton*, the bar is good to a common intent,

(1) *Antè*, 205.  
(4) *Antè*, 101.

(2) *Antè*, 142.  
(5) *Antè*, 514.

(3) *Antè*, 67.  
(6) *Antè*, 119.

H. 21

and the plaintiff should reply it was copyhold or leasehold.

1669.

A discharge shall be intended personal and gone by dissolution.

H. 21 Car. 2. B. R. *Anon.* [2 Keb. 472.]

**WALCOT** prayed a prohibition to the ecclesiastical court of Hereford, on suit for tithes, prescribing in discharge by prescription in the hands of the abbey of *sed non allocatur*; for *per curiam*, as *Bowles* against *Atkins*, (1) this shall be intended personal, and gone by dissolution, unless it were said to be discharged *ratione unitatis*, or that the abbey was of the Cistercian order; and notwithstanding the case of *Slade* and *Drake*, Hob. 295. (2) the court refused a prohibition although it were moved yesterday.

(1) *Ant.*, 450.(2) *Ant.*, 314.

E. 21 Car. 2. B. R.

*Moreton v. Hopkins.* [2 Keb. 502.] 1 Sid. 407. 1 Vent. 30.  
4 Gw. 1578.

Debt on 2 E. 6. for not setting out tithes lies by executors, but not against them; and by *Keylinge* this is a duty trebled by the statute and not a bare penalty.

**HOLLOWAY**, in arrest of judgment, that no action lies by an administrator, as the plaintiff is to his son, upon 2 E. 6. c. 13. for tithes not set out, because 2 Inst. 650. this is a personal action that dies with the person, being, as *YELVERTON*, a contempt, and not any debt *ex contractu*, but like 21 H. 8. c. of mortuaries, Co. Entr. 164. and other penal laws. — *Jones pro plaintiff*. Against executors no action lies on tort as on escape, but for them it does, as trover and ejectment within 4 E. 3. c. 7. and *Dixon's* case, 1 Roll. 913. action sur case by executor lies on escape; so 1 Cro. 297. 1 Roll. 912. the town of *Bridgwaters* were taken by equity on the statute *de bonis asportatis*. — *Twisden* said, this very point has on this statute been adjudged in C. B. and affirmed on error in the Exchequer Chamber, and the constant difference has been in actions by them, which lie well, but not against them, which the court agreed; and *per Keylinge*, this is a duty trebled by the statute, and not a bare penalty; and judgment *pro plaintiff*.

E. 21 Car. 2. B. R. *Anon.* [1 Vent. 32.]

If upon issue joined in prohibition a *modus* be found, though different from that laid, yet no consultation shall go, as it appears that tithes ought not to be sued for in specie.

**IF** the jury, upon an issue joined in a prohibition upon a *modus decimandi*, find a different *modus*, yet the defendant shall not have a consultation; for it appears he ought not to sue for tithes in specie, there being a *modus* found.

M. 21 Car. 2. B. R. *Anon.* [1 Vent. 41.]

If the spiritual court upon a feoffment of tithes and lands without livery adjudge tithes to pass, prohibition lies.

**IN** a feoffment of tithes and lands, where there is no livery; if they do adjudge the tithes to pass, notwithstanding there is no livery, a prohibition will lie.

without livery adjudge tithes to pass, prohibition lies.

1670.

H. 22 Car. 2. B. R. *Amiles v. Chambers.* [1 Mod. 35.] 2 Keb. 596.

Turf, gravel, and chalk, are part of the freehold, and not titheable.

**A** PARSON libels in the spiritual court against several of his parishioners for tithe turf: they pray a prohibition. — *Keylinge*, C. J. Turf, gravel, and chalk, are part of the freehold, and not titheable.

The court granted one prohibition to all the libels; but ordered the plaintiffs to declare severally.

There may be a joint prohibition to several libels, but the plaintiffs must declare severally.

H. 22 Car. 2. B. R.

*Crouch v. Ridsen.* [1 Vent. 61. 2 Keb. 612. 1 Sid. 443.]

1670.

**F**INCH, solicitor, moved for a prohibition to the ecclesiastical court, to stay a suit for tithes of hops, commenced there by the vicar, upon a suggestion, that they had paid for all tithe hops so much an acre to the parson, time out of mind. But it was denied: for there could be no such composition time out of mind, hops not being known in England until Queen Elizabeth's time; for then they were first brought out of Holland, though beer is mentioned in a statute in Henry the Fourth's time.

But it was said by the court, that perhaps the vicarage was endowed time out of mind of small tithes, of which nature hops were: then the prescription of paying a *modus* to the parson shall not take them from him; for it shall be taken to have commenced since the endowment.

Note, if the matter concerns the whole county, it is to be tried in another county which is indifferent. [*Ventris.*]

*Finch*, solicitor, prayed a prohibition in suit by the vicar against impropricator for tithe of hops, suggesting a *modus* of a noble per sacks paid to the impropricator, and that these were due to the impropricator; *sed non allocatur*, hops being a small tithe and not time out of mind, and there may be a *modus* to the parson of great tithes, and none to the vicar but in kind; and if the endowment be of small tithes, whenever the land is so sowed, the vicar shall have it, unless the *modus* be to discharge the land, in which case it is ill, unless the vicarage be time out of mind, and then it shall be intended before the right of the parson: and a prohibition was denied. [*Keble.*]

But it was said, that if the suggestion had been to pay so much in lieu of all small tithes, prohibition should go; for hops, woad, and such small things of new invention are *minuta decimæ*: and for that the suggestion was not so, prohibition was denied.

Note, by TWISDEN, J. (who lived in Kent,) it is a question at this day how hops shall be tithed, *viz.* by the hill, or by the pole, or by the bushel. [*Siderfin.*] (1)

should be tithed, by the hill, the pole, or the bushel.

(1) See *Ridsen v. Crouch*, M. 23 Car. 2. post, 495.

E. 22 Car. 2. B. R.

*Tilden v. Walter.* [1 Sid. 447. 1 Vent. 75. 1 Mod. 50.] 2 Keb. 628.

**A** PROHIBITION was moved for to a libel by a vicar for tithes of wood and woad. The suggestion was as to the wood, that there was a custom within the parish of R. that the parishioners there should not pay tithes for wood spent in their houses; and he further suggested he is a parishioner, and that it was spent in his house.

The court held the suggestion bad, for it did not state that he occupied several lands within the parish, and that the wood was spent for necessities in his house, or for hedging the corn, &c. by which the vicar would have *uberiores decimas*. And it was ordered to be amended.

As to the woad it was suggested that the tithe thereof belonged to the parson and not to the vicar: but there was doubt of this, for it is reckoned among *minutas decimas*, as hops, &c. [*Siderfin.*]

A prohibition was prayed to stay a suit for tithes of wood. The plaintiff suggested, that he had a house in the parish, and that the wood was cut for fuel burnt in his house.

But the court said, that this would not serve, unless it were expressed, that the house was for maintenance of husbandry, by reason of which the parson had *uberiores decimas*. [*Ventris.*]

A vicar

was: it was ordered to be amended. If the endowment of a vicarage be lost, small tithes, as of woad, shall be paid to the parson, or vicar according to prescription.

1670.  
TILDEN  
v.  
WALTER.  


A vicar libelled in the spiritual court for tithe of wood. *Barrell* prayed a prohibition, suggesting, that time out of mind they paid no small tithe to the vicar; but that small tithes, by the custom of the pariah, were paid to the parson. — *Twisdén, J.* If the endowment of the vicarage be lost, small tithes must be paid according to prescription. [Mod. Rep.]

M. 22 Car. 2. Canc. *Bush v. Rishley.* [1 Chan. Ca. 187.]

A bill to have a rate tithe settled by decree against the impropriator, and to prevent multiplicity of suits, was dismissed by the Lord Keeper, although it was insisted that such decrees were frequent in the Exchequer; but he ordered two depositions to be made use of at law, as occasion required.

**T**HE bill was to have a rate tithe settled by decree against the impropriator, and prevent multiplicity of suits.

And for the plaintiffs it was prayed, that the court would either decree that the plaintiffs should hold their lands under that *modus decimandi*, which at a trial at law pending this suit was found by verdict, or that the court would direct another trial to try the verity of the *modus*, and reserve the cause till after the second trial, (if the court were not satisfied with one verdict) it being insisted, that after such tithe rate had been ascertained by two verdicts, the court ought to decree an enjoyment of the lands, for which the *modus* was payable under that rate tithe, and discharge the tithe in kind; and it was compared to the case of copyholders, that have their fines and services ascertained by the aid of this court, by directing of trials for that purpose first, and after decreeing according to the verdicts on such trials.

But for the defendant it was insisted, that this court had not any time decreed a *modus decimandi*, and that tithes were payable in kind by common right.

And though it was insisted for the plaintiffs that it was frequent in the Exchequer to decree a rate tithe, the Lord Keeper did not think fit to decree in such a case, but ordered two depositions to be made use of at law, as occasion served. And dismissed the bill.

E. 22 Car. 2. B. R. *Watson v. Smyth.* [2 Keb. 634.]

Wood used for fuel in a house of husbandry, may be exempt from tithe, although the house be not ancient, for the husbandry is the main, but if sold, tithe will be due.

**T**HOMAS prayed a prohibition on appeal to the Arches in suit for tithe of wood, fallows, osiers, &c. suggesting that some was spent in his ancient house of husbandry, and part in hedges, and the osiers in hurdles for sheep; but the custom being too general that no tithe is paid for wood cut and spent so by any inhabitant, as Co. Entr. *per curiam* a prohibition was denied till amendment; for on sale tithes are payable, albeit the fuel be made of it: also the court agreed, albeit the house be new, yet it is the husbandry is the main, and so this be so, it is sufficient; and on amendment a prohibition was granted.

T. 22 Car. 2. B. R.

*Kettle v. Robson.* [2 Keb. 665. 719. 729.] 1 Vent. 107.

A prohibition was granted to a suit for tithe hay by the parson, upon suggestion of payment of a *modus* to the vicar time out of mind, which is evidence of the endowment, and no other proof as to endowment need be given.

**N**ORTH prayed a prohibition in suit for tithe hay by the parson on suggestion of the vicar endowed, and a *modus* paid to him; and *per curiam* a prohibition was granted *nisi*.

*North* prayed prohibition in suit by a parson on a *modus* to a vicar, who time out of mind is endowed of the tithes of this place; and there being a prohibition on the same *modus* in the Exchequer for another year, and a consultation for want of proof granted, which being collateral, and not granted on the right, he conceived on 50 E. 3. c. 4. a new prohibition may be now granted at the discretion of the court: and *per curiam* a prohibition was granted *quoad* the pasture, one acre of arable being put in to save costs; and the like prohibition was granted *inter Kettle and Robson*.

*Coleman* prayed a consultation in default of proof of suggestion of a *modus* to vicar endowed in discharge of tithe sued for by the parson of Walterbeach, because

Where consultation has been granted for want of proof of the suggestion, and not on the right, another prohibition may be granted, at the discretion of the court, upon the same suggestion.

because only payment is proved time out of, &c. not any ancient endowment of the vicarage in Ely diocese, as *YELVERTON*, 86. *Greene and Austen*; (1) *sed non allocatur*, for *per curiam* payment is evidence of the endowment, and this is the *modus* suggested principally, and no man can prove other endowment; and a consultation was denied.

(1) *Ante*, 165.

Tr. 22 Car. 2. *Wildman and Cluyton v. Oades*. [Pollexf. 1.]

**I**N debt upon the statute 2 E. 6. for not setting out tithes. Upon *nil debet* pleaded, the jury, as to all the sum in demand, except £20, find for the defendant, and as to this £20 they find specially,

That the prior and convent of Southwick, and their predecessors, time out of mind, until and at the time of the dissolution, were seised as well of the manor of Moundsmere *unde*, &c. in the parish of Preston Candorer, as of the rectory of Preston Candorer *simul et semel* in fee in the right of their priory.

Being so seised before the dissolution, *viz.*

20 September, 24 H. 8. They by deed indented *simul et semel* demised to Robert Hannington, as well the manor as the rectory, for forty years: by virtue whereof Hannington entered, and was possessed: the reversion to the prior and convent.

7 April, 29 H. 8. the prior and convent (Hannington thus possessed, and the prior and convent thus seised) by indenture surrender to H. 8. the priory and also the reversion; and that by virtue thereof H. 8. was seised of the reversion.

They find further, the statute for discharge of tithes, 31 H. 8. wherein it was enacted that the King and all persons that should have any manors or lands which did belong to any priory, should have and hold the same according to their estates discharged and acquitted *à solutione decimarum tan liberè et in tam amplo et largo modo quàm priores*, &c. had held, enjoyed, or possessed the same, at the time of the dissolution or surrender.

That King H. 8. afterwards granted the rectory to the Dean of Winchester, under whom the plaintiffs claim;

And the manor to the warden and scholars of the college of the Blessed Mary, the Virgin of Winchester and their successors; under whom the defendant claims.

They find further, that no tithes of any corn have been ever paid out of these lands.

That the defendant did sow these lands, carried the corn without setting forth any tithes.

That the single value was £5: 6s. 8d. the treble £20, *et si*, &c.

Upon this verdict the case is this,

The prior and convent of Southwick, time out of mind, till the dissolution seised of a rectory and lands within that rectory, *simul et semel*, in fee, make a lease of the rectory and lands, *simul et semel*, for forty years. During this lease the priory is dissolved, and the King grants the rectory to the plaintiffs, and the land to the defendant: then the lease expires, and no tithes ever since paid.

Whether those lands be discharged from payment of tithes? that is the question.

For the defendant, that they are discharged.

If the lands and rectory had not been in this case in lease at the time of the dissolution, there had been, I think, no question but they had been discharged by the perpetual unity found.

*Priddle and Napper's case*, Rep. 11. (2) *Slade and Drake's case*, in Hob. (3) and all the authority therein concurs without question at this day.

But that which I shall endeavour is,

1. To

ledged) after argument, never proceeded to judgment in it, and the defendant, not recovering costs in his case if adjudged for him, (2 *Inst.* 651.) had no reason to put it on, and so it rested.

(2) *Ante*, 205.

(3) *Ante*, 314.

H H 2

1670.

KITTLE  
vs.  
ROBSON.

A prior and convent seised in fee time out of mind, till the dissolution, of a rectory and lands within that rectory *simul et semel*, made a lease of the rectory and lands *simul et semel* for forty years; during this lease the priory was dissolved, and the King granted the rectory to the plaintiffs, and the land to the defendant; the lease expired and no tithes were ever since paid; the question was whether those lands were discharged from payment of tithes? and it appears they were, for it was argued that perpetual unity presumes a real discharge that cannot now be proved, and therefore works a discharge without other proof, and causes the proof to destroy this presumption to be brought of the other side of a payment that once was; and that though the lands were in lease, that it was not material; and the plaintiff, finding the law clear against him (as his counsel acknow-

1670.  
WILDMAN  
and  
CLAYTON  
v.  
OADES.

1. To shew the reason why perpetual unity to the time of the dissolution is a discharge within the statute.

2. That that reason extends to discharge as well where such lands were in lease at the time of the statute, and no tithes paid by the lessee, as where they were not in lease; even as in other cases of discharge by bull or prescription.

3. That the lease being of rectory and lands, *simul et semel*, so as none were paid, that the authorities are very strong of my side, that they are discharged by the statutes.

1. Why perpetual unity is a discharge within the statute.

1. It is not strictly and positively by any words of the statute so enacted to be: the statute is, that the King and all other persons shall hold these lands discharged and acquitted from payment of tithes as free, and in as large and ample manner as the prior, &c. held, retained or enjoyed them at the time of the dissolution.

Then a perpetual unity in the prior before the statute was no discharge, but only a suspension of payment, because he could not pay tithes to himself; but if in the time of the prior there had been a severance of the possession, tithes must have been paid; the lands were not freed or discharged: now the statute makes no discharge of lands that were not discharged at the time of the dissolution, but only enacts, that they shall be held as free and discharged from payment of tithes, as they were held by the prior, this being all that the statute has done: in like manner, as if before the statute, if the possession had been severed they must have paid tithes, so must they do after: therefore unity is certainly no discharge strictly and positively by the words of the statute.

2. It is by a just and reasonable construction upon the statute, to avoid a mischief and loss of many real and positive discharges which were truly within the meaning, but by reason of unity could never have been proved to be such.

For the abbots, priors, and religious houses, having such vast revenues, had very many appropriations and rectories, and also manors and lands, and having ancient discharges by bulls, prescriptions, and order, which after so long a unity in possession were impossible to be produced and proved, the benefit intended to the King, and those that claimed by purchase under him, would have been inconsiderable, if all those lands where there was an unity in the abbot or prior, and thereby the evidences of their prescriptions and grants impossible to be proved, should have been charged with payment of tithes, and the intent and meaning of the statute be destroyed and evaded.

To avoid this mischief and inconvenience, the wisdom of the judges did construe, that where there was a perpetual unity, that this should be sufficient to discharge the land, presuming that there was some real discharge by bull or prescription, or else that at some time or other the abbots farming most of their lands it could be proved that at some time or other tithes were paid. This is plain by *Priddle's case*, Rep. 11. Archbishop of *Canterbury's case*, *Slade and Drake's case*, Hob. 298. where he says that unity by prescription is good *prima facie*, but not of itself, but in contemplation of a perfect discharge that shall be supposed.

The pleading also shews it, which must not be that *ratione ipse* it was discharged, but *ratione inde* the abbot held discharged of payment of tithes.

This being so, it follows, that a discharge by unity is in truth and in judgment of law a discharge by bull or by prescription presumed, but not proved; not by order: for if it were by order, then it were only *quandiu in propriis manibus excoherunt*, and would not extend to farmers and tenants; but unity is a full and absolute discharge since the statute, and therefore must be grafted upon such a discharge as was full and absolute; which must be by prescription or bull.

2. That, that reason or construction, which has made perpetual unity a discharge, extends to discharge as well where the lands were in lease at the time of the statute, and no tithes paid by the farmer, as where they were not in lease; even as in cases of discharge by bull or prescription.

Where they were once in lease, and the farmer did pay tithes, there the presumption of a perfect and real discharge is thereby destroyed, and they must



pay tithes still, unless a perfect and real discharge by bull or prescription can be proved; but that is not our case.

But where they were once in lease, and paid no tithes, there the reason holds, or is rather stronger.

For perpetual unity presumes a real discharge that cannot now be proved, and therefore works a discharge without other proof, and causes the proof to destroy this presumption to be brought of the other side of a payment that once was.

Then if there be a unity till 24 H. 8. and then a lease made, and no tithes paid by the lessee, is it not a stronger presumption that no tithes being paid when there was a lease, that the lands were discharged, than if the unity had continued in the prior, when none could have been paid by reason of the suspension, though the land had not been discharged?

Further, if a discharge by unity perpetual be in judgment of law, or by presumption in law, a real discharge by bull or by prescription presumed; then there is no more reason that the leasing the land and rectory, *simul et semel*, should destroy this discharge, than it should in case where a discharge by bull or prescription is produced or proved.

If therefore a prior had by bull or prescription an absolute discharge for him, his farmers and tenants, like as the bishop of Winchester prescribes to have for himself, his farmers, and tenants, in the bishop of Winchester's case, Rep. 2. (1) and had made a lease for years, 24 H. 8. such as in our case, would there be any question whether these lands were discharged by the statute?

Obj. That the statute says, that the subject shall hold these lands discharged as the abbot held them at the time of the dissolution, and the lands and rectory being at the time of the dissolution in lease, the abbot did not hold them.

Ans. This objection, if of force, will confound the sense of the statute, as it has been taken ever since it was made.

The meaning has always been that the lands shall be discharged in as large and ample manner as they were in the prior; if the farmer paid tithes, but the prior none when in his possession, then it must be so still; the tenant pays, but the inheritance discharged.

Porter and Bathurst's case, Cro. 2. 559. Dy. 277. (2) Priors that had lands discharged by order, *quandiu in propriis manibus excoluerunt*: the farmers paid, but the inheritance not, ever since the statute.

So in our case, where there were leases in being at the time of the statute, the inheritance in the prior discharged, the statute made it so continue.

The cases hereafter mentioned will prove this.

3. That the authorities are very strong for me in this case, the lease being of rectory and land *simul et semel*, so as no tithes could be paid.

For, as I take it, the books run thus: That if tithes were paid by the lessee when it was in lease, then the unity is destroyed, and no discharge.

But if they were in lease, and no tithes paid, then the books, some say, and others imply, that they are discharged.

1. For those books that do imply that they are discharged, *Priddle and Napier's case*, Rep. 11. 14. b. (3) say thus: Although there has been a perpetual unity, yet if the farmers or lessees have paid tithes before the dissolution, the lands are not discharged. Suppose then that the farmers had not paid tithes, the report then must needs intend and imply that the lands are discharged; for the book lays the stress, not upon the leasing, but upon the payment of tithes; for if leasing had alone altered the case, and taken away the effect of the unity, it were to no purpose to mention the payment of tithes in the case.

*Dobitoff and Curteene*, Car. 2. 453. (4) Abbot of Evesham, seised of both rectory and land time out of mind, 26 H. 8. demised the land for sixty years, and by the same lease demised all tithes, with a covenant that the lessee shall not set forth corn and hay to the lessor, but that he shall pay tithe of wool and lamb to the lessor, and small tithes to the vicar.

It was adjudged in this case that the lands should pay tithes.

1. Because the tithes were demised, therefore the lands were not discharged, but the tithes were payable.

(1) *Ant.*, 119.

(2) *Ant.*, 312.

(3) *Ant.*, 205.

(4) *Ant.*, 262.

2. Because

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2. Because there was a covenant that the lessee should not set forth his tithes to the lessor, which shews they should otherwise have been set forth.

3. A provision for payment of tithe lamb, wool, &c. all which are strong evidences that the lands were not discharged, as strong as if there had been actual payment; and the finding of all these particulars strongly implies that if there had been nothing else but a leasing, that that had not been sufficient, but that it was necessary to find payment, or that which amounted to payment, discharges by grants and covenants express.

*Slade and Drake's case*, Hob. 298, says, if the farmer paid tithes, that destroys the prescription, which implies, &c.

2. For the express authorities proving that unity perpetual is a discharge, unless payment be made to appear by the other side.

Archbishop of *Canterbury's case*, Rep. 2. 48, proves that if the farmer paid tithes, then no discharge by reason of unity; and likewise expressly, that if the lands were in lease, and no tithes paid by the farmer, that then they are discharged by the unity.

38 Eliz. *Grevill and Trott's case*, there cited, is thus: Prohibition prayed, suggesting a perpetual unity in the Abbot of Waltham; the defendant pleads a lease made by the abbot before the dissolution, and that the lessee paid tithes.

And the court there ruled,

1. That he should not traverse, and rely upon the perpetual unity; for thereby the point of payment of tithes pleaded would not have been in question.

2. That he should conclude without a traverse, to the intent the payment might be in issue, as it was in that case, and found for the plaintiff, that there was no payment; and thereupon the prohibition stood.

Mich. 40, 41 Eliz. *Benton and Trott*. Moore, 528. (1) *Grevill and Trott's case* speeding no better, then they the next time mending their case, found a payment of tithes under the lease, and then the case was thus:—

Abbot of Waltham seised of rectory and land, *simul et semel*, *temps decont*. 7 H. 8. demised the rectory and land for thirty years: the lessee made an under lease of the land to one Gouch, who, before and at the time of the dissolution, paid tithes.

In this case, the whole argument and weight is laid upon the payment by the under lessee; and GAWDY was of opinion, that the payment by the under-tenant to the farmer of the rectory that was his lessor, should not affect the inheritance; but the other three Judges *contra* in that point, and thereupon the prohibition denied.

These cases differ only in that in the last the under-tenant paid tithes, and because he did, therefore no prohibition.

But the first case of *Grevill and Trott* was, as I conceive, the very same with this in question, though shortly put in the Archbishop of *Canterbury's case*; for it was upon the same lands, the demesnes of the manor of Nasing, the same lease, and the same persons concerned, as appears by comparing the cases; and the lease by the abbot was of rectory and land, *simul et semel*; and in this case no notice being taken of tithes paid, being adjudged for the prohibition, compared with the other, where the tithes were alleged to be paid, and therefore adjudged contrary, seems to me a strong authority to prove that not the leasing, but the payment, destroys the discharge.

So that upon the whole matter, I conceive that the lease made by the abbot of rectory and land, *simul et semel*, is no evidence one way or other, whether the lands did then pay or not pay tithes, and therefore can make or work nothing in the case; but it will be the same as if there had been no lease, but a continuing unity of the possession, as well as of the freehold and inheritance, to the time of the dissolution; and then no doubt it had been discharged from payment of tithes.

In this case the plaintiff, finding the law clear against him, as his counsel acknowledged, never proceeded to judgment in it; and the defendant, not recovering costs in his case, if adjudged for him, had no reason to put it on; and so it rested.

M. 22 Car. 2. B. R. *Hust v. Clerke.* [2 Keb. 696.]

1670.

**L**EEK prayed a prohibition in suit for tithe herbage of barren cattle, suggesting they were beasts used in husbandry. 2. *Modus* to pay so much for sheep sold before clipping, in Leicester; and it was granted *per curiam*.

Prohibition to a suit for tithe of herbage of cattle used in husbandry.

A *modus* to pay so much for sheep sold before clipping, allowed.

M. 22 Car. 2. B. R. *Messenger v. Jennings.* [2 Keb. 721.]

**J**ONES opposed a prohibition in suit for tithe of mills, being after a sentence, on the right. 1 Roll. 319. and 3 Cr. 355. so the alleging a *modus* comes too late; though the court takes notice they allow no *modus*, yet a *modus* must be suggested as pleaded in time, which the court agreed; and the rule for prohibition was discharged.

Prohibition in suit for tithe of mills on the right will not lie after sentence; so, though the

court takes notice that in the spiritual court they allow no *modus*, yet a *modus* must be suggested, as pleaded in time.

H. 23 Car. 2. B. R.

The Dean and Chapter of *Windsor v. Gover.* [2 Sa. 296.] 2 Keb. 688. 727. 737. 775. 1 Lev. 308. 1 Vent. 98. T. Raym. 194.

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**L**ONDON, to wit. Be it remembered that heretofore, to wit, in the term of St. Michael last past, before our lord the King, at Westminster, came the dean and chapter of the King's free chapel of St. George, within the castle of Windsor, by Richard Thomas, their attorney, and brought here into the court of our said lord the King, then there, their certain bill against Christopher Gover, gent. in the custody of the marshal, &c. of a plea of debt, and there are pledges of prosecution, to wit, John Doe and Richard Roe, which said bill follows in these words, to wit: London to wit, The dean and chapter of the King's free chapel of St. George, within the castle of Windsor, complain of Christopher Gover, gent. being in the custody of the marshal of the marshalsea of our lord the King, before the King himself, of a plea that he render to them 260*l.* of lawful money of England, which he owes to and unjustly detains from them; for that whereas the said dean and chapter, on the 20th day of October, in the twelfth year of the reign of our Lord Charles the Second, now King of England, &c. at London to wit, in the parish of St. Mary-le-Bow, in the ward of Cheap, by a certain indenture then and there made between the said dean and chapter, by the names of the dean and canons of the King's free chapel of St. George, within his castle of Windsor, of the one part, and the said Christopher Gover, by the name of Christopher Gover of Ottery St. Mary, in the county of Devon, gent. of the other part (one part of which said indenture, sealed with the seal of the said Christopher, the said dean and chapter bring here into court, the date whereof is the same day and year aforesaid), demised, granted, and to farm let to the said Christopher Gover, all that parcel or portion of tithes of corn and grain called town-mow, in the said parish of Ottery St. Mary, with all and singular the rights, members, and appurtenances thereunto belonging, or in anywise appertaining; to have and to hold the said parcel or portion of tithes, with the appurtenances, to the said Christopher, his executors, administrators, and assigns, from the feast of St. Michael the archangel then last past, before the date of the said indenture, unto the end and term of twenty-one years then next following, fully to be completed and ended; yielding and paying therefore yearly, for every year during the said term, to the said dean and chapter and their successors, or certain attorney, in the south porch of the said free chapel, 52*l.* of lawful money of England, at the two usual terms in the year, to wit, at the feasts of the Annunciation of the blessed Virgin Mary, and St. Michael the archangel, by equal portions: by virtue of which said demise the said Christopher entered into the said parcel or portion of tithes, with the appurtenances, and was thereof possessed, and from thence hitherto has quietly and peaceably had, held, and occupied

Qu. Whether rent reserved on a lease of tithes only, runs with the tithes to the assignee, or lies only in privacy of contract, so that the assignee is not chargeable with it; and consequently whether by acceptance of such rent from the assignee, the first lessee be discharged from the rent in future, or not.

Whether rent may be reserved out of any incorporeal hereditaments.

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cupied the said parcel or portion of tithes, with the appurtenances. Yet 260*l.* of the said rent for five years, ended on the feast of St. Michael the archangel, in the 21st year of the reign of our said Lord the now King, were and still are in arrear and unpaid to the said dean and chapter; whereby an action has accrued to the said dean and chapter, to demand and have of and from the said Christopher the said 260*l.*: yet the said Christopher (although often required), has not yet paid the said 260*l.* to the said dean and chapter, but to pay the same to them has hitherto altogether refused and still refuses, to the damage of the said dean and chapter of 20*l.* and therefore they bring suit, &c.

And now at this day, to wit, on Friday next after the morrow of the Holy Trinity, in this same term, until which day the said Christopher had leave to imparl to the said bill, and then to answer, &c. before our Lord the King, at Westminster, come as well the said dean and chapter, by their said attorney, as the said Christopher Gover, by John Savage, his attorney; and the said Christopher defends the wrong and injury when, &c. and as to 52*l.* parcel of the said 260*l.* in the said declaration above mentioned, for the said rent for the first year of the said five years, in the said declaration likewise specified, ended on the feast of St. Michael the archangel, in the 17th year of the reign of our said Lord the now King, he the said Christopher says, that he does not (1) owe to the said dean and chapter of the King's free chapel of St. George, within the castle of Windsor, the said 52*l.* or any penny thereof, in manner and form as the said dean and chapter above thereof complain against him, and of this he puts himself upon the country; and the said dean and chapter of the King's free chapel of St. George, within the said castle of Windsor likewise, &c.: and as to 208*l.* residue of the said 260*l.* the said Christopher says, that the said dean and chapter of the King's free chapel of St. George, within the castle of Windsor, ought not to have or maintain their said action thereof against him, because he says that after the said demise of the said parcel or portion of tithes of corn and grain, so as aforesaid made by the said dean and chapter to the said Christopher Gover, and long before the said rent of 208*l.* for the four last years of the said five years in the said declaration specified, or any part thereof, became due, to wit, on the 24th day of January, in the said 12th year of the reign of our said Lord the now King, at London aforesaid, in the parish and ward aforesaid, he the said Christopher Gover, by his certain indenture, sealed with his seal, and bearing date the same day and year aforesaid, granted and assigned all his interest and term of years which he then had to come of and in the said parcel or portion of the said tithes, with the appurtenances, to one John Vaughan, esq.; by virtue of which said grant the said John Vaughan entered into the said parcel or portion of the said tithes with the appurtenances, and was thereof possessed. And the said Christopher Gover further says that the said dean and chapter afterwards, to wit, on the 25th day of March, in the 13th year of the reign of our said Lord the now King, at London aforesaid, in the parish and ward aforesaid, had notice of the said grant and assignment, and knowing of the said grant and assignment afterwards, to wit on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, accepted and received from the said John Vaughan the said rent, so as aforesaid above reserved for the said tithes, to wit, six-pence of the said rent, and then and there accepted him the said John Vaughan as their tenant of the said tithes. And this he is ready to verify; wherefore he prays judgment, if the said dean and chapter ought to have or maintain their said action thereof against him, &c.

And the said dean and chapter say that they, by reason of any thing by the

(1) Though it be not necessary in general to set out the indenture in the declaration in debt for rent, yet it seems to have been necessary in this case, because it was debt for rent on a lease of tithes, which, being an incorporeal hereditament lying in grant, could not be granted without deed. See 1 Saund. 276. *Duppa v. Mayo*, notes 1 and 2. For

the same reason it was necessary to allege in the plea, that the defendant, the lessee of the tithes, assigned the term by indenture; for that was always required by the common law; and the statute of frauds, 29 Car. 2. does not apply to cases of incorporeal hereditaments, for they were not within the mischief intended to be remedied by that statute.

said

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said Christopher Gover above in pleading alleged, ought not to be barred from having their aforesaid action thereof against him the said Christopher, because, as to the said plea of the said Christopher, in manner and form aforesaid above pleaded, as to the said 208*l.* residue of the said 260*l.* in the said plea of the said Christopher above specified, they say, that the plea aforesaid by the said Christopher in manner and form aforesaid above in that behalf pleaded, and the matter in the same contained, are not sufficient in law to bar the said dean and chapter from having their said action thereof in that behalf against the said Christopher, and that they the said dean and chapter have no necessity, nor are bound by the law of the land in any manner to answer, and this they are ready to verify: wherefore, for want of a sufficient answer in this behalf, the said dean and chapter pray judgment, and their said debt as to the said 208*l.* together with their damages, by reason of the detention of the said debt, to be adjudged to them, &c.

And the said Christopher Gover, as to the aforesaid plea of the said Christopher in manner and form aforesaid above pleaded as to the said £208 residue of the said £260 above mentioned, says, that the said plea by him the said Christopher in manner and form aforesaid above in that behalf pleaded, and the matter in the same contained, are good and sufficient in law to bar the said dean and chapter from having their said action thereof in that behalf against the said Christopher, which said plea and the matter in the same contained, he the said Christopher is ready to verify and prove as the court, &c. and because the said dean and chapter have not answered the said plea, nor have hitherto in anywise denied the same, the said Christopher, as before, prays judgment, and that the said dean and chapter may be barred from having their said action thereof as to the said £208 residue, &c. against him the said Christopher. But because the court of our said Lord the King now here is not yet advised what judgment to give of and upon the premises, whereof the said parties have put themselves upon the judgment of the court, a day therefore is given to the said parties before our Lord the King at Westminster, until Wednesday next after fifteen days of the Holy Trinity, to hear their judgment of and upon the said premises, because the court of our said Lord the King now here is not yet advised thereof, &c. And to try the said issue above joined between the said parties to be tried by the country, let a jury thereof come before our Lord the King at Westminster, at the day aforesaid, and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the said parties there. At which day before our Lord the King at Westminster, come the said parties by their said attorneys, and because the court of our said Lord the King here is not yet advised what judgment to give of and upon the premises, whereof the said parties have put themselves upon the judgment of the court, a day therefore is given to the said parties before our said Lord the King at Westminster, until Monday next after three weeks of St. Michael, to hear their judgment of and upon the said premises, because the court of our said Lord the King here is not yet advised thereof, &c. And as to try the said issue above joined between the said parties to be tried by the country, the sheriff has not sent his writ therein, therefore as oftentimes before, let a jury thereof come before our said Lord the King

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King at Westminster, at the said day, and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the said parties there, &c. At which day before our Lord the King at Westminster, come the parties aforesaid by their attornies aforesaid, whereupon all and singular the premises, whereof the said parties have put themselves upon the judgment of the court, being seen and by the court of our said Lord the King here more fully understood, and mature deliberation having been thereupon had, for that it seems to the court of our said Lord the King here, that the said plea of the said Christopher as to the said £208, residue of the said £260, in manner and form aforesaid above pleaded, and the matter in the same contained are not sufficient in law to bar the said dean and chapter from having their said action thereof in form aforesaid against the said Christopher. Therefore it is considered that the said dean and chapter recover against the said Christopher the said £208, parcel of the said £260. But because it is necessary that there be but one taxation of damages in this behalf, therefore let the taxation of damages as to the said £208, be staid until the said issue above joined between the said parties to be tried by the country be determined. And as to try the said issue, the sheriff has not sent his writ. Therefore as well to try the said issue, as to inquire what damages the said dean and chapter have sustained by reason of the detention of the said debt, let a jury thereof come before our Lord the King on Tuesday next after fifteen days of St. Hilary, and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the said parties there, &c. Afterwards the process being continued between the parties aforesaid, in the plea aforesaid, by the jury being put in respite between them, before our Lord the King at Westminster, until Monday next after the octave of the purification of the Blessed Mary then next following, unless our said Lord the King's right trusty and well-beloved Sir John Keylynge, Kt. chief justice of our said Lord the King, assigned to hold pleas of the court of our said Lord the King, before the King himself, shall first come on Saturday next after the octave of the purification of the Blessed Mary, at Guildhall, London, according to the form of the statute for default of jurors, &c. At which day before our Lord the King at Westminster, came the said dean and chapter by the said Daniel Vinicombe, their attorney, and the chief justice before whom, &c. sent here his record had before him in these words, to wit: afterwards on the day and at the place within contained before our said Lord the King's right trusty and well-beloved Sir John Keylynge, Kt. chief justice within written, John Squire being associated unto him according to the form of the statute, &c. come the within-named dean and chapter of the King's free chapel of St. George, within the castle of Windsor, by their attorney within written, and the said Christopher Gover, although solemnly required, comes not but makes default, therefore let the jurors of the jury whereof mention is within made, be taken against him by default: and the jurors of that jury being summoned, some of them, to wit, W. S., P. G., C. T., N. C., A. Y., W. S., H. S., E. B., B. F. and W. G., come and are sworn upon that jury; and because the residue of the jurors of the same jury do not appear, therefore others of the bystanders, being chosen by the sheriffs, of the city of London, within written, at the request of the said dean and chapter, and by the command of the said chief justice, are appointed anew, whose names are annexed to the within written panel, according to the form of the statute in that case made and provided. Which said jurors so appointed anew, that is to say, N. K. and B. B. being called, likewise come, who, together with the said other jurors before impanelled and sworn, being chosen, tried and sworn to speak the truth of the matters within contained, say upon their oath, that the said Christopher Gover doth owe to the said dean and chapter of the King's free chapel of St. George, within the castle of Windsor aforesaid, the said £52, parcel of the within-mentioned £260, for rent for the first year of the within-mentioned five years, ended on the feast of St. Michael the archangel, in the seventeenth year of the reign of our said Lord the now king, in manner and form as the said dean and chapter within complain thereof against him; and they assess the damages of the said dean and chapter, by reason of the detention of the within-

written

written debt, besides their costs and charges by them about their suit in this behalf expended to £10, and for these costs and charges to £5 : 3s. 4d. Therefore it is considered that the said dean and chapter recover against the said Christopher the said £52, residue of the said £260, and the damages by the said jury in form aforesaid assessed, and also £17 : 6s. 8d. for their costs and charges by the court of our said Lord the King, now here adjudged to the said dean and chapter with their assent, which said damages in the whole amount to £30, and the said Christopher in mercy, &c.

DEBT for rent by the dean and chapter of Windsor against Gover; the plaintiffs declare that on the 20th day of October, in the twelfth year of the reign of the now king, by indenture under their common seal, they demised to the defendant a portion of tithes in the parish of Ottery St. Mary, in the county of Devon: to have from Michaelmas then last past for twenty years; yielding yearly £52, at two feasts, namely, the Annunciation of the Virgin Mary, and St. Michael the archangel, by equal portions; by virtue of which demise the defendant entered and was possessed, and that £260 of the said rent for five years, ended at the feast of St. Michael, in the twenty-first year of the reign of the now King, was in arrear and unpaid, whereby an action has accrued, &c.

The defendant as to £52 of the said rent for the first year of the said five years pleads *nil debet*: and as to the residue of the said rent demanded, the defendant pleads in bar, that after the said demise, and before any part of the said residue of the rent became due, to wit, on the 24th of January, in the twelfth year aforesaid, the defendant by deed assigned over all his term and interest in the said portion of tithes to one John Vaughan, by virtue whereof the said John Vaughan entered and was possessed: and the defendant further avers that the plaintiffs afterwards, to wit, on the 25th day of March, in the thirteenth year aforesaid, had notice of the said assignment, and accepted and received from the said John Vaughan the said rent so as aforesaid above reserved for the said tithes, to wit, 6d. of the said rent, and then and there accepted him, the said John Vaughan, as their tenant of the said tithes. And this, &c. wherefore, &c. upon which the plaintiff demurred in law.

And the point of law was, whether the rent reserved on the said lease made of tithes only, and not of any corporeal thing out of which a rent may be properly reserved, but such a rent as will run with the tithes to an assignee, so that by the acceptance of it from the assignee, the first lessee is discharged from the rent in future; or whether it is such a rent as lies only in privity of contract, so that the assignee of the tithes is not chargeable with it, and consequently the acceptance of rent is of no operation, but the first lessee is always chargeable to pay the rent, notwithstanding such acceptance.

And it was argued by *Jones*, for the plaintiffs, that this is not properly a rent which goes with the tithes, so that the assignee is chargeable with it; but it is a yearly payment in the nature of a rent which lies only in privity of contract between the lessor and lessee and their executors and administrators; therefore the acceptance of rent from the assignee, as tenant of the tithes, does not avail the defendant any thing, but he is always chargeable with it upon the contract; and that it was only a debt upon a personal contract, and not a rent which goes with the tithes, and is a charge upon the assignee. And he cited Co. Lit. 47. a. where it is said that a rent cannot be reserved out of an incorporeal inheritance, as an advowson, tithes, &c. and it is there further said, that if a lease for years be made of them by deed, it is good by way of contract, and so is the same book, 142. a. And he cited 2 Roll. Abr. 451. (O.) *Smith* and *Bowles*'s case, that if a lease be made of land and tithes together reserving rent, the rent is only issuing out of the land, and not out of the tithes. And he said that *Jewel*'s case, 5 Rep. 3. a. is an express authority in point, namely, that a rent reserved on a lease made of an incorporeal thing, as of a fair, (as the case then was,) is good, by way of contract between the lessor and lessee, but yet such rent is not incident to the reversion, nor will go along with it, and therefore such a lease, though the ancient rent be reserved, shall be voidable by the successor of the bishop who made it, as it is there adjudged. Therefore

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he concluded, that the money reserved in the case at bar is no rent which is incident to the estate demised ; but only lies in privity of contract between the lessor and lessee, and the acceptance of rent from the assignee is of no operation, but the plaintiffs may always resort to the defendant, being the lessee, for the rent on the privity of contract, notwithstanding such acceptance.

*Saunders* for the defendant said, that if the rent in question was not a rent at all, but only a debt upon the contract which lies in privity, then the plaintiffs cannot bring their action until the last day of payment of all the rent is past, for so is Co. Litt. 47. b. expressly. But he said that it was a rent payable for the tithes, though it is not issuable out of the tithes ; as if a barn with a portion of tithes be demised, reserving £100 a year rent, it is reserved as well in respect of the tithes as of the barn ; and if the tithes are evicted, the rent must be apportioned, for otherwise such a lessee will pay £100 a year, being the whole rent, for the barn, which perhaps is not of the yearly value of forty shillings, which would be against all reason and justice. And so is the case of *Dubytofte v. Curteene*, Cro. Jac. 453. (1) and it is there said that though the rent in such case is only issuing out of the barn in point of remedy, yet it is issuing out of both, as well the tithes as the barn, in point of render. And in the case of *Talentine v. Denton*, Cro. Jac. 111. Moor, 778. S. C. (2) it is agreed by YELVERTON, WILLIAMS and TANFIELD, that if a bishop make a lease for years of tithes only, reserving the ancient rent, such lease will bind the successor ; but not if a bishop make such a lease for life ; and the reason is, because on a lease for years the successor has remedy for the rent reserved by an action of debt, but he has no remedy for the rent reserved on such a lease for life. And this resolution was twenty years after *Jewel's* case, which, as may well be collected out of the book, was a case upon a lease for life, and not for years, and so no resolution in the point, but at the end of the case, an extrajudicial opinion on the point of a lease for years. Then if the successor of a bishop have a remedy by action of debt, for such rent reserved on a lease for years, it follows that it is such a rent as will go with the reversion, and does not lie in privity of contract ; for the successor of a bishop, who was lessor, is not privy to the contract of his predecessor, but has only a privity of estate, namely, the reversion : (3) and consequently the rent in the case at bar will go along with the term to the assignee, who will be bound to pay it to the lessors ; and they having in the present case accepted him to be their tenant, and accepted rent, cannot resort again to the defendant and demand the rent of him, as the rule is in *Overton* and *Sydall's* case, 3 Rep. 24. a.

TWYSDEN, J. said, that it is not adjudged in the book, 3 Rep. 24. b. *Walker's* case, that if the lessor accept the rent from the assignee, that the lessor is so bound by it, that he cannot afterwards sue the lessee for it ; but the words of the book are, " also it was said."

But to this *Saunders* answered, that in the case of *Marsh v. Brace*, Cro. Jac. 334. it is expressly so adjudged, 1 Saund. 240. *Thursby v. Plant*.

And thereupon the court said that it was a case of great consequence ; for many persons are seised of tithes in fee as of their lay inheritance ; and if they lease their tithes reserving rent, and the rent is adjudged to be only a debt by privity of contract, then the heirs, to whom the reversions of such tithes descend, will not have any remedy for rent which shall become due in their own time ; and therefore it was worthy of much consideration ; and the court seemed to incline that it was a rent which would go with the reversion, and that the assignee would be bound to pay it : (4) but it was not adjudged, for the plaintiff's

(1) *Ante*, 262.

(3) So Lord Hale (see Mr. Hargrave's note (3) to Co. Litt. 44. b.) says, " that if " tithes have been usually let to farm, they " cannot be leased for life to bind the successor ; but they may be leased for twenty-one " years, rendering the ancient rent, and shall " bind the successor ; adjudged in *Denny's* " case ; and the rent goes with the reversion." See Bac. Abr. Leases, 352.

(2) *Ante*, 162.

(4) From the above cited cases in Cro. Jac. 111. and 1 Ld. Raym. 77. and the opinion of Lord Hale, and also from the inclination which the court discovered to support this as a lease, with all the properties incident to a lease of corporeal hereditaments, it should seem, that a lease for years of tithes was good at the common law, and the rent went along with the reversion, and the assignee of the lease



plaintiff's counsel took two objections to the plea. 1. That it is said, that the plaintiffs being a corporation aggregate, had received rent from the assignee, and accepted him to be their tenant, but it is not shewn that such acceptance is by deed under their common seal, and without that there could be no acceptance; wherefore the plea was insufficient, and so the matter of law would not now come in question, as he concluded.

But to this it was answered, that if a deed be necessary it is implied in the plea; for an acceptance being pleaded, every thing that makes it to be a good acceptance is implied, for otherwise it is no acceptance at all; and there are several cases to this purpose. In *Plow. Comm.* 143. *Throckmerton v. Tracy*, pleading that abbot and convent made a lease for life, without shewing any warrant of attorney, under their common seal, to make livery is good; so in *Cro. Jac.* 411. the bailiffs and commonalty of Ipswich entitled themselves, and did not shew any letter of attorney under their common seal to receive livery, and without such letter of attorney the feoffment could not be good, yet the

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lease was bound to pay it, and the reversioner might bring an action of debt for the rent against the assignee. However, this point appears to have received a more solemn decision in a subsequent case, where it was held, that a covenant in a lease for years of tithes, made by the lessee respecting them, should run with the tithes, and bind the assignee of the lessee, and consequently, that an action would lie against him for a breach of such covenant. That was an action of covenant by a rector of a parish against the assignee of his lessee for years of his tithes, who had covenanted for himself, his executors and assigns, not to let any of the farmers of the parish have any part of the tithes without the plaintiff the lessor's consent: and the breach was that the defendant the assignee, after the premises came to him by assignment, let some farmers in the parish have part of the tithes without the plaintiff's consent. After verdict for the plaintiff, it was objected in arrest of judgment, that the action did not lie against the assignee, for it was a mere personal and collateral covenant binding the lessee only; and that tithes were incorporeal lying in grant, and therefore such a covenant could not run along with them, as it would with lands which lay in livery; and that a rent could not be reserved out of them, for if a lease were made of them by deed for years it was good by way of contract to have an action of debt against the lessee, but the lessor could not distrain; and that the assignee of the tithes was not chargeable with the rent, and consequently the defendant could not be chargeable with breach of covenant in that case. But it was answered and resolved by the court, that the action was maintainable against the assignee; for as to the objection that tithes were incorporeal, and therefore the assignee was not bound; they answered, that tithes were a tenth part of the profits of the land; the profits of the land was the land itself; tithes were tangible and visible, might be put in view in an assize; an ejectment lay for them; *præcipe quod reddat* lay of a portion of tithes, and they were realized by statute 32 H. 8. c. 7. s. 7; a warranty might be annexed to incorporeal inheritance; and that they had every property of an inheritance in land, except that they lie in grant and not in livery, and *Dyer*, 85. a. b. was cited. And as to the objection

that a lease of tithes was not good, and that the assignee was not chargeable with the rents, they cited the argument of *Saunders* in this case, which they said was an exceeding good one, and with which they concurred, and they also cited Sir T. Raym. 18. *Tippin v. Grover*: and said that debt lay for rent, reserved upon a lease for years of tithes at the common law. 3 Wils. 25. *Bailly v. Wells*.

The statute 32 H. 8. c. 7. s. 7. having put tithes in the hands of lay improPRIATORS upon the same footing with any of their corporeal hereditaments, and turned them, as it were, into lands and tenements, it seems to follow, that since that statute a lease made of tithes by a lay improPRIATOR for years has the same properties, except as to the remedy by distress, as a lease made by him of any of his lands and tenements: and therefore he may bring an action of debt for rent against the assignee of his lessee of tithes in the same manner as he can do against the assignee of a lease of his lands; and the best opinion seems to be, as we have already observed, that ecclesiastical persons might also make a lease of their tithes for years, and the rent would go with the reversion to their successors; but neither lay improPRIATORS nor ecclesiastical persons could make a lease for life. However, the statute 8 Ann. c. 14. has enabled lay improPRIATORS to make leases of their tithes for life, and to bring debt for the rent; and ecclesiastical persons, as well as some other corporations, are now enabled to do so by statute 5 Geo. 3. c. 17. by which it is enacted, that all leases for one, two or three lives, or any term not exceeding twenty-one years, of any tithes solely, by any bishop, college, or hall, dean and chapter, precentor, prebendary, hospital, or any other person who is enabled by statute to make leases for one, two or three lives, or any term of years not exceeding twenty-one, of any lands, tenements, or other corporeal hereditaments, shall be as effectual against the lessors and their successors, as any leases of lands or other corporeal hereditaments made by them; and in case the rent reserved upon such leases shall be in arrear for the space of twenty-eight days after it is payable, they may bring an action of debt against the lessee for such rent, in the same manner, as any landlord can do to recover his rent.

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pleading was ruled to be good enough, because such letter of attorney was implied in the pleading: and so in Cro. Car. 169. *Edgar v. Sorrell*, an entry for a forfeiture was pleaded to be made by the dean and chapter of Norwich, being a corporation aggregate, as the plaintiffs are here, and an exception was taken to it that there was no deed or warrant to enter alleged by them to be under their common seal; but the pleading was adjudged good, because a sufficient entry shall be intended, and all necessary circumstances are implied. And it was further said for the defendant, that a deed under the plaintiffs' common seal perhaps was not necessary, for a corporation aggregate can do many things without any writing, as retaining servants, and the like; see for this 4 H. 7. 6. 13 H. 7. 17. 13 H. 8. 12. But it is not much relied upon, for the court was well satisfied with the former cases, that the pleading was good enough in this point.

The second exception was, that the pleading of the acceptance of rent was vicious and insensible; for it is said that the plaintiffs accepted the said rent, to wit, sixpence of the said rent, and accepted the said John Vaughan their tenant of the said tithes. *Saunders* answered, that it was true that these words, sixpence of the said rent, were superfluous, and inserted by the mistake of the clerk, but that the sense, omitting those words, was perfect and certain enough; *ut utile per inutile non vitiatur*.

*Sed non allocatur*, For this fault alone judgment was given against the defendant by TWISDEN, RAYNSFORD, and MORTON, J. (KEYLINGE, C. J. being absent,) who said that the plea in this point was altogether insensible. But I believe their principal reason was, because they would not determine the matter of law.

#### H. 23 Car. 2. C. B. *Thornton v. Teisdall*. [2 Keb. 744.]

The court thought that in a joint prohibition tenants in common must declare severally, because tithes concern inheritance, and not bare profits; but they left the other to demur.

**S**TOT prayed a joint prohibition for eighteen defendants, in suit for tithes in kind, suggesting the land was barren heath in Northumberland, and discharged by statute; which the court granted, but conceived it would not hold jointly, unless, on appearance, the defendants, being all tenants in common, declared severally, because tithes concern inheritance, and not bare profits; but the court left the other to demur.

#### E. 23 Car. 2. B. R.

#### *Pellow v. Kingsford*. [1 Vent. 126.] 2 Lev. 1. 2 Keb. 756.

In debt upon 2 E. 6. for not setting out tithes in the parishes of D. and S. not shewing how much in D. and how much in S. is good, for the action is but in nature of trespass, and to punish the tort in not performing the statute.

**I**N an action for debt, *sur l'estatute* 2 E. 6. for not setting out tithes. After verdict for the plaintiff, it was moved in arrest of judgment,

That the lands out of which the tithes were demanded, were shewn in the declaration to lie in two parishes; so that the plaintiff ought to have made several titles, and also to have shewn how the tithes should have been set out upon the land, (viz.) how much in one parish, and how much in the other.

But it was held to be well enough; for this action is but in the nature of trespass, and to punish the tort in not performing the statute.

#### E. 23 Car. 2. Scacc. *Wenham v. Thetcher*. 1 Wood, 112.

Sussex, 30th May, 1671.

A payment of 3*l.* per annum by the lord of a manor, in lieu and in discharge of all tithes issuing out of the manor, held good.

**T**HE bill was, to be relieved for certain tithes in kind, in the bill mentioned, from sixty acres of land, lying within the parish of Haylesham, in the county of Sussex, and in the defendant's occupation.

The defendant denied the plaintiff's right to tithes in kind, for, that the lord of the manor of Otham had for forty years paid a composition of 3*l.* per annum, to the vicar of Haylesham, in lieu and discharge of all tithes issuing out

out of the said manor, and that the said composition is paid for the said lands in the defendant's occupation.

The court directed a trial at law, whether tithes were due and payable to the vicar of Haylesham, for the lands in the defendant's occupation; and a verdict was given for the defendant.

The court accordingly ordered the said bill to be dismissed.

M. 23 Car. 2. Scacc. *Risden v. Crouch*. 1 Wood, 117.

Kent, 26th October, 1671.

**T**HE bill stated, that the plaintiff, for four years past, is and had been vicar of the parish of Ashford, in the county of Kent, and ought to have had and received all manner of tithes and church duties, yearly arising, &c. within the said parish, due to the vicar; that the defendants for the same time have enjoyed several messuages, lands, and tenements, and several hop grounds planted with hops, within the said parish, and have picked and carried away the same, without setting out or ordering the tithe thereof, or any thing in lieu, and had several other titheable matters and things, the tithe whereof ought to have been answered to the plaintiff, but that they refused, saying, that the plaintiff had no right to the tithe of hops.

The defendants admitted their inhabitaney, and set forth the quantities and values of their hops, and then stated, that there was and had been an ancient custom, time out of mind, in the said parish, that every planter of hops should pay to the parson of the said parish, 6s. 8d. for every acre in lieu of the tithe thereof, and that the same of right belonged to the parson of the said parish, who had constantly, according to such custom, received the same.

The court declared, that there can be no such custom for the payment of a *modus*, in lieu of the tithe of hops, to the parson, for that hops, being in their nature small tithes, do belong to the vicar.

The court therefore ordered, that the defendants shall pay to the plaintiff the values of the tithes of their hops, which they had in the years aforesaid, according to values set forth in their answers, viz. the defendant Crouch 7*l*. for the two years mentioned in the bill; and the defendant Lounds 20*s*. for 1669: the plaintiff being willing to accept thereof accordingly.

H. 24 Car. 2. B. R. *Wall v. Bezier*. [2 Keb. 883.]

**N**ORTH, Solicitor, prayed a prohibition to the ecclesiastical court of Durham in suit for tithes of wool, on custom in the parish, to set out one fleece from six to sixteen, and that the parishioner packs it, and the parson takes one unseen and untouched; but this being denied in exchequer, and in C. B. and here in this court, and in the courts below, it was denied now; but the court held clearly that a prohibition might be granted between party and party, as well as *habeas corpus*, hence, to the ecclesiastical court of Durham, the suit being *contra coronam*; but this custom to take unseen, as Hob. is unreasonable.

Prohibition will lie from B. R. to the ecclesiastical court of Durham, as well as *Habeas Corpus*, the suit being *contra coronam*.

E. 24 Car. 2. B. R. *Knight and others v. Peepes*. [3 Keb. 24.]

**B**EDINGFIELD prayed a prohibition in suit for tithes on parol agreement to retain, having been several years paid, on *Small v. Tanner's* case; (1) and to this the court inclined, but being an unsettled point, *adjournatur*; but agreed that on *nil debet* this agreement is a good mitigation of damages; also if the execution of this agreement, by several years payment be suggested, a prohibition ought to be.

(1) *Antz*, 170.

was adjourned; but agreed that on *nil debet* such agreement is a good mitigation of damages; also if the execution of the agreement by several years payment be suggested, a prohibition ought to go.

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The court of exchequer held, that custom to pay a *modus* of 6s. 8d. an acre to the parson, in lieu of tithes of hops was void, for that hops, being in their nature a small tithe, belong to the vicar.

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A custom to set out for tithes of wool one fleece from six to sixteen, the parishioner to pack it, and the parson to take one unseen and untouched, is unreasonable.

The court inclined to grant a prohibition on a parol agreement to retain, having been several years paid, but being an unsettled point, it

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A parson makes a lease for years, which is confirmed, this does not determine by his death, as by non-residence. A non-residence within the statute is a non-residence voluntary, and punishable by the statute.

M. 24 Car. 2. B. R.

*Bayly v. Munday.* [2 Lev. 61.] 1 Vent. 244. 3 Keb. 46. 107. 193.

**E**JECTMENT, and upon *non culp.* and a special verdict, the case was, a vicar, having made a lease for years, did after, upon the 11th of September, the first lease being unexpired, make a new lease for twenty-one years, to commence at Michaelmas next, rendering the ancient rent, and more, payable at four days, or within twenty days after, which lease was confirmed by the bishop, being patron and ordinary, and by the dean and chapter; the vicar died: his successor made a new lease to the lessor of the plaintiff, upon which this ejectment was brought; and the case was twice argued at bar, viz. this term by *Thursby*, for the plaintiff, and *Turner*, for the defendant; and Hill. 23 & 24. by Sir *William Jones*, for the plaintiff, and Sir *Richard Hardres*, for the defendant. And after, in Trinity term, judgment was given for the plaintiff by the whole court, viz. *HALE*, *TWYSDEN*, *RAINSFORD*, and *WYLDE*. In this case three points were argued: First, whether the lease of a parson or vicar, so confirmed, be void by his death, according to what is said to be adjudged in *Mott* and *Hale's* case, 3 Cro. upon the statute of non-residence, viz. if death be a non-residence within this statute. And resolved by the whole court, it is not; for a non-residence within the statute is a non-residence voluntary, and punishable by the statute; but a dead man is not punishable. And non-residence may be excused by sickness, 6 Co. *Butler* and *Goodale's* case, and Moor. pl. 609. by the exhibition of the ordinary. And in the case of *Mott* and *Hale*, though reported by Croke to be adjudged, Sir Francis Moore says, in his report of it, the court were divided in opinion in that point. 2. The whole court agreed, that the reservation of this rent at four days, or within twenty after, does not make the lease void, it being for the advantage of the successor; as suppose his predecessor die after the four days, and within the twenty. 3. All agreed, that this lease, made the 11th of September, for twenty-one years, to commence at Michaelmas next, is a lease in reversion, and therefore void; but *HALE* said, the first lease being *in esse* does not make this a lease in reversion, but a concurrent lease, which a vicar may make, the former lease being to determine within three years; to which the rest said nothing, *TWYSDEN* only seeming to disagree thereto.

Tr. 24 Car. 2. B. R.

*Sir William Juxon v. Lord Byron.* [2 Lev. 64.] 1 Freem. 67. 75.

Spiritual court may proceed upon an act, or other temporal matter incident, as long as they proceed according to the rules of common law.

**S**IR WILLIAM JUXON prayed a prohibition to the spiritual court of Chester, shewing, that the Archbishop of Canterbury, being seised of the impropriate rectory of Rachdale, in the county of Lancaster, and diocese of Chester, demised the same to the Lord Byron for twenty-one years, (about the year 1661) who afterwards mortgaged the same to Pery, who was indebted to Sir William, and went off to places unknown; whereupon it was enacted, by a private act of parliament, that this mortgage should be invested in Sir William Juxon, to all intents and purposes, as it was in Pery: and that the Lord Byron libelled in the ecclesiastical court, against divers of the tenants for tithes due after the said act; upon which Sir William Juxon came in *pro interesse suo*, and set forth all the said matter to the court; yet they nevertheless proceeded and gave sentence against the tenants for their tithes, for which he prayed a prohibition. First, Because the said court is not to meddle with the construction of acts of parliament, 2 Roll. 306, 307. Secondly, Admitting they may hold plea of a temporal matter incident in an ecclesiastical cause, according to 12 Co. 65. *Fuller* and *Wiscard's* case, yet this is no longer allowable than while they proceed according to the common law in that matter, for they shall not be suffered to proceed in an incident temporal matter, contrary to the course of the common law. And here they have determined contrary to the common law, that the rectory in effect was not well settled in Sir William by the act of parliament, because they had given the tithes due after the said act,

to

to the Lord Byron. But the prohibition was denied *per HALZ*, and the whole court. They agreed, that the spiritual court, though they may try matters conusable at common law, which fall in incidentally where the principal is ecclesiastical; yet they shall be prohibited if they proceed in the trial of such incident temporal matter otherwise than the common law would: but they have not done so here; for the act vests the mortgage in Sir William Juxon as it was in Pery; and Pery being but a mortgagee, and out of possession, and Byron the mortgagor in possession, Pery could not, at common law, have recovered the tithes, till he had gained the possession of the rectory by ejectment; no more can Sir William Juxon. But till the rectory be recovered from the Lord Byron, the tithes belong to him. So that they have given the same judgment in their court, as this court would have given, and this being affirmed here to be the ground of their proceeding there, a prohibition was denied, without putting the Lord Byron to plead to the suggestion.

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M. 24 Car. 2. Scacc. *Brabourne, D. D. v. Eyres, Kt.* 1 Wood, 126.

Middlesex, 18th November, 1672.

**T**HE bill stated, that the plaintiff, for eleven years last past, had been vicar of the vicarage of Northall, in the county of Middlesex, and thereby was entitled to have all the tithes arising within the said parish, and in particular the tithes of coppice wood, as of poles, saplings, pollards, and standards, growing within the said parish, and not converted into timber; and also the tithes of calves, lambs, wool, pigeons, and all other small tithes: that the defendant, for the time aforesaid, possessed several parcels of coppice-wood or underwood, standards, pollards, and saplings, and did cut down yearly eight acres of poles and standards, and coppice-wood and poles; and did also occupy and possess land in the said parish, and kept and depastured yearly several sheep, and had fallen several lambs, and clipped and sheared the said sheep, from which he had quantities of wool; and also had a pigeon-house stocked with pigeons, and possessed gardens and orchards; the tithes of all which amounted to a large sum, and which the defendant denied to pay.

The court of exchequer held, that wood set out for tithes, ought to be stacked and faggoted.

The defendant answered, and confessed the plaintiff's title to all tithes and duties as the former vicars of the said parish have had; but said that he knew not or believed, that saplings, poles, or other trees, grown to timber, and of twenty years standing, are titheable, although used for fire-wood; neither are pollards titheable, whose growth is above the said age; and as to the said tithe poles, standards, and other woods cut down from the year 1660 to the winter of the year 1669, he said, that in that year all tithes demandable by the plaintiff from the defendant were paid, and accepted by the plaintiff, for all that was due and to be paid for any of the preceding years. But concerning the tithe wood since Michaelmas, in the year 1669, he did then, as he had done in the preceding years, cause the tithe wood to be made up into faggots, upon the plaintiff's promise to pay the charge of faggoting; but the plaintiff had refused to perform his promise, wherefore the defendant had omitted to faggot any more tithe wood for the plaintiff; that since the year 1669, the defendant had caused a full tenth part of such wood as was titheable to be set out for the plaintiff; but that he left the same on the defendant's ground, refusing to take it away, because it was not made up into faggots and stack-wood for him, which the defendant contends he is not bound to do. That he had not, in any of the said years, any sheep depastured a month together in Northall parish, nor the number of seven lambs yeained in a year, except the year 1669, wherein he had fourteen lambs fallen; that he fed and clipped his sheep in his grounds lying in other parishes, where he paid a composition for tithes; and that he had clipped no sheep in Northall but what he bought with wool on their backs ready for shearing. He confessed, that he had two dove-houses in the said parish, but whether tithe pigeons were payable or not, he did not know.

The court, upon reading the depositions in the cause, and after great debate,  
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declared, that the defendant ought to have stacked and faggoted the wood which he set out for the tithes; and that the plaintiff ought to be relieved for his tithes for the years in which the defendant did not set them out.

And in respect the defendant had, and still possessed, four hundred acres of land in the parish of Northall, and only seven acres in the parish of Greenford,

It is further ordered, that the defendant shall pay to the plaintiff tithes of all the wool and lambs proved to be shorn and fallen in either of the said parishes, according to the rates and values they are proved to be worth, deducting and abating out of the same to the said defendant, the tithe wool and lamb of so many sheep as the said seven acres in Greenford could yearly keep and maintain with feeding.

EDWARD TURNOR.  
CHR. TURNOR.  
TIM. LITTLETON.  
EDW. TREULAND.

1673.

No tithes are payable for pasture of plough horses; nor, according to HALE, of saddle horses.

H. 25 Car. 2. B. R. *Anon.* [1 Vent. 236.]

**NOTA**, no tithes to be paid for pasture wherein the plough horses are fed.

And HALE said, so it is of saddle horses.

H. 25 Car. 2. C. B. *Stone v. Peacock.* [1 Freem. 72.]

A prohibition nisi was granted upon suggestion that tares, &c. sowed and cut green for horses, had been tithe-free.

**THE** plaintiff suggested, that time out of mind, he had all the tares, &c. that he sowed and cut green, to give his horses, tithe-free. And a prohibition was granted nisi.

E. 25 Car. 2. Scacc. *Parsons v. Noble, et à contrà.* 1 Wood, 131.

Cumberland, 28th April, 1673.

A custom for the several possessors and occupiers of every ancient tenement within a parish to pay to the rector three bushels of oats and one bushel of bigg, in full satisfaction of all the tithes in kind of oats and bigg within the rectory, held good.

**THE** scope of the first bill was to be relieved upon a pretended ancient custom or manner of tithing of several lands lying within the rectory and parish of Graystock, in the county of Cumberland, whereby the several possessors and occupiers within the said rectory and parish had used to pay to the rector, or his farmer, yearly, for every ancient tenement, three bushels of oats, and one bushel of bigg, in full satisfaction of all the tithes in kind of oats and bigg arising and growing within the said rectory; and that every such bushel had used to contain twenty gallons, and not less.

The scope of the cross bill was, to settle a pretended custom within the said rectory of Graystock, whereby the several possessors and occupiers within the rectory had used to pay yearly to the rector, or his farmer, a certain quantity of bigg and oats, commonly called "bushel tithe," and a certain yearly sum of money, called "pension money," being answerable to the proportion of twelve-pence for every bushel of bigg, and eight-pence for every bushel of oats, in lieu of all tithes; the bushel to contain eight gallons, according to the Winchester measure; the peck proportionably to contain two gallons; and the hoop, being the fourth part of a peck, to contain two quarts, and no more.

To which several bills the respective defendants appeared and answered; and the plaintiffs replied, and issue being joined, divers witnesses were examined in both causes.

The causes came on to be heard this day; and upon opening the pleadings, and reading several depositions taken on behalf of the plaintiffs in the cross cause, and upon long debate,

It was ordered by the court, that the matter be referred to a trial at law, the issue to be, whether twenty gallons or sixteen gallons to the bushel of oats and

and bigg have been accustomed to be paid yearly by the several possessors and occupiers of the tenements in the bill mentioned, within the rectory of Graystock, to the rector, or farmer of the said rectory.

The causes, being continued in the paper of causes, came on to be further heard upon the eighteenth of November last; and upon reading the said order, and the verdict thereupon,

It was then ordered, that a new trial should be had, to be tried before a jury from the county of Lancaster, upon the said issue. But on the 19th of February it was ordered, by and with the consent of all parties, that the causes should be set down to be further heard this 24th of February, 1673; and that, if the court should think fit to alter the issue, the defendants should pay costs for this day's attendance; but on the contrary the plaintiff should pay costs; (1) and the causes now coming on to be further heard, a new issue was ordered to be drawn up in the following form: "That whereas there were several discourses moved and had between the plaintiffs and the defendants, concerning a certain manner of tithing of oats and bigg, commonly called bushel tithe, within the villages of Berrier, Penruddock, Hutton, and Johnby, within the rectory of Graystock; and upon that discourse the plaintiffs affirmed to the defendants, that the several occupiers and possessors of every ancient tement within the said villages, time out of mind, have paid and ought to pay, twenty gallons to the bushel, and no less; and the defendants affirmed to the plaintiffs, that they have paid, and time out of mind ought but to pay, sixteen gallons, and no more: in consideration, therefore, of five shillings to the defendants by the plaintiffs in hand paid, the said defendants upon themselves did assume, and to the plaintiffs then and there faithfully promise, that for every gallon the said bushel, time out of mind, has contained more than sixteen gallons, they would pay to the plaintiffs twelve-pence upon request." The said action to be tried at the assizes to be held for the county of Lancaster; and the verdict formerly obtained upon the first issue to be given in evidence at the trial now directed.

The trial was accordingly had, and a verdict found, that the bushel ought to contain sixteen gallons, and no more.

The cause came on to be further heard on the 28th of November, 1674, when it was ordered, that a new trial should be had at the next assizes for the county of Westmoreland, upon the last issue, (which said trial should be final) upon paying taxed costs.

The cause came on again, and the defendant's counsel informed the court, that the defendants had obtained another verdict upon the last issue, which was to be final to the plaintiffs in the first cause; upon reading the several orders and the *postea*,

It was ordered by the court, that the defendants, Noble and others, shall pay to the plaintiffs, Parsons and Robson, the oats and bigg, commonly called bushel tithe, which are in arrears and due to the said plaintiffs, from the time the same was detained, until the 25th of April, 1673; to be paid in money, according to such price as oats and bigg were sold for in the several years as they respectively grew due, by a bushel containing sixteen gallons and no more, according to the verdicts upon the several issues directed out of this court; and that the said measure of sixteen gallons to the bushel shall be the measure between the plaintiffs and defendants for the time to come. The costs of the two last issues to be taxed, and deducted out of the bushel tithes already due. The costs expended in this court to be spared on both sides. The auditor of the said county to cast up the values of the oats and bigg remaining due, and report the same.

TIM. LITTLETON.  
VERE BERTIE.

(1) Costs were afterwards ordered accordingly.

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PARSONS  
V.  
NOBLE.

1673.

The Queen grants a messuage and all her tithes in B. thereunto belonging and used, and it was found that no tithes were demised; on special verdict the court conceived the tithes did not pass.

T. 25 Car. 2. B. R. *Cockam v. Hale*. [3 Keb. 180.]

**T**HE Queen grants a messuage and all her tithes in B. thereunto belonging and used; and it was found that no tithes were demised: on special verdict the court conceived the tithes passed not; also several bargains and sales are said *debito modo irrotulato*; not said in six months, which is well enough in verdict, but not in a plea; and judgment for the plaintiff.

T. 25 Car. 2. B. R. *Anon.* [1 Freem. 78.]

Upon suggestion of a *modus*, the court will grant prohibition without notice to the other party.

Prohibition will be granted after

**U**PON the suggestion of a *modus* the court use to grant prohibitions, without notice given to the other party.

If they proceed to sentence in the spiritual court in a cause where they have jurisdiction of the libel, the court will not grant a prohibition; but if it be of a matter whereof they have no jurisdiction, they will grant a prohibition, although it be after sentence.

sentence, if the spiritual court had no jurisdiction of the libel; but not otherwise.

M. 25 Car. 2. B. R.

*Kendal v. Pearm.* [3 Keb. 217. 1 Vent. 248. *Anon.*]

Upon affidavit that a plea, that the tithes belonged to another who was rector, had been refused in the spiritual court, prohibition will go.

**B**IGLAND prayed a prohibition on suggestion that the plaintiff had pleaded that J. S. was rector, and the tithes belonged to him, which plea was refused; and in Hil.

1671, between *Morris and Justice*, of tithes in Legingham: and 3 Cro. 228. *Green and Penilden and Taylor*; on the like suggestion a prohibition was granted, which the court agreed, but would do nothing without an oath of refusal, unless libel had been before them, but ordered to shew cause against it; but this being a sinecure, institution and induction are needless.—[*Keble.*]

In a suit for tithes, the defendant pleaded in the spiritual court, that the tithes belonged to another, who was rector, and not to the plaintiff. Which plea being refused, and oath thereof made in this court, a prohibition was granted.—[*Ventris.*]

M. 25 Car. 2. B. R.

*Peters v. Prideux.* [3 Keb. 251. 284. 332. 427.]

On libel for corn tithes fraudulently scattered, and plea that they were

rakings involuntarily scattered, B. R. held, that whether voluntary or not, was no cause for prohibition, but appeal. If however in the spiritual court they agree them

rakings, and involuntarily scat-

tered, and yet adjudge payment, prohibition lies; but no issue can be on the intention of the judge, unless specially declared in the decree, and not suggested by the party only, that *preteritus* of tithes being due of rakings involuntarily scattered, it was so decreed. If it be suggested that the judge refused the plea, issue should be taken on that, for if the plea were accepted, the judge's opinion might be as well on the fraudulent scattering, as that tithes were due of rakings.

**I**N libel for corn (tithes) *minus voluntariè sparsis*: to which the defendant pleads that it was fraudulently scattered, and that hereon sentence was for the defendant in the prohibition. And *Pollexfen* prayed a consultation, because the refusal of the plea of fraud is triable at the spiritual court, though the fraud be at common law.

In prohibition where the defendant suggests suit for tithe corn, and by libel it appears that the defendant permitted it to be so scattered that the farmer could not take it, though it were set out; the plaintiff says it was rakings, and not voluntary scatterings, and this was pleaded in spiritual court and refused; the defendant says that the plea was received, and the proceedings therein *absque hoc*, that the judge refused; the plaintiff allows these rakings, and that under colour of this the judge proceeded; but *per curiam* whether voluntary or not is no cause of prohibition, but of appeal, for this is within their



their comensure; but if they agree them rakings, and involuntarily scattered, and yet adjudge payment, a prohibition lies, being contrary to our law. *Adjournatur*.

In prohibition to a suit for fraudulent scattering of tithes; the plaintiff here suggests a plea refused of *minus voluntariè* scattered, and so no tithes due; the defendant says, this plea was not refused, *absque hoc* that this plea was proved; the plaintiff replies, that sentence, notwithstanding sufficient proof tendered, was given against the matter of the tender, to which the defendant demurred, supposing this a departure; *sed per curiam*, this is a special refusal, as where it is replied, *bene et verum est* the judge received plea, but adjudged otherwise; but here being not said *et sic iudex recusavit*, there can be no issue; and this is more properly evidence of refusal, and no issue can be on the judge's intention, unless specially declared to be against our law in the decree, and not by suggestion of the party, only that *prætextu* of tithes being due of corn involuntarily scattered; it was so decreed. 2 Inst. 652. *Sed adjournatur*.

In a prohibition, the defendant pleads, that in suit for tithes the defendant pleaded that they were rakings, and notwithstanding that, the judge being of opinion that tithes were due for rakings, sentence was against the defendant there, whereupon he prayed prohibition; to which the plaintiff below replied, that the judge accepted the plea and allegation of the defendant, *absque hoc*, that the judge refused the plea, to which the defendant demurred; *et per curiam*, this is only cause of appeal, and the issue should be on the refusal of the plea; for if that was accepted, the judges opinions might be as well on the fraudulent scattering, as that tithes were due of rakings; and a consultation awarded, *nisi*.

### M. 25 Car. 2. B. R.

*Fosset v. Francklin.* [T. Raym. 225. 3 Keb. 208. 217.]

THE lands were parcel of the possessions of the priory of St. John of Jerusalem, and came to the crown by 32 H. 8. cap. 24. and parcel of St. John's Wood, in the parish of Marybone, and Hampstead; and whether they are discharged from payment of tithes by 32 H. 8. cap. 24. was the question upon a trial at bar, and a special verdict found thereupon. But it seemed to HALE, C. J. that they shall not pay tithes, by reason of the word (privileges): and in *Whitton v. Weston*, (1) Bridgman, 32. Latch, 89. Godbolt, 392. pl. 478. the court was divided. But in 2 Cro. 57. Moor, 913. pl. 1291. *Cornwallis v. Spurling*, (2) in debt upon 2 E. 6. judgment was given, that the lands are titheable: and so in a prohibition, 2 Brownlow, 8. 20. *Urrey v. Bower*. (3) *Adjournatur*. But Dyer, 277. b. pl. 60. (4) is, that they were not titheable. And judgment was afterwards given for the defendant, and resolved the lands are not titheable. [*Raymond*.]

In debt on 2 E. 6, cap. 13. of tithes to the value of 40*l*. it was agreed, by Mr. Attorney Finch, and Sir William Jones, &c. for the plaintiff, and Serjeant Maynard, the Solicitor, &c. for the defendant, that the lands were the Priors Hospitallers, and discharged of tithes at the time of 32 H. 8. cap. 24. but whether or not on *Weston v. Whitton*, Bridgman, 32, in Disms. Br. 12. § 43. this be discharged in the hands of the patentee, on 31 H. 8. cap. 13. § 21. was agreed to be found specially; the defendants relying on that judgment, the plaintiff upon the former resolutions; but because it did not appear whether the Hospitallers were discharged only by bull, *quamdium in manibus propriis*, as the plaintiff agreed, or by prescription, as the defendant affirmed; and which is well enough consistent with that bull, which does not take away any prescription that was at common law before, *adjournatur*.

In debt on 2 E. 6 cap. 13. by impropriator of the priory of St. John's of Jerusalem, which came to the crown by 32 H. 8. cap. 24. and so the plaintiff on 2 Cro. 57. Moor, 1291. in Disms. Br. 17. § 25 & 36. *Quarls and Spurling's* case, conceived that it does not partake of the discharge by 31 H. 8. cap. 13.

(1) *Antè*, 340.

(2) *Antè*, 157.

(3) *Antè*, 214.

(4) *Antè*, 59.

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PETERS.  
v.  
FRIEDRUX.

Lands of the Hospitallers may be discharged by prescription, under 31 H. 8. Evidence of a discharge by prescription, non-payment not only in the hands of the owners of the inheritance, but of the King's farmers, and their under-tenants, was proved; and the prescription may be found for the King, his farmers and tenants; for a bull to be discharged *quamdium manibus propriis* does not take away any prescription that was at common law before. So of Cistercians, if it appear that their lands never paid tithes when in tenants hands.

1673.

FOSSBT  
v.  
FRANKLIN.

by the word privileges, or any other words which are useless as to farmers, contrary to *Whitton* and *Weston's* case, on which the defendant relied; and for evidence of a discharge by prescription proved a non-payment, not only in the hands of the owner of the inheritance, but in the hands of the King's farmers of St. John's wood, next Marybone park, in Middlesex, and their under-tenants. It was agreed that the King's farmer is discharged, though the discharge were only in *propriis manibus*, and Sir *William Jones* said it was so adjudged

but the court remembered it not; but held the King's fee-farmer is not discharged, nor no more is his lessee coming under the privilege of the monastery. 2 Co. 43. *Bishop of Winchester's* case; (1) the King, as a spiritual person, may prescribe for discharge for himself and farmers, but by general prescription his farmer is not discharged, much less on a discharge by privilege of order, &c. And the court conceived the prescription must be found for the King, his farmers and tenants; and that non-payment by the under-tenants of the King's farmer is sufficient evidence; so of Cisterians, it not appearing that ever they paid tithes, and yet in tenants' hands; and this was found specially, contrary in the owner's hands. [*Keeble*.]

(1) *Ant2*, 119.

1674.

A suggestion for a prohibition that a copy of the libel has been denied must be upon oath, and is *quousque* delivery.

H. 26 Car. 2. B. R. *Anon.* [1 Vent. 252.]

**N**OTE, when a prohibition is moved for, because a copy of the libel is denied to be delivered, the court requires that oath should be made of the denial, and the prohibition is but *quousque* a copy be delivered.

T. 26 Car. 2. Scacc. *Conant v. Greaves*, Bt.

Sussex, 6th July, 1674.

The best buck and doe is payable yearly by the owner of the forest of St. Leonard's, in lieu of tithes arising in the said forest; and they cannot be withheld for non-payment of the keeper's fees.

**T**HE bill stated, that the plaintiff *Conant* had been lawful rector of Beeding, in the county of Sussex, for five years past, and was entitled to all the tithes within the said parish that had been accustomed to be paid; that the defendant was owner of certain lands called the forest of St. Leonard's, within the said parish, and ought to pay all the great and small tithes arising therein to the rector, or the best buck and doe yearly, at every season, in lieu of the tithes for the said forest; that the defendant, for five years past, had refused to pay any tithes for the said forest; that the plaintiff *Turnor*, as tenant to the said rector, ought to have the best buck and doe yearly, at every season, paid to him in specie, the same being worth 10*l.* per annum, in full satisfaction for the tithes arising yearly out of the said forest.

The defendant confessed that he was owner of the forest of St. Leonard's; and that before and since the plaintiff was rector of Beeding, he had given orders to his keepers or tenants of the said forest, that they should kill the tithe-deer when demanded; and that the reason they had not, for two years past, been paid was, that the plaintiff refused to pay the keeper's fees.

The court ordered, that the defendant shall forthwith pay to the plaintiff *Turnor* the several bucks and does in arrear in specie, due and owing, as other bucks and does are usually paid, upon warrants.

And it is this day further ordered, that the defendant shall, for the future, pay and deliver to the plaintiff *Turnor*, the lessee, during the term of his lease, and after the expiration to the rector, a buck and doe yearly of forest deer, in specie, in lieu of the tithes of the said forest, at the respective seasons, for the time to come, as other bucks and does are usually paid and delivered, upon warrants; without costs.

EDW. TURNOR.

CHR. TURNOR.

TIM. LITTLETON.

EDW. THURLAND.

M. 26 Car. 2. Schacc. 1674. *Wickham v. Thrower.*

Suffolk, 19th November, 1674.

1674.

**T**HE bill stated, that the plaintiff was, and for ten years past had been, lawful rector and incumbent of the parish of Wilby, and for all that time had been entitled to, and ought to have had and enjoyed the tithes, and customary duties and payments for tithes, within the parish; that the defendants, for one year, were proprietors and occupiers of certain farms and lands, and kept and depastured thereon cows for the dairy, and had calves therefrom fallen; that within the parish there were, and had been, time out of mind, the customs and manners of tithing following:

Thirteen cheeses payable yearly in lieu of lactage and tithe-milk.

First, For every calf there, if under the number of ten, the seventh calf for tithe, the parishioner and occupier to be allowed 2d. for every calf there wanted from the number of seven to the number of ten calves.

Secondly, That if there fall above ten calves, for every seventh calf above that number, the seventh calf, with such allowance to make up such seven calves to the number of ten; and in like manner for a greater number of calves fallen, the same being titheable, one of every tenth calf fallen, without such allowance.

Thirdly, That the said tithe-calf and calves were and are payable to the parson there, and to be delivered at the parsonage-house, every calf that falls before our Lady-day yearly, at the age of seven weeks; and every calf fallen after the said feast, at the age of five weeks.

Fourthly, That every parishioner and occupier of lands there, for and in lieu of lactage and tithe-milk, had used to pay and deliver thirteen cheeses yearly, each cheese to be made of all the milk of the evening and of the morning following, of the evening flett and of the morning unflett, as it comes from the cow; the first cheese of the said thirteen cheeses to be made on the 3d day of May yearly, and in like manner upon every tenth day following, yearly; seven of the said thirteen cheeses to be delivered at the church or parsonage-house at Wilby, upon St. Mary Magdalen's-day, and the remaining six to be delivered at the same place upon Holy Rood-day yearly. That the defendants refused to set forth what calves they had fallen in that year, or to make satisfaction for the same; and for their tithe-cheeses do set forth other customs, in prejudice of the plaintiff.

The defendant Thrower answered, and confessed, that the plaintiff was rector for the time in the bill mentioned, and entitled to all the customary dues and payments for tithes there; that he was proprietor and occupier of the lands, and a farm, whereon he kept and depastured several cows, from which he had calves; that he believed there had been such ancient customs and manners for tithing of calves and milk, as in the bill set forth, excepting only that the tithe of calves belonging to the parson were not to be sent home to the parsonage-house by the occupier or proprietor, but to be delivered, at the time appointed by the custom, at the crib of the parishioner, whither the parson ought to send for the same; and also, except that the thirteen cheeses were to be made of the milk of the day in the morning flett and in the evening next following unflett, as in the bill was mentioned; that there was but one tithe-calf due from him, which he kept for the plaintiff, and gave him notice of the same; and that his tithe-cheeses for that year were delivered, part in the chancel, and part to the plaintiff's wife, in the church-porch; that the cows were not milked at unusual hours, but at such times as they were usually milked when a cheese is to be made for themselves, or at night.

The defendant Clowting put in the same answer.

Upon opening the bill and answers, and hearing counsel, and reading the deposition of Dr. Ball, (taken in the cause) and on debate of the matter, the difference between the said parties touching the tithe-calf appeared to be, that the plaintiff required that the same should be brought to the parsonage-house, whereas the defendants alleged that the same should be delivered at the crib; and that the difference about the tithe for cheeses was, that the plaintiff alleged

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alleged that the same should be made of the evening's milk preceding the tithing day, flett upon the morning of the tithing day, and the morning's milk of the tithing-day unflett, and the defendants alleged that the same should be made of the morning's milk and evening's milk of the same day.

It is ordered by the court, that for the future the tithe-calves, as they come due, shall be paid and delivered to the plaintiff at his parsonage-house.

And it is also ordered, that, for the future, the tithe-cheeses which shall be yearly paid to the plaintiff, shall be made of the evening's milk preceding the tithing-day, flett up in the morning of the tithing-day, and the morning's milk of the tithing-day unflett, according to the custom set forth in the bill, and at such hours and times as the cows are milked for the parties themselves on other days not titheable, without fraud.

And that the tithe-cheeses shall be delivered, for the future, at the parsonage-house of Wilby aforesaid, and not at the church-porch or chancel of the church.

And whereas it is alleged, by the defendant's counsel, that the plaintiff has commenced several suits in the ecclesiastical court against the defendants, touching other titheable matters arising within the said parish,

It is ordered by the court, that the said matters in difference in the ecclesiastical court and also the difference touching the tithe-calves and cheeses, pretended to be due to the plaintiff, for the time in the bill mentioned, from the defendants, be referred to the determination of the said Dr. Ball, to end the said matters in difference, if he can; and if he cannot end the same, then the said parties are to attend the LORD CHIEF BARON, in order to the determination and composure of the said differences, without costs on either side.

EDWARD TURNOR.

CHR. TURNOR.

TIM. LITTLETON.

EDW. THURLAND.

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H. 26 Car. 2. Scacc. *Widdrington, D.D. v. Barker.*

Norfolk, 11th February, 1674.

Tithes of coleseed decreed to the rector and not the vicar.

**T**HIS was a bill to be relieved from the tithes of coleseed, in Terrington; the plaintiff being rector, the defendant Henson, vicar, and the other defendants inhabitants.

The court, after hearing counsel on both sides, and reading the depositions of several witnesses examined in the cause, took time to consider of the matter, and the 29th of April, 1675, upon hearing counsel on both sides, and on full debate, and consideration thereof had,

The court is of opinion, that the said tithes of coleseed are due, and ought to be paid to the plaintiff, being rector, and not to the curate or vicar: that the defendants, Barker and others, shall satisfy and pay the plaintiff, the value of the said tithes of coleseed sown by them upon the lands holden in the said parish for one year; and that the said defendants shall not be sued, molested, or disquieted for the same by the defendant Henson, the curate or pretended vicar of Terrington; and the plaintiff to have his taxed costs.

EDW. TURNOR.

TIM. LITTLETON.

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Tr. 26 Car. 2. Canc. *Anon.* [1 Freem: 303.] 2 Eq. Ca. Abr. 731.

Demurrer to the jurisdiction of the court of chancery in a bill for tithes over-ruled; and the Lord Keeper Finch said, that the exchequer did not hold plea by English bill till 33 H. 8. 39.

**A** BILL was exhibited for tithes, and the jurisdiction of the court demurred to; but the demurrer overruled, and the defendant ordered to answer. And it was said by FINCH, Lord Keeper, that the court of Exchequer did not hold plea by English bill until the statute of 33 H. 8. 39.

And the Lord Keeper Finch said, that the exchequer did not hold plea by English bill till

Tr. 26

Tr. 26 Car. 2. Canc.

1674.

*King v. Brownlow.* [1 Cha. Ca. 233.] 1 Eq. Ca. Ab. 133.

**A** BILL was exhibited in Chancery concerning tithes and bounds of a parish, which proceeded to answer and replication. Then he exhibited another bill in the Exchequer, and there witnesses were examined, and now proceeds again in Chancery, and replies. The defendant pleaded the proceedings and examination in the Exchequer, and ruled good as to the examination of the same matters, which being examined there, were not to be examined in Chancery.

pending in Chancery, in which the plaintiff had proceeded to answer and replication, before the bill in the Exchequer exhibited.

Witnesses who have been examined in a suit for tithes in the Exchequer, shall not be examined to the same points in another suit depending in the Exchequer.

M. 26 Car. 2. B. R. *Bishop's Case.* [3 Keb. 383.]

**EX** *motione* Hed to change a *venue* in action upon the case, for suing for tithes of hops, contrary to *modus* of 2s. per pound in the Wild of Sussex, laid in Middlesex, the court conceived this action would not lie, though *falsè et malitiosè et scienter*, &c. the court refused it because of partiality in the counties of Sussex, Kent, &c. but at last altered it to Essex.

*modus*, would not lie, though "falsely, maliciously, and knowingly, &c."

The court thought that an action on the case for suing tithes of hops, contrary to a

M. 26 Car. 2. B. R. *Anon.* [1 Vent. 265.]

**A** SUIT for a pension may be in the ecclesiastical court, though by prescription; but if it be denied to be time out of mind, then a prohibition is to go, so that the prescription may be tried at law, as a *modus decimandi, mutatis mutandis*. But if a writ of annuity be brought at common law, he can never after sue in the spiritual court; for his election is determined. 1 Mod. 218.

It was said by the court, that two might join in a prohibition, though the *gravamen* were several; but they must sever in their declarations upon the attachment.

Two may join in prohibition, though the *gravamen* be several, but they must sever in declaration.

A suit for a pension may be in the spiritual court, though

by prescription, but if denied to be time out of mind, a prohibition will go.

1675.

E. 27 Car. 2. B. R. *Lady Fitzwilliams v. Westby.* [3 Keb. 458.]

**W**ILLIAMS prayed prohibition in suit for prædial tithes in consistory at Chester, the defendant, by allegation of lease, claiming a *dies datus* for life; the plaintiff replies by allegation of lease precedent; the defendant shews a lease precedent to his by rejoinder: and on 2 Cr. 350. pl. 3. for the plaintiff prayed prohibition in his own cause, as has been often ruled on appeals; yet for the bare trial of a precedent lease no prohibition; but because they adjudged the law contrary to the lease, that is ill, unless delivered after the day; and prohibition was awarded.

The bare question of a precedent lease may be tried in the spiritual court, but if they decide contrary to the common law, prohibition lies.

Tr. 27 Car. 2. B. R.

*Darrel v. Withers.* [3 Keb. 479. 514. 535. 728.]

**I**N trespass by parson against the vicar, for taking clover-grass, justified by the defendant as vicar, the court conceived that is due to him that has the tithe hay and grass, being no grain, no more than saffron, &c.; and by TWISDEN this has been often ruled in the circuit. And the bar being ill in saying he was vicar, *tempore captionis et diu ante*, not said at the time of tithes set out, and the replication new assignment, the court advised to mend, and bring the right in question.

The tithe of clover-grass is due to him who has the hay and grass, being no more grain than saffron, &c.

TRESPASS of taking away clover-grass hay, the defendant avers he is vicar, and

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DARREL  
v.  
WITHERS.

and that it was tithe of grass which belongs to the vicar; the plaintiff by new assignment replies insufficiently; to which the defendant demurred. And *Saunders* for the plaintiff excepted, that it is not said the defendant was vicar when the tithes were severed, but only that the defendant was at that time of the trespass vicar of Kingsclere, *et dis ante*, and that at trespass the hay was tithes of grass then lately growing; which by *Pollesfen*, for the defendant, is good to a common intent. *HALES, C. J. super* by intendment is after *dis*, and so may be intended to overreach it, that he was vicar at severance; but this is traversable, and so should be precisely alleged. *See adjournatur*.

In trespass the defendant pleaded the hay grew in Kingsclere, and A. was vicar at the time of the taking, and took it as tithes; to which the plaintiff makes a new assignment of the trespass in other places; to which the defendant demurred, being for carrying away hay cut, not for cutting the grass; which the court agreed ill; but the party agreed to amend and try *de novo*, &c.

TRESPASS of taking forty cart-load of hay in Kingsclere: the defendant pleads that the hay grew in D. and that the tithes thereof belong to the vicar, and the defendant as servant, &c. The plaintiff replies that these were growing on other lands in Kingsclere, *absque hoc* that they grew in D. the lands alleged by the defendant: to which the defendant rejoins that his grew in D. *absque hoc* it grew in the plaintiff's land, because this being but a common bar, the new assignment had been sufficient in replication, and the traverse is void; which *TWISDEN*, Justice, agreed, and so is the rejoinder; but parties agreed to pay 40s. and pleaded not guilty for the rest.

Tr. 27 Car. 2. Scacc. *Hatcher v. Ridley*. 1 Wood, 149.  
Lincolnshire, 30th June, 1665.

A custom for all occupiers of marsh meadow or pasture land not living in the parish, to pay 12d. per acre for the tithe of sheep and cattle depastured, and for tithe hay, held good.

THE plaintiffs, as executors of the last will and testament of Charles Skipwith, deceased, exhibited their bill, stating that the said C. Skipwith, by lease from the dean and chapter of Lincoln, dated the ninth of January, in the eighteenth year of his present Majesty's reign, was seised to him and his heirs during his own life, and the life of two others, of and in the rectory or parsonage impropriate of Gosberton, otherwise Gosberkirke, and of all messuages, glebe lands, tithes, customary tithes, or rates for tithes, oblations, obventions, and other duties, to the said rectory and parish belonging; that the said C. Skipwith, for several years past, was owner of the said rectory, and thereby entitled to the tithes and rates for tithes arising within the said parish; that the defendant (living out of the said parish) was, for several years, farmer and occupier of certain marsh lands in the said parish, called Sir Robert Carr's Marsh, containing four hundred acres, worth four hundred pounds a year, which he stocked and depastured with sheep, beasts, and other titheable cattle; that there has been a custom, time out of mind, used in the said parish, that all persons living out of the parish, and occupying any pasture or meadow grounds in the marshes in the said parish, had used to pay yearly to the owners of the rectory twelve-pence an acre for the tithe of sheep and cattle depastured within the said parish, and for tithe hay; that the said C. Skipwith, on the eleventh of November, 1672, made his will, and appointed the plaintiffs his executors, and died in October, 1673; and that they had proved the same, and thereby become entitled to the said rate tithe, which the defendant refused to pay.

The defendant answered, and set forth, that Carr's Marsh contains, by estimation time out of mind, two hundred and forty customary acres, and that a *modus* or rate tithe had been paid for the same, of twelvepence the customary acre, by occupiers not inhabiting in the said parish; that he was occupier of certain marsh lands in the said parish, but not four hundred acres; that he occupied part of the said two hundred and forty acres; that he and his under-tenants fed sheep and cattle thereon; that he knew not how the plaintiffs reckoned the acres, or how their *modus* or rate tithe was applicable thereunto, but conceived the same to be a new invention to destroy the old *modus*, which, time out of mind, had been concerning marsh land in that parish; that the parishioners

parishioners of Gosberton, time out of mind, had used to keep books of accounts for levies, taxes, and parish payments, and in them, or some other books, were contained (in nature of a terrier) the number of acres of marsh lands in the said parish (whereof the two hundred and forty acres are parcel); that according to that number, twelve-pence the acre had been, and ought to be, paid, for all levies, taxes, tithes, and parish dues, by every farmer or occupier not inhabiting in the said parish, according to the estimation in the said books and terriers, and not otherwise; that he had, for the same time, farmed part of the said two hundred and forty acres; and that, according to the custom, he tendered, after the said rate tithe, the sum due, which was refused, and that he was willing to pay the same.

The plaintiffs replied, and thereby set forth, that the composition of twelve-pence an acre ought not to be paid after the common estimate of the number of acres, or the books and terriers, and other rates or levies in the town of Gosberton, but according to the real number and quantities of acres, according to the laws and statutes of this kingdom, and the usual measure in other places.

The defendant rejoined; and the cause being at issue, witnesses were examined on both sides; and upon opening the pleadings, and reading the answer,

It appearing to the court, that the marsh called Sir Robert Carr's Marsh, lying in the parish of Gosberton, contains three hundred and thirty-five acres; and that twelve-pence an acre *per annum* ought to be paid as a *modus* or rate tithe for the said marsh, according to the real quantity of acres, and not according to common estimate;

It is ordered by the court, that the defendant shall pay to the plaintiff after the rate of twelve-pence an acre for the tithes of the said marsh called Sir Robert Carr's Marsh, containing three hundred and thirty-five acres, for three years, by him occupied and enjoyed in the said years, allowing what had been already paid.

EDWARD TURNOR.  
TIM. LITTLETON.  
EDWARD THURLAND.  
VERE BERTIN.

M. 27 Car. 2. Scacc. *Turnor v. Weedon and others.* 1 Wood, 150.  
Oxfordshire, 18th November, 1675.

**T**HE bill stated, that for seven years last past the plaintiff was lawful rector of Soulderne, in the county of Oxford, and lawfully entitled to all tithes and duties thereto belonging, predial, personal, and mixed.

The defendants Weedon, Kilby, Lord, Dodwell, and King, put in their plea and answer; and the defendants Wells and Smith their answers; and for plea said, that the plaintiff, by his bill demanded tithe wood for hedge rows and coppice woods; for dry beasts, for the time they were kept and fattened; for barren sheep sold before shear time; and for the second crop, or after-math of meadow ground; that, time out of mind, there had been a rate tithe for barren sheep and dry beasts kept and sold within the said parish; viz. fourpence, and not above, for every cow kept, fattened, and sold there; one halfpenny for every barren sheep sold after Candlemas, and before shear time; the third of the wool for all sheep brought in after Candlemas, and sold before Candlemas following; and that no other tithes were due for the same; that for the aftermath of meadow no tithes at all were due, by custom nor otherwise; nor for hedge rows or coppice wood spent or used in the premises to which the same belong; nor for any horses kept and used about the same, or for any other use; and they set forth the particulars of their tithes.

Upon arguing this plea it was ordered, that the defendants should answer over, and the benefit of the plea be saved to the hearing.

The defendants thereupon put in a further answer; the plaintiff replied; and issue being joined, witnesses were examined; and the cause came on to be heard the eleventh instant.

1675.

HATCHER.

v.

SIDLEY.

w.

A *modus* of one halfpenny for every barren sheep sold after Candlemas, and before shear time, was held unreasonable.

Tithes decreed for coppice and hedge row wood and lop-pings of trees, when sold or not spent in the house.

1675.

TURNOR  
v.  
WEEDON  
AND OTHERS.

And upon hearing counsel on both sides, and reading several depositions taken in the cause, and a decree made in a cause the third of July, in the fifteenth year of Charles the First, in Chancery, whereby it appeared, that the matter had been referred to the then Bishop of Oxford, to examine the best way for the payment of tithes, and whether the rate of forty shillings a yard land, formerly decreed at the first inclosure, would be prejudicial to the church, who made his certificate, that he did conceive the payment of tithes in kind was, and would be for the future, a greater benefit to the church than the forty shillings *per annum* in lieu of tithes for every yard land could be; it was ordered, adjudged, and decreed, in the said Court of Chancery, that the said decree, as touching the composition and agreement for payment of tithes should be reversed and made void as against the plaintiff and the church of Soulberne, and the plaintiff be left at liberty to take his tithes in kind, any thing in the aforesaid decree to the contrary notwithstanding; and upon long debate of the matter, for that it was insisted upon by the counsel for the plaintiff, that the custom of one half-penny a sheep sold before shearing or after had already been adjudged an unreasonable custom at common law, in the case of *Weedon v. Harden*, (1) in the late King Charles' reign,

The court declared they would further consider thereof.

The cause now came on again; and on reading several depositions, and hearing counsel on both sides; and on long debate concerning the customs pretended by the defendants;

The court declared, that the custom of a half-penny for a sheep was an unreasonable custom.

And as to all the other customs (except four-pence for a dry cow, and the tithe of aftermath, or second crop of meadow, for which the court will direct a trial at law), they declared all the other customs pretended by the defendants to be unreasonable, and do overrule the same.

Whereupon it is this day ordered by the court, that the defendants shall pay their tithes in kind to the plaintiff, viz. for coppice wood, and for hedge rows, and loppings of trees, when sold or not spent in the house; the tenth of the value of the depasturage of sheep, according to the time of their being kept, sold, and removed unshorn; and likewise for all other dry cattle, fed, kept, or depastured (except beasts of the plough and pail, and dry cows, which is referred to a trial at law), to pay according to the value of the herbage: tithe wool to be paid, and tithe milk, at all times of the year; lambs to be tithed when fit to live without the dam; and calves to be paid in kind: and it is referred to the deputy-remembrancer to compute and report the same.

And as to the custom of four-pence for every dry cow fed, and for the aftermath, or second crop of meadow, the same is referred to a trial at law, and the equity reserved till after such trial had.

(1) *Ant.*, 401.

M. 27 Car. 2. C. B. *Sharp v. Hubbard*. [2 Mod. 58.]

The months in prohibition shall be calendar months.

THE six months in which, by the statute 2 and 3 Edw. 6. cap. 13. s. 14. the suggestion is to be proved for a prohibition, must be reckoned according to the calendar months; and it is so computed in the ecclesiastical court.

1676.

A prohibition granted to suit for tithes of broom burnt in a house of husbandry, of furze used for sheep-pens, and of heath and fern as not titheable.

E. 28 Car. 2. B. R. *Dr. Wats's Case*. [3 Keb. 635.]

LEEK prayed a prohibition upon 2 Roll. 469. Nixon, and 2 Roll. 644. in suit for tithes of broom-heath, furze, and fern, suggesting the defendant keeps a house of husbandry, and used the broom to burn, and the furze to make pens upon his ground for sheep, and that for the rest it was not titheable: *et per curiam* a prohibition was granted.



Tr. 28 Car. 2. C. B. *Stoutfil's Case*. [2 Mod. 77.]

1676.

**PROHIBITION.** It was agreed clearly, that no tithes ought to be paid for brick, because it is part of the soil; and so it has been after adjudged. And it was also said, that tithes shall not be paid for pigeons, unless it be by special custom.

No tithe is due of brick, because part of the soil.

No tithes payable for pigeons, but by special custom.

Tr. 28 Car. 2. C. B. *Anon.* [1 Mod. 216.]

**A** VICAR libelled in the spiritual court for tithes of young cattle; and surmised, that the defendant was seised of lands in Middlesex, of which parish he was vicar, and that the defendant had common in a great waste, called Sedgemore Common, as belonging to his land in Middlesex, and put his cattle into the said common. The defendant prayed a prohibition, for that the land where the cattle went, was not within the county of Middlesex.

Sheep fed in stubble fields solely for the purpose of manuring the land are not titheable.

First: As for this, no prohibition was granted, because of that clause in 2 and 3 Edw. 6. c. 13. whereby it is enacted, "That all and every person which hath or shall have any beasts or other cattle titheable, going, feeding, or depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay their tithes for the increase of the said cattle, so going in the said waste or common, to the parson, vicar, or proprietor, portionary, owner, or other their farmers or deputies of the parish, hamlet, town, or other place where the owner of the said cattle inhabiteth or dwelleth."

A *modus* to the rector is a good discharge against the vicar.

Secondly: The same plaintiff libelled against the same defendant for tithes of willow faggots; who suggests, to have a prohibition, the payment of two-pence a year to the rector for all tithes of willow.—The court held, that a *modus* to the rector is a good discharge against the vicar.

Thirdly: The same plaintiff libelled also for tithes of sheep. The defendant, to have a prohibition, suggests, that he took them in to feed, after the corn was reaped, *pro melioratione agriculturae infra terras arabiles et non aliter*.—The court held, that the parson ought not to have tithe of the corn and the sheep too, which make the ground more profitable, and yield more. *Per quod*, &c.

H. 28 Car. 2. Canc. *Brown v. Vermuden*. [1 Cha. Ca. 272. 282.]

**W**HERE a parish is sued, and four named to defend, and a decree against him, one who claims under none of the four, contests the decree.

Brown, vicar of Worselworth, sued a *scire facias* and by *subpena*, to have execution of a decree had by and on the behalf of one Carrier, his predecessor, for the tenth drill of lead ore in the parish, at the charge and labour of the miners there, viz. the vicar to pay one penny a drill. Carrier, his predecessor, sued divers miners there, grounding his suit by prescription. Four persons were named by the miners to defend the suit for them; and a decree passed against the four, for Carrier and his successors, that the defendants and all the miners should pay. Vermuden, who owned and wrought a mine there, being served, appeared and insisted that he is not bound by the decree, for that he was not party or privy, nor claimed under any who was; and if he should be bound, then the parson ought to be bound, if the decree had been against the parson, which could not; because the parson nor ordinary were no parties, and the defendant could have no bill of review of it, if it be erroneous, and therefore ought not to be bound.

In a suit by a vicar against a parish for tithe of lead ore by a prescription, four had been named to defend for the rest, and a decree had passed against them, the Lord Chancellor held that a successor of the vicar might well proceed by *scire facias* and *subpena* for the execution of the decree against a person not claiming under any party or privy to the

The LORD CHANCELLOR. 1. If the defendant should not be bound, suits of this nature, as in case of inclosures, suit against the inhabitants for suit to a mill, and the like, would be infinite, and impossible to be ended. And declared that

former bill; but a commission was granted to ascertain the quantity and value of the ore, and the plaintiff's title as vicar, &c.

1676.

BROWN

v.

VERMUDEN.

that the defendant, though no party nor privy, yet he may have a bill of review, because he is grieved by the decree.

2. The defendant insisted on the jurisdiction of the dutchy court, the parish being part of the dutchy, and the King had *Cap.* and *Lat.* as in right of a dutchy, and a court of revenue.

The CHANCELLOR. It is within the county palatine; this court may hold plea of lands in the dutchy.

3. The court who made the decree, held the penny per drill too little, and ordered a commission to settle some more reasonable recompense to the miners, which never was executed. *Non allocatur.*

4. Sir John Heath was tenant in common with Vermuden, who ought not to be prosecuted alone. But the defendant was notwithstanding ruled to perfect his answer to the interrogatories.

The LORD CHANCELLOR. The question is, whether the decree, while it stands, should be obeyed; not whether it be well made.

Brown, parson of Worselworth, exhibited a bill against Vermuden, to have performance of a decree obtained against certain persons, workers and owners of lead mines in Derbyshire, whereby a certain manner of tithing lead ore was decreed, not only against the particular persons named, defendants, but all other owners and workers.

Vermuden pleaded *inter alia*, that he was a stranger, and claimed not under any party or privy to the bill, and therefore insisted he ought not to be prosecuted by a bill not grounded on the fact and title, but on the decree in the nature of a *scire facias*.

This plea was formerly over-ruled by the Lord Chancellor, but a commission granted to examine the quality and value of the ore, and the plaintiff's title, if parson, &c. The six clerks appointed time and place, but the defendant's witnesses were so aged, that they could not come to the place, and therefore a new commission prayed. — LORD CHANCELLOR. The time and place is only for the fixed meeting of the commissioners; but after they may adjourn to another time or another place.

Tr. 28 Car. 2. Scacc. *Skinner v. Smith.* 1 Wood, 161.

Worcestershire, 8th June, 1676.

Where the shoulder of every deer killed in a park had been paid to the rector in lieu of tithes of the park, it was held that by disparking the *modus* was gone.

THE bill stated, that for six years past, the plaintiff had been and still was the rector of the parish church of Hartlebury, in the county of Worcester, and, as rector, ought to have all manner of tithes, both great and small, coming, &c. within the said parish.

The defendant confessed the plaintiff's title to the rectory, and tithes, and stated that he had paid the plaintiff all tithes due to him, except the tithes of certain lands, containing eighty odd acres, called Hartlebury Park, to which he had been tenant about four years, at forty-eight pounds a year; that he had depastured several cattle upon the said ground, but cannot set forth the particular number; that the Bishop of Worcester, and his predecessors, for the time whereof the memory of man is not to the contrary, had held the said lands freed and discharged from all tithes; that he had two colts and one calf, during the said years, the tithe whereof was four-pence a colt, and one penny in a shilling for a calf, which is ten-pence; that he depastured on the said lands all sorts of young cattle for several strangers, and yearly kept sheep, and sheared some yearly, and had some lambs; and he set forth the value of the tithes; and that for sheep sold before the shearing time, the usual tithe was four-pence a score; and that the full tithes of the said lands was yearly worth about twenty shillings.

Upon hearing counsel on both sides, and reading several depositions taken on behalf of the plaintiff, whereby it appeared that before the disparking of the said park, the shoulder of every deer, killed in the said park, was paid to the rector of the said parish, for and in lieu of the tithe of the said park: and upon long debate of the matter,

It is ordered by the court, that the defendant shall forthwith pay to the plaintiff the values of the tithes coming, growing, and renewing within the said park, for the said four years, in the bill mentioned, according to the answer, which at twenty shillings *per annum* amount to four pounds.

WM. MONTAGU,  
TIM. LITTLETON,  
EDW. THURLAND.

1676.

SKINNER

v.

SMITH.

M. 28 Car. 2. B. R. *Huit v. Hill*. [3 Keb. 705.]

**S**ERJEANT *Stroud* prayed prohibition to Wells to libel for the feathers of old geese sheared, and young, suggesting a *modus* of a young goose with the feathers, paid 1st Aug. yearly, in full of tithe of all geese and feathers; *ex per curiam*, a prohibition granted, because this is more than by law the parishioner is bound, to keep a goose feathered until the 1st of August.

Prohibition on a *modus* of a young goose with the feathers, paid on the 1st of Aug. granted, in full is bound to do.

M. 28 Car. 2. C. B. *Moor v. Field*. [1 Mod. 229.]

**A** CUSTOM was alleged, that all persons, in a parish, that had sheep upon the ground on Candlemas-day, should be discharged of tithes of all sheep that should be upon the ground after in that year, upon payment of full tithes for all the sheep that were there upon that day:—and this was adjudged an unreasonable custom. *Serjeant Turner* argued for it, and cited 2 Roll. Abr. 647, 648.

A custom to pay tithes for all sheep on the ground on a particular day, in lieu of tithe for all that should be thereafter in that year, held unreasonable.

H. 29 Car. 2. Scacc. *Asfordby v. Newcomen*. 1 Wood, 166. 183. 207.  
Lincolnshire, 19th February, 1676.

**T**HE bill stated, that the plaintiff for twelve years past had been rector of the parish church of Mablethorpe cum Staine, in the county of Lincoln, and was entitled to all tithes within the said parish, and to all compositions and customary payments in lieu of tithes.

The defendant answered that he had, during the time mentioned in the bill, been occupier of several acres of pasture ground in the said parish, and kept thereon sheep and other cattle, and that the tithes of the said stock of cattle were worth, one year with another, three pounds, and ten shillings; that all the time aforesaid, he had dwelt in the parish of Saltfleetby, and not in Mablethorpe; that there was a custom in Mablethorpe, that all farmers of land within the said parish, living out of the said parish, should pay to the rector upon the first day of August, or afterwards upon request, four-pence an acre, in full satisfaction of all tithes, for every acre of pasture ground.

It is ordered by the court, that the defendant shall pay to the plaintiff twelve-pence an acre for all new converted ground by him occupied and enjoyed, within the said parish of Mablethorpe, in the said twelve years; and also shall pay to the plaintiff four-pence an acre for all ancient pasture ground, by him occupied and enjoyed, within the said parish, for the said time in lieu of tithes.

Tr. 30 Car. 2.—6th June, 1678.

The plaintiff stated, that for twelve years past he had been rector of the parish church of Mablethorpe Saint Mary cum Staine, in the county of Lincoln, and was entitled to all tithes within the said parish.

The defendant set forth, that for the said time, he had been occupier of several acres of pasture ground in the said parish, and had kept thereon sheep and other cattle; but that, for all the time aforesaid, he dwelt in Saltfleetby, and not in Mablethorpe; and that there was a particular custom of tithing in Mablethorpe.

Two issues were directed, to try,

First,

1676.  
ASTFORDBY  
v.  
NEWCOMEN.

First, Whether, by custom in Mablethorpe, all farmers of lands within the said parish, living out of the said parish, ought to pay to the rector there for the time being, four-pence an acre, or any other sum or sums of money, and how much, for every acre of pasture ground, in full and satisfaction of all tithes yearly coming, happening, or renewing, within the said parish, to be paid yearly upon every first day of August?

Secondly, How much new converted ground, and how much ancient pasture, the said defendant occupied within the said parish of Mablethorpe in every of the said twelve years?

A trial was had; and the jury found, that the said defendant held and occupied, in the said parish of Mablethorpe, in every of the said twelve years, one hundred and seventy-seven acres, namely, one hundred and forty-eight acres of ancient pasture, and twenty-nine acres of new-converted ground; and that the custom is to pay four-pence a year for every acre of ancient pasture, when the same remain pasture lands, and twelve-pence for every acre of new-converted ground.

The court, therefore, ordered the defendant to pay to the plaintiff four-pence an acre *per annum* for every acre of ancient pasture by him held and occupied in the said parish of Mablethorpe, in every of the said twelve years; and also twelve-pence an acre *per annum* for every acre of new-converted ground for the said time; which said several sums being computed in court, amount to forty-seven pounds; and the plaintiff is to allow the defendant twelve pounds, four shillings, and four-pence, paid him thereout; therefore there remains due to the plaintiff thirty-four pounds, fifteen shillings, and eight-pence.

And it is further ordered by the court, that the plaintiff shall have his costs in this suit, except for the former decree, and except costs for the trial at law, which is to be set one against the other, the said verdict being partly for the plaintiff and partly for the defendant.

WM. MONTAGU.  
THO. RAYMOND.  
EDW. ATKYNS.

M. 32 Car. 2.—11th November, 1680.

THE scope of the bill was to compel the defendants to pay to the plaintiff, as rector of Mablethorpe St. Mary's cum Staine, in the county of Lincoln, the tithes of several grounds occupied by the defendants, in the said parish, for three years past; and to compel the defendant N. Newcomen to pay eight pounds a year for eight acres of glebe, and the tithes of the same. The bill also stated, that the defendant T. Newcomen ought to have permitted the plaintiff to keep four cows and a mare, in a close called Stainehill, and to have paid to the plaintiff twenty shillings a year for Staine churchyard, lying open to Stainehill.

The defendant T. Newcomen said, that he lived out of the parish, and was tenant of several closes in Staine; that there was a custom in Staine, for all persons living in or out of Staine, to pay three-pence an acre *per annum*, and no more, in full satisfaction of all tithes, upon Lammas day; and he denied that he hindered the plaintiff from keeping four cows and a mare upon Stainehill, if he had a right so to do; but said, that the plaintiff, or his tenant, did keep three cows there, which he conceived to be in lieu of the churchyard, and that he ought not to pay the said twenty shillings a year.

The defendants said they were occupiers of several closes in Mablethorpe St. Mary's, and that there is a custom there, for any person, living out of the said parish, who farms any lands within the same, to pay to the rector there, twelve-pence an acre *per annum*, for every acre called new converted ground, and four-pence an acre, *per annum*, for every acre of ancient pasture, in satisfaction for all tithes, upon the first day of August.

The defendant N. Newcomen denied that the said eight acres are glebe land, and averred that they were his own inheritance, and that therefore he ought not to pay any rent for the same.

The defendant's counsel, upon the hearing, insisted upon the several *modusses*,

as set forth in the answer, and the plaintiff's counsel insisted that tithes in kind ought to be paid.

The court, upon reading several depositions taken in the cause, and on long debate of the matter, was satisfied, and declared, that there was no sufficient proof of any *modus*, or customary rate, or payment for the lands or grounds in Staine, but that tithes in kind ought to be paid by the defendant T. Newcomen for the same: and also that the said defendant ought to pay to the plaintiff thirteen shillings and four-pence *per annum*, for Staine churchyard, during the said time.

As to the glebe lands, the court leaves the same to be determined at law.

And as to the lands in Mablethorpe St. Mary's, held by the defendants as foreigners, living out of the parish, and farming grounds in the parish, the defendants' counsel insisted, that the usage had been to pay twelve-pence an acre for new converted grounds, and four-pence an acre for ancient pasture, and the plaintiff's counsel insisted upon the unreasonableness of the pretended usage or custom for such payment, so as to bar the plaintiff of his tithes in kind, and the rather because it appears that the inhabitants in Mablethorpe, who then held the same, or any other grounds in Mablethorpe St. Mary's, ought to pay tithes in kind; that foreigners ought also to pay tithes in kind for the same ground, if ploughed or tilled.

The court ordered a case to be stated and agreed to by counsel on both sides, and if they cannot agree to the same, the Lord Chief Baron is to be attended to settle the same. A case was accordingly made and settled by the Lord Chief Baron, and the barons of the court being attended therewith,

The question was, whether the usage alleged be reasonable and consistent with the rules of law, so as to bar the plaintiff from his tithes in kind? or, whether tithes in kind ought not to be paid to the plaintiff, for the lands and titheable matters in question, notwithstanding such pretended usage?

The barons, having had and taken full consideration of the said case, are all of opinion, and do unanimously declare, that the custom set forth in the answer, as to Mablethorpe St. Mary's, is unreasonable and contrary to law, and therefore ought not to bar the plaintiff of his tithes in kind.

Before the barons gave their opinion upon the case, the defendant N. Newcomen died, whereby all proceedings in the cause, as against him, ceased and the plaintiff filed his bill of revival against his son, and the proceedings were revived, pursuant to order.

The barons, having had and taken full consideration of the case, are all of opinion, and do unanimously declare, that the custom, set forth by the defendant's father, as to Mablethorpe St. Mary's, is very unreasonable, and contrary to law, and therefore ought not to bar the plaintiff of his tithes in kind.

It is ordered by the court, that the defendant do account for the same during his father's life-time, and since his death.

And it is referred to the deputy remembrancer to take and report the same.

WM. MONTAGU.

EDW. ATKYNS.

WM. GREGORY.

T. STREET.

T. 29 Car. 2. C. B. *Walwin v. Aubrey*. [1 Freem. 232.]

**T**RESPASS for taking four loads of wheat, four loads of barley, &c.

The defendant pleads, that the plaintiff was impropriator of the rectory of B. and that the chancel of that church was out of repair, and that the plaintiff being cited into the spiritual court, and refusing to appear, the ordinary granted a sequestration; and that the defendant, by virtue of that sequestration, seized the wheat and barley, &c. which was set out for tithes, to employ the same upon the repairs of the chancel. And the plaintiff demurred.

Appropriations were said (*arguendo*) to be those things which were so called when in the hands of those to whom they were appropriated.

The  
ated: but since the statute, and they have come into lay hands, are called impropriations. Impropriators are liable to sequestration for non-repair of the church, for it was a charge originally inherent in the tithes, and an *onus reale* that shall go along with them.

1676.

WALWIN

v.

AWBREY.

The only question was, whether or no, in case the impropriator did neglect to repair the chancel, the ordinary might sequester the profits of the rectory to repair it?

1. It was agreed, that in many cases the ordinary might sequester, as in case of non-residence, vacancy, or deprivation, because he is entrusted to see the cure served. Hob. 144.

2. They seemed to admit, that whilst those rectories were in the hands of those to whom they were first appropriated, viz. spiritual persons, the ordinaries might sequester, as in this case.

But it was insisted upon, that since the statute of dissolution, they are become lay-fees, even so much, that before the statute 32 H. 8. it was doubtful what remedy they should have for recovery of them; and that statute enables them to sue in the ecclesiastical court.

Baldwin argued *pro def'*, and distinguished between appropriations, which were when they were in the hands of those to whom they were appropriated; but since the statute, that they are come into lay-hands, they are called impropriations; and he said, that the consueance of repairs of the church properly belonged to the ecclesiastical court; and cited, *Nat. Brev. 50. M. Register, 44, 48. Joannes de Atham, 54. Lindwood, 136. 5 Co. Ecclesiastical Persons, 9. Davies, 70. Vaughan, 326.* that lawful canons are a part of the law of the land. *Reg. Jud. 22. 26.* And he said, that if an execution be against one, and the ordinary return, that he is *Clericus beneficiatus non habens laicum, &c. sed habens curam Ecclesie*, that then a writ at this day goes to the ordinary, to levy the same on his ecclesiastical goods, glebe, tithes, &c. which he does by sequestration.

But to that it was answered by NORTH, Ch. J. that in that case the ordinary is but the Ecclesiastical Sheriff; and therefore in the case of Bishop Wren, the court compelled him to make the same return as the sheriff should have done in the like case, and refused to accept of his return, that he had granted a sequestration, but would have either a *feri feci* or *nulla bona*.

It was admitted by all, that the ecclesiastical court had properly consueance of the matter, and that they might proceed, by way of personal censures, to excommunication against the impropriator.

But for the matter in law, NORTH, Ch. J. inclined that the ordinary could not sequester now it was become a lay-fee; but the other three judges inclined *contrâ*, because the repair of the church was a charge originally inherent in those tithes, and that it was *onus reale* that should go along with them.

And ATKINS said, the impropriation was only of the surplus of the profits, and this was a precedent: and they said, that impropriations are liable to procurations and synodals.

Another question was made; admitting that the ordinary might sequester, yet whether the party might justify by it at common law? And ATKINS seemed to think he might; and so for a sequestration in Chancery, if it were specially alleged to be the custom of that court time out of mind to grant such sequestrations. *Sed adjournatur.*

1677.

Tr. 29 Car. 2. Scacc. *Gwynne v. Sharpe.* 1 Wood, 171.

Wiltshire, 2d June, 1677.

A modus of 12s.  
a yard land in  
lieu of small  
tithes decreed.

THE plaintiff, as rector of the parish church of Wilton, in Wiltshire, exhibited his bill, claiming the tithes of Friars' Mead in kind, and twelve shillings for every yard land in the tithing of Netherhampton, in lieu of small tithes.

The defendants confessed the plaintiff to be lawful rector of Wilton, and entitled to all manner of tithes there, saving the tithes for Friars' Mead, which mead is tithe free, and except the right of the Earl of Pembroke to the great tithes in Netherhampton.

The defendant Sharpe said, that for nine years past he had been possessed, for the remainder of a term of ninety-nine years determinable upon lives, whereof

whereof two were yet in being, of Friars' Mead, containing four acres, granted to him by Philip Earl of Pembroke; which mead, for four years last past, he had let to the other defendant for thirteen pounds per annum, he, the defendant Sharpe, allowing one pound thirteen shillings and six-pence for lord's rent, with all rates and taxes, amounting to fifty shillings; that he believed the same was part of some abbey, friary, or religious house, in or near Wilton; and that the same was always tithe free.

The defendant Brazier said, that he held Friars' Mead of the defendant Sharpe.

The defendant Sharpe farther said, that he was owner of a messuage and one yard land, in Netherhampton, held of the Earl of Pembroke by copy of court-roll; and believed there has been a custom in Netherhampton, for every yard land there to pay to the rector of Wilton for the time being, in lieu of small tithes, twelve shillings yearly, and so proportionably for a greater or lesser number of lands there. He said, that the same were for the said time (except the last year) in different persons possessions; but that he was willing to pay the plaintiff twelve shillings for the said year, according to the said custom.

The plaintiff replied, the defendant rejoined, and witnesses were examined.

The cause now came on to be heard; and on reading several depositions, and on full debate of the matter,

It is ordered by the court, that the defendant Sharpe do forthwith pay to the plaintiff twelve shillings, in lieu and satisfaction for the tithes of the said yard land in Netherhampton, for the year 1672, when he held the said yard land in his own hands.

And as touching and concerning the tithes of Friars' Mead for the said years mentioned,

It is ordered, that the said defendants do respectively satisfy and pay to the plaintiff the values of the tithes of the said mead called Friars' Mead, for the several years they held the same.

WILLIAM MONTAGU.

M. 29 Car. 2. C. B. *Anon.* [1 Freem. 234.]

**I**NDEBITATUS *assumpsit* for tithes sold. *Baldwin* moved in arrest of judgment, that this sounds in the realty, and so an action of the case will not lie. But *per curiam* it is well enough, for this shall not be intended a lease of tithes, but a sale of tithes. And *per North*, C. J. a lease of tithes cannot be for more than a year, without deed, and it is not good by way of lease for one year, but so it enures by way of sale. 2 Roll. 63.

A lease of tithes cannot be for more than a year, without deed; nor for a year, but as it enures by way of sale.

M. 29 Car. 2. Canc.

*Anon.* 2 Cha. Ca. 237. [2 Freem. 27.] 2 Gw. 527.

**A** BILL being preferred against a Quaker for tithes, who refused to answer upon oath, the defendant was brought to the bar, and having been brought three times before, the bill was taken *pro confesso*, and referred to a master to examine what was due, and to be armed with a commission for that purpose. And the Lord Chancellor declared that this court had consueance of matters of tithes as well as the Exchequer, and that the plaintiff had *electionem fore*.

Chancery has consueance of tithes as well as the Exchequer.

Where a Quaker refused to answer a bill for tithes upon oath, it was

taken *pro confesso*, and the master had a commission to inquire what was due.

H. 30 Car. 2. Scacc.

1678.

*Dodd v. Ingleton.* [1 Wood, 188. T. Raym. 277. 1 Freem. 329.]  
Essex, 24th February, 1678.

The whole of the meal of milk of every tenth morning and evening is due for tithe.

*Quere,* Whether it shall be delivered at the church porch, or the vicarage-house?

**T**HE plaintiff, as vicar of the vicarage and parish church of Chigwell, in the county of Essex, claimed the tithe of milk, and complained that the defendant, under colour of some words in a decretal order made in this court in a former cause between the now plaintiff and H. Hudson and others, inhabitants of Chigwell (1), had not sent or carried the same to the plaintiff's house every tenth day, or meal, as he ought to have done, according to the custom of the said parish.

The defendant denied any custom for carrying tithe milk to the vicar's house.

The court being unanimously of opinion, that the tenth meal's milk, and not the tenth of every meal's milk, ought to be paid for tithes, it is ordered, by consent of the defendant's counsel, that the defendant, for the future, shall pay to the plaintiff his whole tenth meal's milk of all his cows every evening.

But as there was not any custom within the said parish of Chigwell insisted on by either side, for the plaintiff's fetching his tithe milk, or for the defendant's bringing the same either to the church porch, or to the vicarage-house in the said parish of Chigwell; and the court being divided in opinion, whether of right the same ought to be fetched by the plaintiff, or carried by the defendant, the cause was ordered to stand over, that the court might further consider and advise thereof in the mean time; and, on the fifteenth of May, 1769, it was further ordered again to stand over, and that the court will hear counsel on both sides, as well civilians as others, as to the common law right; and on the twenty-second of May, 1679, after hearing the civilians, and counsel on both sides, and upon full debate, it was ordered again to stand over for the opinion of the court.

On the 10th of November, 1679, the cause came on to be further heard, when

It was ordered, adjudged, and decreed by the court, that the defendant, for the future, shall pay to the plaintiff his whole tenth meal's milk of all his cows every morning, and his whole tenth meal's milk every evening; and for that there is not any custom within the said parish of Chigwell insisted upon on either side for the plaintiff's fetching his tithe milk, or for the said defendant bringing the same, either to the church porch, or to the vicarage-house in the said parish of Chigwell; and the court being of opinion, that tithe milk is due of common right, and that as well for the preservation of the same as for the convenience in collecting the said milk, the same ought to be brought to the plaintiff, it is thereupon further ordered, &c. that the defendant, for the future, shall bring or send his tithe-milk to the church porch within the said parish of Chigwell, as the same shall become due from time to time; that is to say, his, the defendant's, whole tenth meal's milk every tenth morning, and his whole tenth meal's milk every evening, to the end that the plaintiff, or his agent, or servant, in that behalf appointed, may receive the same accordingly without costs. [*Wood.*]

WM. MONTAGU.

THO. RAYMOND.

EDW. ATKYNS.

WM. GREGORY.

**T**HE plaintiff, being vicar of the parish of Chigwell, in Essex, exhibited his English bill in the Exchequer Chamber against the defendant for small tithes, and amongst the rest for tithe milk; and upon the hearing, a question arose, Whether the defendant should pay the tenth part of the milk of his cows every meal, or only every tenth meal? And it was decreed that he should pay every tenth meal entire to the plaintiff, for otherwise the plaintiff must be forced to keep a servant for that service of collecting the milk only, and perhaps the tithe would not amount to a pint a day. The next question was, Whether *de jure* (there being no custom one way or other) the parishioner ought to send the tithe milk to the vicar to his house, or that the vicar ought to fetch it from the parishioner? And now, 22 May, 1679, the vicar brought a civilian, one

(1) In the case of the present plaintiff, *Dodd v. Hudson*, 29th April, 1675, 27 Car. 2. the court ordered, "that the defendants shall pay to the plaintiff tithe milk in kind all

"the year round; the said plaintiff, or his  
"tithe gatherer, making a demand of the same  
"at the respective habitations of the said defendants." Book of Decrees and Orders.



Doctor Raynes, to argue, whose argument was as follows: By the *Jus commune Ecclesiasticum*, which is the canon law, all tithe ought to be brought home to the parson; and the law is grounded upon the Scripture. Malac. 3. 10. Bring ye all the tithes into the store-house. And St. Jerome gives the rule so; and Lindwood, l. 3. tit. 16. *De Decimis Cap. Quia quidam, verbo colligendis*, p. 168. *Colonus de jure tenetur non solum decimas hujusmodi colligere et coacervare, sed etiam in horreum sacerdotis offerre*. And this is certain for predial tithes. And so says Speculator it is for wines. And although there be no express mention of milk, and that milk is here in England reckoned amongst minute tithes; yet in other countries it is a predial tithe.

2. All tithes ought to be paid so soon as they be may be fit for the parson to receive them; so calves at such an age, and other things, as the matter will bear. Now it will be very inconvenient if the milk which *de jure* is titheable every meal, shall be sent for by the parson twice a day, and every time may not be a pint.

3. In the manner of tithing, that which *magis expedit ecclesiæ*, is to be observed, then it is more decent for the parishioner to bring, than the parson to fetch his tithes. Where the law is silent, the custom of the places adjacent prevails. Now here, all the neighbour vicars have their milk brought home to them.

Upon hearing this argument, the court thought fit for the plaintiff, if he saw cause, to insert all his parishioners, or as many of them as he pleased, into his bill; and upon their answers the court would deliver their opinion, because of ascertaining the way of paying tithe milk quite through the parish, to prevent multiplication of suits; but if the plaintiff shall not think fit so to do, the court adjourned this cause till Michaelmas Term, to give their opinions; and afterwards, viz. 10th November, 1679, we all agreed that the tithe milk ought to be carried by the parishioners. My opinion was, that it should be delivered at the vicarage-house, because where there is no custom, the common law prevails: but my Lord Chief Baron and the other two Barons agreed, that it should be delivered in the church porch, because the neighbouring parishes did so; but that appeared not in the pleadings, but so it was decreed. [*T. Rayn.*]

THE question being, whether tithe-milk should be brought home to the vicar, or whether he ought to send for the same to every parishioner, there being no custom either for the one or the other?

The barons having taken time, since the last term, to consider of this point, delivered their opinions *seriatim*:

MONTAGUE, ATKYNS, and GREGORY were of opinion, that there being no custom in the case, they ought to respect the convenience of the matter; and therefore it being the usage in that country to bring their tithe-milk, and other small tithes, to the church-porch, they thought that the parishioners ought to bring their small tithes thither, it being an indifferent place for that purpose, but for great tithes the parson ought to fetch the same.

RAYMOND was of opinion, that tithes being due by the ecclesiastical law, and by that law small tithes are to be carried home to the vicar's house, and therefore he was of opinion, that this court ought to adjudge it so too. [*Freeman.*]

E. 30 Car. 2. Scacc. *Silverlocke v. Isles*. 1 Wood, 176.

Essex, 29th April, 1678.

THE bill was filed to discover what lands the defendant occupied within the parish of Tilbury, in the county of Essex, and to have satisfaction for the tithes of the milk of cows depastured thereon.

The defendant insisted upon a custom within the parish of West Tilbury, "that the inhabitants there ought to pay for tithe milk every tenth day's milk, or tenth meal's milk, from the first day of May to the first day of August following yearly, in full of all tithe milk throughout the year."

The court was of opinion, that the custom is illegal; and therefore ordered, that the defendant shall pay to the plaintiff his tithe milk throughout the whole year, or the value thereof.

WM. MONTAGU.

TIM. LITTLETON.

EDW. THURLAND.

FR. BRAMPSTON.

1678.  
DODD  
vs  
INGLETON.

A custom to pay every tenth day's milk from the first of May to the first of August yearly, in lieu of all tithe-milk throughout the year, is bad.

1678.

E. 30 Car. 2. Scacc. *Perne v. Styles.* 1 Wood, 176.

Lincolnshire, 22d April, 1678.

In answer to a bill for tithes it was stated that the lands whereof, &c. had belonged to a greater abbey, and been granted to several copyhold and other tenants, under whom the defendants claimed, and that the abbey had held the same for time whereof, &c. for themselves and their tenants, discharged of tithes.

An issue was directed to try whether the demesne lands of the abbey of Crowland were and ought to be legally freed and discharged from the payment of all tithes. A verdict was found for the defendant, and the exemption established.

**T**HE bill stated that Robert Chapman, clerk, was seised in fee of the advowson of the church of Crowland, in the county of Lincoln, and of the rectory impropriate, and of the tithes in the parish of Crowland, in the said county; that he had issue Grace Richmond and Susan Southwell; that Grace Richmond, the eldest sister, died; whereupon one moiety of the advowson and impropriation descended to William, her son and heir; that Susan Southwell died, whereupon the other moiety descended to Robert, her son and heir; that they being seised, and the church being void, they presented the plaintiff; that Robert having a desire to settle his moiety in trust for the plaintiff, and for those that should succeed him in the cure of the said church, did, by indenture dated the first of August, 1671, grant his moiety to the defendants Wildbore and Southwell, and to their heirs, for the parsons and curates of the said church, and their successors, for ever; that William did, by like indenture dated the twentieth of October, 1672, convey his moiety to the defendants Southwell and Hawkins, and their heirs, in trust for the plaintiff, being legally presented and inducted, and the succeeding ministers of the said church; whereby the plaintiff became entitled, and ought to enjoy the same; that the plaintiff, upon occasion of opposition, had been several times put into possession by the *posse comitatus*; but that the defendants Southwell, Wildbore, and Hawkins, by multiplicity of suits and threats, compelled several of the parishioners to pay them the tithes, whereas in truth they had no title at all since the twenty-sixth of December, 1672; that several of the defendants had occupied lands in the said parish, but refused to pay the tithes to the plaintiff. To the end, therefore, that the defendants, the parishioners, might discover what tithes they had, or what lands they occupied since the twenty-sixth of December, 1672, or since the plaintiff's title accrued, and that the plaintiff might be relieved in the premises, the bill was filed.

The defendant Styles put in his plea and answer, and died before the cause was brought to an issue.

The defendant Kendall put in his plea, which, upon argument, was overruled, and he was ordered to answer.

The defendants the parishioners answered, and confessed the plaintiff's presentation from Southwell and Richmond, and their conveyances in trust for the plaintiff's use; but they alleged, that he had no title to any of the tithes he pretended to; for that the rectory is impropriate, and no tithes belonging thereto, but only oblations, mortuaries, funerals, and christenings; the other tithes being due to the rectors, who had used, at their own charge, to find a chaplain, who was licensed by the bishop, and admitted to it for his life in the nature of a donative; that, under this qualification, the defendant Styles was in; and therefore the plaintiff's institution and induction void; as also the grants of Southwell and Richmond. They therefore set forth their respective small tithes, but not their predial tithes. They further answered, and said, that the presentation to the plaintiff was void by simony, because the defendant Styles was, at the time of such presentation, curate or incumbent. They admitted, that Richmond and Southwell granted their several moieties in trust for the plaintiff; and said, that the same was intended to be by virtue of the statute 17 Car. 2. c. 3. which only extended to cities and towns corporate, which Crowland was not, and therefore the grant was void; that the manor of Crowland, and the rectory thereof, heretofore did belong to the abbot of Crowland, who was a mitred abbot, and that his abbey, one of the great monasteries, was dissolved by the statute 31 H. 8. c. 13; that the said manor consisted of very great demesnes, wastes, and services, several of which demesnes and wastes were granted to several copyholders and other tenants, under whom these defendants respectively claim; that the said abbot, and all those whose estates he had in the said manor, from the time whereof the memory of man is not to the contrary, for themselves and their said tenants, had been respectively

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V.  
STYLES.

spectively discharged of all predial and mixed tithes arising and renewing within the said manor, except the tithes particularly mentioned in their answer; that in consideration thereof the said abbot did, at his own charges, build a chapel, and found a priest to celebrate divine service there, who yearly had the following tithes, viz. oblations, burials, christenings, tithes of hops, geese, milk, and marriages; that the said abbot of Crowland was, at the time of the dissolution, seized of the said abbey, the site whereof consisted in a fair abbey-house, with a chapel thereunto adjoining, which was parcel of the said monastery, and of four hundred acres of marsh, surrounded with water, which were in the said abbot's hands at the time of the dissolution; that the rectory, time out of mind, had been in the possession or occupation of the predecessors of the said abbot; that it coming to the crown by the 31 H. 8. c. 13. the same descended to King Edward the Sixth, who sold the same to the Lord Clinton and Say; and that from him, by mesne conveyances, the same was come to F. Wingfield, whose estate herein was claimed to be discharged of all payments of tithes by reason of the said unity of possession, or by prescription time out of mind, or by some other lawful ways and means.

The defendants Randall and others confessed, that in 1673, 1674, and 1675, they held lands in Alderlands, and also in Postland, within the said parish, for which they paid no tithes to the plaintiff.

The plaintiff replied specially, and said, that by the statute of the 17 Car. 2. c. 3. the owners of the impropriation and tithes settled the same in trust for the curates, parsons, or vicars of the said parish successively; that thereby, or by other good title, the plaintiff, for the time in the bill mentioned, was entitled to the tithes in the said parish; and that the lands in the defendants' possessions were liable to pay tithes in kind.

Issue being joined, witnesses were examined on both sides; and upon hearing counsel on both sides, and upon much debate of the matter in question, the court was fully satisfied, that the church of Crowland is not presentative, nor the matter capable of simony; and that therefore the plaintiff cannot be guilty of simony, as is alleged against him, but that he has made forth a good title to such tithes of the said parish as ought to be paid.

But inasmuch as the defendant's counsel insisted, that the demesne lands of the said manor of Crowland were discharged from payment of tithes; and it appearing to the court, by the defendant's proofs, that the lands in Postland, in the said parish, are the demesne lands of the said manor, the court ordered a trial at law on the following issue, "Whether the abbot of Crowland, at the time of the dissolution of the said abbey, in the thirty-first year of King Henry the Eighth, and all his predecessors abbots of the said abbey, time out of mind, held the said lands called Pusant, otherwise Postlands, freed and discharged from payment of any manner of tithes?" to be tried by a special jury in an action on the statute 2 & 3 Edw. 6. c. 13; the defendants to admit the plaintiff to be rightful incumbent of Crowland, and to admit his title to the same, and agree a value; the action to be brought against one defendant, and the rest who hold any demesne lands in the said parish, to be concluded by the said trial; and the equity of the cause, as to the demesne lands, to be reserved till after the trial.

And as to all the other lands, except Postlands, within the said parish, held by the defendants Kendall and Hampson, in regard it no ways appeared to the court that the same are demesne lands,

The court ordered the defendants to pay to the plaintiff the value of the tithes of the said lands.

A trial was accordingly had against the defendant S. Kendall, upon the statute of Edward the Sixth, for not setting forth his tithes of the demesne lands in his possession; and after long evidence on both sides, a verdict was given for the plaintiff.

Now, upon hearing, the plaintiff's counsel desiring that the plaintiff might have a decree for the tithes in question; and upon reading the return of the *postea*; and the defendant's counsel insisting that the defendant Styles (who died

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PERNE  
v.  
STYLES.

died since the commencement of the suit) was lawful curate of the said parish, and continued so until his death, and thereby was entitled to the tithes of the said parish, all which was made to appear to the court by the defendant Styles's answer; and by reading of a license granted to the said Styles from the vicar-general; and that accordingly he enjoyed the same; and also that the plaintiff had not produced any particular license to serve the said cure, otherwise than what is mentioned in an instrument of admission grounded upon a presentation granted to the plaintiff, which was declared to be void as such; and that, for that reason, the bill ought to be dismissed, as the defendant's counsel did insist.

The court, upon a deliberate hearing touching the aforesaid matter; and upon a serious and solemn debate thereon; and upon reading the instruments whereby the plaintiff claims, as curate or incumbent of the parish-church of Crowland, do unanimously declare, that the said W. Styles, clerk, has no title to any of the tithes of the said parish of Crowland and for and during any of the time for which the plaintiff, by his bill, seeks a discovery; but that the plaintiff has a good title to the same for and during all the said time.

But inasmuch as the said Styles pretended a title to the same tithes, and the defendant's counsel alleged that they had paid some of their tithes to them,

The court, by and with the consent of the plaintiff, do order that they shall be allowed what tithes they shall make appear to have been actually paid to him, or any composition for the same, in his lifetime.

And inasmuch as the defendant's counsel prayed another trial concerning the defendants being discharged from the payment of tithes for their said demesne lands; and the court taking into consideration the great value of the tithes of the said demesne lands, and not out of any dislike of the verdict obtained, ordered, that a trial shall be had at the bar of this court between the plaintiff and the defendant Kendall; the issue to be, "whether the demesne lands of the manor of Crowland, and whereof the defendant Kendall held part during the years in the bill mentioned, are, and ought to be, legally freed and discharged from the payment of all tithes, or not?" and at the said trial the defendant is to admit the plaintiff to be rightful incumbent of Crowland, and duly entitled to all such tithes as are due and payable for the said demesne lands of the manor during the time in the bill mentioned; and if a verdict shall pass for the plaintiff, all the defendants who hold demesne lands are to be bound by the same: to be tried by a special jury of the county of Middlesex.

And it is further ordered by the court, by consent of the defendants, that they are to pay the jury (the plaintiff being a pauper), whether the verdict be for or against them; and they are to pay the defendant his taxed costs of the last trial; and in case they do not pay the same, then the aforesaid trial shall not be had; but this cause shall be determined without any other trial.

A trial was accordingly had, and a verdict passed for the defendants; and on the fifth day of July instant, the plaintiff's counsel moved for a new trial; but the court thought fit to make no order; and now, on the tenth of July, 1679, upon hearing counsel, and reading the plaintiff's affidavit, a new trial being a second time prayed,

The court declared, they saw no cause for a new trial, and refused the application.

Tr. 30 Car. 2. B. R. *Jackson v. Nele*. [2 Lev. 230.]

No prohibition  
to inferior courts  
after judgment.  
Qu.

**A**SSUMPSIT in Windsor Court, for meat, drink, &c. *apud* Maidenhead, *infra jurisdictionem curiæ*; and upon *non assumpsit* the evidence there given was of meat, drink, and a promise *apud* Henly, which is *extra jurisdictionem*; for which the defendant offered to demur upon the evidence, but the steward would not admit thereof, whereupon verdict and judgment for the plaintiff; and now upon the whole matter a prohibition was prayed, but denied, for it is not grantable after judgment there. *Quare*, in this case, for the

the party has no other remedy, he has done all that he could to prevent judgment; and at this rate they may give judgment in inferior courts after verdict, before the defendant can be heard time enough to have a prohibition, and so tortiously enlarge their jurisdiction.

1678.  
JACKSON.  
v.  
NELE.

E. 31 Car. 2. B. R. *Anon.* [1 Vent. 335.]

**A** PROHIBITION was prayed to a suit for tithes, upon the suggestion that the lands out of which they were demanded lay out of the parish, and the bounds of parishes are triable at the common law.

But the court denied the prohibition, because it did not appear, that a plea thereof had been offered in the ecclesiastical court.

bounds whereof are triable at common law; prohibition was denied, because it did not appear that such plea had been offered in the spiritual court.

1679.

On suggestion that the lands of which tithes were demanded lay out of the parish, the

E. 31 Car. 2. B. R.

*Etherington v. The Archbishop of York.* [2 Lev. 251.]

**A** PROHIBITION was prayed, suggesting that by the stat. of 28 H. 8. 16. all briefs, bulls, &c. of the pope shall be void, and shall not be pleaded, used, or allowed in any court; and yet the defendant libelled against him in the spiritual court for a pension, setting forth that the church of Rillington was appropriated *per sanctissimum patrem Clement. divinâ providentiâ papam Sextum, Anno Domini 1443, ad Abbey de Belland*, and that upon the appropriation the abbot granted to such a bishop the pension, and that so he grounded his suit upon the pope's bull, contrary to this statute; to which it was answered, that the bull and appropriation are not used otherwise than as inducements to his title, which is founded upon the grant of the pension, and it was necessary to shew the appropriation; for till the appropriation no pension could be granted by the abbot, and it ought to appear how the appropriation was. The statute does not extend to this case; for the statute directs that they who have liberties, &c. granted by the pope, ought to come to the King within a year, and take new grants from the King, which shall be of the same force and efficacy as the pope's bulls, &c. Here the bull was not made to the archbishop, nor could he have a grant of the pension from the King, for it was not granted to him by the pope, as it is not necessary for the bishop to shew the King's confirmation, for that is not his title, but only matter of inducement. The prohibition was denied. LEVINZ for the archbishop.

A pope's bull may be pleaded as inducement to a title, notwithstanding 28 H. 8. c. 16. that all briefs, bulls, &c. of the pope shall be void, and not pleaded, used, or allowed in any court.

E. 31 Car. 2. Scacc.

*Legross v. Levemoor.* [Dodd's MSS.] 2 Gw. 529.

**O**N a trial at law for tithes of a mill, the plaintiff offered in evidence an ancient book, (produced in this court at the hearing) wherein one of his predecessors had made entries of what he had received for tithes for several years, whilst he was vicar, as well for the mill in question, as for other tithes. But the judge would not suffer it to be read in evidence, whereby the plaintiff was nonsuited. A new trial was ordered, on payment of costs, and, by the defendant's consent, the book to be read in evidence.

Entries in a predecessor's books evidence for the vicar, by consent, upon a new trial, on payment of costs of the first.

E. 31 Car. 2. Scacc.

*Scudamore v. Pemberton, Kt. and others.* 1 Wood, 191.

London, 22d of May, 1679.

**T**HE bill stated, that by indenture tripartite, dated the 14th of November, in the fifteenth year of his present Majesty's reign, made between R. Cocks, impropiator of the rectory of St. Dunstan's in the West, in the city of

Certain ancient customary payments due for houses to the London, rector of St.

*Dunstan's in the West* No tithes are due to the vicar of *St. Dunstan's* for the Rolls, by the stat. 37 H. 8. c. 12. or otherwise.

1679.  
SCUDAMORE  
v.  
PEMBERTON.

London, of the first part; J. Thompson, clerk, vicar of the said church, of the second part; and the plaintiff, Scudamore, of the third part; all that rectory and vicarage, with its rights, &c. and all tithes, oblations, profits, and advantages thereunto belonging, were demised, bargained, and sold to the plaintiff, to hold for ninety-nine years, if the said Thompson should so long live and continue vicar thereof; that by virtue of the said demise the plaintiff became entitled to all the profits of the said rectory and vicarage; that some part of the parish lies in the city of London, and another part in the suburbs of the said city, within the county of Middlesex; that the defendants had been owners or inhabitants of houses, &c. therein, and that several rates or sums of money were due to the plaintiff, which they refused to pay. The bill therefore prayed relief in the premises.

The defendants' counsel insisted, that the defendants' respective houses were discharged from the payment of 2s. 9d. in the pound, by reason of certain ancient customary payments for their said houses, in lieu of tithes for their said houses, or of the ground on which they were built.

The court ordered, that trials shall be had touching the validity of the *modus*; the equity of the cause to be reserved till after the same be had.

Accordingly a trial was had; and the jury found, that by custom a certain sum of money was payable, and accustomed to be paid, from time to time, every year, time out of mind, viz. 8s. 11d. quarterly, for and in satisfaction of all tithes of the ancient house and garden (in the occupation of Sir George Benyon,) to the proprietor of the tithes of St. Dunstan in the West; and that 2s. 9d. in the pound, according to the annual rent of the said ancient messuage and garden, with the appurtenances, was never paid, nor ought to be paid to the proprietor of the tithes of St. Dunstan, for the tithe of the said ancient messuage, with the appurtenances.

The cause now came on to be heard upon the equity reserved; and upon reading the said order and *postea*, and hearing counsel,

It is this day ordered by the court, that the defendant, Sir F. Pemberton, shall be, and is hereby dismissed out of this court, as to the said bill, and all and every the matter and things therein contained, without prejudice nevertheless to the plaintiff, his executors, or assigns, to sue for and recover the arrears of the *modus* due for the said house and ground late Sir Simon Baskerville's, from the said defendant, and other the persons liable to the payment thereof; the other persons liable with the said defendants to the arrears of the *modus*, not being made parties to this suit, if the plaintiff, his heirs, or assigns, shall think fit to sue for the same. (1)

WM. MONTAGU.

THO. RAYMOND.

EDW. ATKYNS.

WM. GREGORY.

T. 31

(1) It appears from the Book of Decrees and Orders, that the plaintiff did file another bill against the defendants, Sir Francis Pemberton and others; that the cause came on to be heard on the 22d May, 31 Car. 2; that the defendants' counsel insisted, that the defendant J. Marshall's house was discharged from the payment of the 2s. 9d. in the pound, by reason of an ancient customary sum of 9s. 4d. payable yearly in lieu of tithes for the said house. On which the court directed two issues, first, whether the said sum was payable for the said house in lieu of tithes; secondly, whether 2s. 9d. in the pound, according to the annual rent, was payable to the vicar for the said house, or not: and upon full evidence on both sides, the plaintiff was nonsuited, and a new trial granted; on which trial, before the Lord Chief Baron, the plaintiff, after full evidence, was again nonsuited.

On which it was finally ordered, on the 27th Oct. 1681, in Michaelmas term, 33 Car. 2. that the defendant Marshall be dismissed from the said bill, and the matters and things therein contained. The defendant Marshall died; and on the 9th June, 1684, 36 Car. 2. the plaintiff Scudamore filed a bill against his widow for the recovery of the 2s. 9d. in the pound, pursuant to the stat. 37 H. 8. c. 12. The widow pleaded, that the house was situated in Fetter-lane, and, having been burnt down, was re-erected on ground, time out of mind, belonging to the converted Jews, called the Rolls, which is situated between Chancery-lane and Fetter-lane; that the said Rolls is a liberty in itself, and not in the city of London, but exempt from the same, and a chapelry of itself; that the said house of converts, now called the Rolls, was and is an ancient structure or building, and was a religious house

E. 31 Car. 2. Scacc. *Anon.* [1 Freem. 329.]

1679.

**I**F a man agist cattle, such as are unprofitable, and yield no tithe in kind, as horses, &c. there the party that takes them in, viz. the owner of the ground, shall answer the parson the tithe, according to the rate he has for their depasturing.

For unprofitable cattle the owner of the ground shall pay agistment-tithe, according to the rate he has for depasturing. But if he agist profitable cattle, as sheep, then

But if a man agist profitable cattle, and such as yield a tithe in kind, as sheep that yield tithe wool, and lambs, there the owner of the cattle shall answer the tithes, because the wool and lamb in kind were due to the parson, and it is impossible that the owner of the ground could pay that. This difference was taken by Sir ROBERT SAWYER, and agreed *per Cur'*.  
the owner of them shall be answerable, because wool and lamb in kind are due, which it is impossible the owner should pay.

Tr. 31 Car. 2. Scacc. *Swan v. Stanley, et à contrà.* 1 Wood, 194.

Worcestershire, 30th June, 1679.

**T**HE plaintiff, as vicar of the parish church of Alderminster, in the county of Worcester, stated, by his bill, that for twenty years past, he had been vicar of the said parish, and was entitled to, and ought to have received predial tithes of grass and hay, and all small tithes there arising; that there was a custom within the said parish, that if any inhabitants bought in sheep before Candlemas, and sold them before the next shearing-time, the owner was to pay to the vicar a halfpenny a sheep, for every sheep sold; that if any owner sold any ewes and lambs, kept there before Holy Rood-day, the owner was to pay to the vicar a halfpenny for every ewe, and a halfpenny for every lamb so sold; that if any owner sold sheep between Candlemas and Midsummer, the vicar was to have a halfpenny a sheep.

A custom that every house keeper should pay a penny at Easter, called a smoke penny, in lieu and satisfaction of tithes for the fuel burnt in their respective houses established.

The defendants answered, and confessed the plaintiff to be vicar of the parish, and entitled to the tithes of wool, lamb, calves, pigs, pigeons, apples, pears, hens, turkeys, geese, hemp, and flax, arising within the town and common fields there, according to the custom of tithing there used, time out of mind, but whether in all the parish they knew not; nor did they believe that he ought to have the predial tithes of grass and hay within the said parish, for that the vicarage was not endowed therewith; but they confessed, that he had received the tithe-hay arising on their several farms; but denied that he was entitled to the tithe of furze, or lops of trees, for that the vicarage was not endowed thereof, nor were such tithes demanded till of late years. They further stated, that in recompense of what fuel they burnt in their houses, they had paid to the vicar a penny, called a smoke penny, according to the custom there used time out of mind. They confessed also, that there were such customary payments for sheep, as in the bill mentioned, and said that there was a custom to pay the vicar a farthing a sheep, for every sheep agisted in the common fields there; and one penny a cow for every milch cow kept there, as a rate in lieu of tithe-milk; and for calves, if the owner had seven, the vicar to have the seventh, paying the owner three-halfpence, if under seven, the vicar to have half a calf, if ten, the vicar to have the tenth in kind; which rates the plaintiff and his predecessors had or ought to have observed.

The cross bill set forth, that the plaintiffs were landholders of several farms

house or monastery, time out of mind, and was long before the 37 H. 8. c. 12. and decree, anciently appointed and appropriated to and for the reception, instruction, and maintenance of such Jews and infidels as were converted to the Christian faith; and that, time out of mind, it has been exempt from tithes. Two issues were directed to try, first, whether the house was within the Rolls; secondly, whether the ground on which it was built is in London or Middlesex: but the parties never

went to trial, and it came on again on the equity reserved; and the court, on inspecting many grants from the crown, to several persons masters of the rolls, and other records, declared, that the house ought not to be charged with any tithes to the vicar of Saint Dunstan's by the statute 37 H. 8. c. 12. or otherwise, no tithes ever having been paid for the same. See also *Bennet v. Trespass*, Bunb. 106.

1679.  
SWAN  
v.  
STANLEY.

in the said town and common fields of Alderminster; and that there had been several customs there, time out of mind, observed, that is to say, that for such sheep as were bred in the common fields, and not wintered there, the vicar to have only half tithe-wool thereof; and for such sheep as were brought in after Candlemas, and shorn there, the vicar to have a halfpenny a sheep; and for such sheep as were agisted in the common fields there, the vicar to have a farthing a sheep, and that such rates were in lieu of tithe-wool; that for tithe-calves, if the owner had seven, the vicar to have one, paying to the owner three halfpence; if under seven, the vicar to have half a calf; if ten, to have the tenth in kind. That for such milch cows as were kept in the common fields he was to have one penny a cow, and so for every milch cow, as a rate for tithe-milk. That every housekeeper used to pay a penny at Easter, called a smoke penny, in lieu of tithe for the fuel they burnt in their houses; and twopence for offerings for man and wife; which customs had been observed by the vicar there, but were by the present one refused, who endeavoured to abolish the same, and set up other customs; that, notwithstanding, they had paid the vicar all his tithes, as in their answer set forth: therefore they prayed relief in the premises, and that the customs might be confirmed by the decree of this court.

The defendant answered, and confessed there might have been some such usages for tithing for some years; but said, that the same had not been observed time out of mind, and that the penny paid as a smoke penny, was not paid in lieu of what fuel they burnt in their houses. He denied that he endeavoured to destroy the ancient customs, but submitted to the same when proved; and said, that there were good lops of trees and quantities of furzes, which the plaintiffs sold, for which they had not paid tithes.

In both which causes issue being joined, several witnesses were examined on both sides; and the causes brought to a hearing on the 26th of June, 1678, when they were referred; but the parties not agreeing, they came this day for the opinion of the court; and after long debate of the matters complained of by the vicar,

The court did not see cause to relieve him upon any of them, but this day orders and adjudgeth, that the said bill be, and is hereby absolutely dismissed, yet without costs.

And for that the court was satisfied with the proofs now read, that there are, and have been such customs for tithing used, time out of mind, within the said parish of Alderminster, as the plaintiffs in their cross bill have set forth,

It is further ordered, adjudged, and decreed by the court, that the customs mentioned in the said cross bill, and hereafter recited, that is to say, first, the custom for paying to the vicar of Alderminster for the time being, at Lammas-day yearly, a farthing a sheep for every sheep agisted in the common fields of Alderminster, in lieu of tithe-wool; secondly, the custom for calves, that if the parishioner have seven calves, the vicar is to have one, paying to the owner three halfpence; if under seven, the vicar to have one halfpenny for each calf at Lammas-day; and if ten, the vicar to have the tenth calf in kind;—Thirdly, The custom for milch cows, that for every milch cow kept in the said common fields, the vicar to have yearly one penny for each cow, in lieu of tithe milk, to be paid at Lammas-day;—Fourthly, The custom that every housekeeper shall pay a penny at Easter yearly, called a smoke penny, in lieu and satisfaction of tithe for the fuel burnt in their respective houses, shall be, and are hereby established and confirmed to be for ever hereafter observed by and between the said vicar and his successors; and the said Robert Stanley, and other the plaintiffs in the cross bill, and all others claiming under them; with moderate costs to be paid by the defendant Swan in this cause.

WM. MONTAGU.  
THO. RAYMOND.  
EDW. ATKYNS.  
W. GREGORY.



Tr. 31 Car. 2. Scacc. *Simpson v. Tucker*. 1 Wood, 197.

Devonshire, 7th July, 1679.

1679.

**T**HE plaintiff, as vicar of Collyton, and of Shute, and Monneton, thereto appendant, claimed tithes for agistments for three years past.

*A modus of Sd. for every hog-head of cider or perry in lieu of all apples and pears void, but decreed for each hoghead.*

The defendants alleged, that they were inhabitants within the tithings of Minchenholme and Woodland, within the said parish of Collyton, and set forth several customary payments within the said tithings; viz. fourpence for a milch cow, and threepence an heifer yearly, in lieu of the tithes of calves, milk, cheese, and butter; one penny for every colt; threepence for the tithes of every acre of meadow in Minchenholme, and twopence in Woodland; and for every hoghead of cider or perry threepence, in lieu of the tithes of all apples and pears growing within the said tithings.

The plaintiff insisted, that there were the same customs throughout the whole parish of Collyton, except the twopence and threepence an acre of tithe hay; that the defendants are *justment* holders, or renters of land at a yearly rack rent; that all the *justment* holders, or renters of land, as well within the said tithings of Minchenholme and Woodland, as in all other tithings within the said parish, ought to pay agistments after the rate of twenty-pence in the pound for so much land as they depasture; which said agistments or payments have been usually paid by all renters of land throughout the whole parish of Collyton, where the vicar had tithes, though the owner of such lands, if he kept the same in his own possession, might have the benefit of the same customs.

The court conceived the custom of paying threepence a hoghead for cider or perry, in lieu of all apples and pears growing within the said tithings, to be void, and against law; and therefore doth order and decree, that the defendants shall pay to the plaintiff threepence for every hoghead of cider or perry in lieu of all tithes for the same; and that the said defendants shall account, satisfy, and pay to the plaintiff the tithes of all hoard apples and pears, and all other apples and pears not made into cider or perry, or the value thereof.

The court further ordered this issue to be tried, "Whether by the custom within the said tithings of Minchenholme and Woodlands all *justment* holders, or renters of ground at a yearly rent within the said tithings, have used, and ought to pay yearly to the vicar of Collyton, for the time being, twenty-pence in the pound for such grounds as they feed and depasture, in lieu of all tithes and customary payments for all cattle fed or depastured upon the same?" both parties to admit all circumstances, and to insist only upon the matters aforesaid.

A trial was accordingly had; and, after full evidence given on both sides, a verdict was given for the plaintiff, and thus indorsed: "When pasture is let by itself, then the renters are to pay twenty-pence in the pound according to the rent; when pasture and other grounds are let together, then they are to pay tithes in kind for the pasture according to law, one penny for every forty shillings;" that upon the trial of this cause, the plaintiff pretended a *modus* of twenty-pence in the pound; and the defendant pretended a *modus* of fourpence per cow, and the rest of the tithes of pasture to be paid in kind; and it being Lord Ch. J. NORTH's opinion that "where the pasture was not let by itself, whereupon the rent of the pasture was not certain, there could be no such *modus* of twenty-pence in the pound for the uncertainty of the value;" thereupon his lordship directed the jury that, in case they found against the pretended *modus* of fourpence per cow, they should find that tithes in kind were due; whereupon they gave a verdict for tithes in kind.

The cause came on the 22d instant; and upon reading the order, the *postea*, the indorsement, and the judge's certificate, and hearing counsel on both sides, the same was continued to the 25th of November, 1680; when, after long debate thereupon, and due consideration of the whole matter had by the court, forasmuch as it appears that pasture and other grounds were let together to the defendants,

1679.  
SIMPSON  
v.  
TUCKER.

It is ordered by the court, that the defendants shall satisfy and pay to the plaintiff their tithes in kind, according to the value thereof, to be computed by the deputy remembrancer, (except for cider, which is to be paid according to the said *modus* of threepence a hogshead.)

WM. MONTAGUE.  
EDW. ATKINS.  
WM. GREGORY.  
J. STREET.

1680.

A suggestion of barren land newly improved ought to be proved within six months, in the same manner as all affirmative suggestions.

H. 32 Car. 2. B. R. *Thomas v. Gifford*. [2 Show. 92.]

**P**ROHIBITION. Resolved that by statute of 2 & 3 Edw. 6. c. 13. s. 14. the suggestion of barren land newly improved, and therefore exempt from tithes for seven years, ought to be proved within six months, otherwise a consultation to go. Cro. Car. 208. *State v. Eskins*. 1 Brownl. 198. *Lobb v. Hunt*; and all affirmative suggestions ought to be proved, as is implied in 2 Inst. 662. And for want of this proof a consultation was granted in this case accordingly.

H. 32 Car. 2. Scacc. *Turnor v. Smith*. MS. 2 Gw. 529.

Stub oak and ash is titheable in the county of Essex, not being there accounted timber; but some trees of oak and ash, being seconds or standards, for which no tithe is due, being felled therewith, an account was ordered to be taken thereof.

**B**ILL by rector for tithes of coppice wood and underwood. The defendant insisted it was not titheable, being above thirty years growth, and much of it sold by him for timber.

Now forasmuch (in the very words of the court) as it appeared to the court, by the proofs that the wood felled by the defendant did consist principally of hornbeam, saw, hazel, and ash, and stub-oak and ash, being titheable wood, and in the county of Essex never accounted timber; the court declare that the plaintiff ought to have tithe in kind for the same. But in regard there were some trees of oak and ash, being seconds or standards, which, growing promiscuously in the said coppice, were felled, and the heads or tops thereof made into faggots, for which no tithe was due to the plaintiff; decreed that it be referred to the auditor to take an account of what coppice wood or underwood, or woods growing promiscuously on stubs, or stems, the defendant felled, and what timber trees, or trees of oak, ash, or elm, commonly called seconds or standards, were felled by the defendant, and sold for timber: and as to the coppice wood or underwood, and wood growing on stubs or stems, the auditor is to compute the value, and what is due for the tithe thereof.

H. 32 Car. 2. Scacc. *Collard v. Newton*. [Banb. 37.] 2 Gw. 530.

A general allegation of discharge by bull, order, prescription or some other way, is sufficient.

**T**HE defendant insisted, that the lands, where, &c. were discharged by bull, order, prescription, or some other way, and allowed to be good.

E. 32 Car. 2. Canc.

*Perne v. Oldfield*. [2 Vent. 349.] 2 Chan. Ca. 19.

Where tithes were devised to a curate, and to all that should serve the cure after him, the lord chancellor decreed that the

**A**N impropiator devised to one that served the cure, and to all that should serve the cure after him, all the tithes and other profits, &c. Though the curate was incapable to take by this devise in such manner, for want of being incorporate and having succession; yet my Lord Chancellor FRICH decreed, that the heir of the devisee should be seised in trust for the curate for the time being.

heir of the devisee should be seised in trust for the curate for the time being.

To a suit for tithes of fen lands lately improved and gained from the water, a *non decimando* under the abbey of Crowland was set up, and an issue directed.

Tr. 32 Car. 2. [2 Chan. Ca. 31.]

1680.  
PERNE  
v.  
OLDFIELD.

**T**HE church of Crowland in the county of Lincoln, being appropriate to the abbey of Crowland, and no vicar endowed, (for aught appears it seems that the cure was served by some of the monks) the rectory came to the crown; and by meane conveyances to one Mr. Chapman, who gave the rectory, by his will, to the maintenance of a minister there for ever, not reserving the nomination of a minister there, nor expressing any thing concerning such nomination; the devise of the rectory being void at common law, being made to no certain person, the estate thereof came to Sir Thomas Orby and Wingfield, who did appoint and nominate the defendant Oldfield to be minister and serve the cure; afterwards the plaintiff, supposing a lapse to the crown, was presented, instituted, and inducted, as if the church had been void; Orby and Wingfield rectors, supposing that the nomination of the minister belonged to them, nominated Oldfield.

Perne sued the rector for tithes of fen lands improved lately, and gained from the water; they pretend a *non decimando* under the abbey; and that Perne the other defendant was not minister; so he pretended, that the tithes belonged to him.

For the plaintiff it was said, that here is a pious use wholly subject to this court, and that Perne coming in by the ordinary, though he was not parson or vicar, was allowed by the bishop; and decreed accordingly, that he should have the tithes; but as to the *non decimando*, a trial, &c.

E. 32 Car. 2. Scacc. *Woodford v. Standfast*. MS. 1 Raym. 59.

**T**HE question was, whether clover should pay tithes as hay, and should be within a *modus* of two-pence an acre for all meadow and mowing ground, when the clover stands for seed, and a great quantity thereof produced.

Note; the court was divided; MONTAGUE, C. B. and ATKYNS, that it should be accounted hay; RAYMOND before his removal, and GREGORY to the contrary; and afterwards WESTON inclined that it was not within the custom; but the plaintiff the day after the term prayed to dismiss his bill without costs or prejudice; which was admitted.

Quære, Whether clover shall pay tithes as hay, when it stands for seed?

E. 32 Car. 2. Scacc. *Croft v. Blake*. MS. 2 Gw. 530.

**A** CUSTOM to tithe lambs on St. Mark's day, as insisted upon by the defendant, the court declared to be unreasonable; for that the tithe lambs were then not able to live of themselves; and that they are titheable when they can live without the dam, and when the occupier weans his own lambs, and not before.

Lambs are titheable when they can live without the dam, and when the owner weans his own lambs.

Tr. 32 Car. 2. Scacc. *Anon.* MS. 2 Gw. 530.

**A** BILL for wild cherries (*inter al.*) the defendant insisted they were not titheable by law: but tithes decreed.

Wild cherries titheable.

Tr. 32 Car. 2. Canc.

*Pomfret v. Lander*, and others. [Dodd's MS. cited in Bunb. 344.]  
2 Gw. 530.

**L**UTON, in Bedfordshire: tithes of clover grass threshed, and made into horse-bread, and hogs fed with the seed; yet adjudged to be hay, and titheable to the vicar, who was endowed with hay, and not to the use of the impropiator, as a new or different tithe from hay.

Clover grass threshed for seed titheable as hay.

Tr. 32 Car. 2. Scacc. *Gwavas v. Teage.* 1 Wood, 203.

Cornwall, 14th June, 1680.

1680.

The fishermen of the parish of Paull, otherwise Paulyn, in Cornwall, ought to pay tithes of all sea fish taken by them, except such fish as are taken for bait, or meased in the aleeves of the seynes, whether used for bait or not.

**T**HE bill stated, that the plaintiff, on the 25th of March, in the year 1669, was seised, and ever since has been seised in his demesne as of fee, of the rectory impropriate, and tithes of the parish of Paull, otherwise Paulyn, in the county of Cornwall, the same being a very ancient rectory and adjoining to the sea, and extending itself into Mounts Bay, where the inhabitants of the parish aforesaid, and others, had, time out of mind, used to have and keep fishing boats and nets for taking of cod, ling, hake, lobsters, pilchards, and all other great and small sea fish within that bay and seas adjoining, and to tie and moor their boats, and keep their nets; that, time out of mind, a custom of tithing had been there used and approved, that every parishioner, and others, being proprietors or occupiers of any fishing-boat or net which had been usually tied, moored, or kept in any part of the parish aforesaid, when not used, paid, and by the custom ought to pay to the owners of the rectory, the tenth part of all great and small fish taken in the said bay or other seas, with such boats, nets, or other fishing craft so tied, moored, or kept (except only such fish as had been used for bait for other fish, of which bait no tithes were paid); that the defendants ever since have been inhabitants of Paull aforesaid, and used fishing-boats, nets, and other engines for the catching of fish; that they usually tied, moored, or kept the same at Mousehole, or Newlyn, (being towns or villages within the said parish of Paull,) or at other places within the parish, at such times when the same were not used for fishing; that since the 25th of March, 1669, the defendants had taken in the said bay and seas (besides such fish as were used for baits) several quantities of sea fish of several sorts and kinds, the tenth part whereof ought to have been paid to the plaintiff, according to the custom; but which they refused to do under various pretences. The bill therefore prayed a discovery, and an account and satisfaction for the same.

The defendants said, that they believed the plaintiff was seised of the said rectory impropriate, whereby he ought to have had the tithe of corn, grain, and hook fish, and certain customary payments for pilchards caught by seynes, as the same had been paid time out of mind; they confessed that the parish of Paull adjoined to the sea, and extended itself into Mounts Bay; and that the inhabitants of that parish, and others, had, time out of mind, used to moor and keep their boats and nets there for taking of cod, ling, hake, lobster, pilchards, and other sea fish within the said bay and seas adjoining; but they denied the custom in the bill set forth; and said that, time out of mind, there had been, in the said parish of Paull, otherwise Paulyn, two ancient fishing towns, called Newlyn and Mousehole; that the inhabitants of those towns, and of Paull, who had so moored and kept their boats and nets, did only pay tithe in kind for hook fish, which was set out by the fishermen who took the same after they came on shore, and that there was never any tithe in kind paid for pilchards; but that for pilchards caught in seynes by boats so moored, (except such as were measured and hung by the head in such seynes,) the owners of such boats and seynes had used to pay the tenth part of the money for which the same were used to be sold in fresh, according to the price the owners paid the seamen for their parts thereof, (being one-half of all pilchards so taken by such seynes,) except the meased fish for which no tithe was paid; that greater quantities of pilchards were taken in driving nets than could be used for bait, and that when brought on shore part were sold in fresh to the common people, and the other part made into fumachoes, and sold to merchants without payment of any tithe in kind, or any thing in lieu thereof; and they did believe that, if any tithes were due for pilchards meased in seynes, or caught in driving nets, the same would have been demanded and recovered by the former rector of the said parish, in whose time driving nets were used, and quantities of pilchards taken by them, more than were used for bait, and yet no tithe paid or demanded for the same, as they remembered. They also stated, that they did

not know that any tithe had been paid in kind for lobsters caught in pots or otherwise, or any thing in lieu thereof. They denied the payment of the tenth pilchard in kind of such as were taken in seynes, or other payment than as aforesaid; but said that they were willing to pay, and had paid their tithes and customary payments, as anciently used; and they all owned themselves to be parishioners and inhabitants of the said parish, who had exercised the fishing craft within the time aforesaid, with boats and nets so moored and kept as aforesaid; they said that in the years charged they were owners of boats, seynes, driving nets, or other fishing craft, kept and moored in the parish of Paull, with which they had taken pilchards, lobsters, and other fish, and had paid to the plaintiff the tithe of all hook fish, and also the customary payment for all pilchards taken in seynes (except meased pilchards); but they insisted that they ought not to pay any tithe or other thing in lieu thereof for lobsters or pilchards caught in driving nets, or meased in seynes; nor any tithe in kind for pilchards caught in seynes, but only the tenth penny, for which the same were sold in freshes as aforesaid.

The plaintiff replied; and issue being joined, witnesses were examined on both sides; and upon hearing counsel on both sides, and reading the depositions, and on long and solemn debate of the matter,

The court declared, that the plaintiff ought to have the tithes in kind of all sea fish whatsoever, taken by the defendants, since the plaintiff's title accrued, by or with boats, nets, or other fishing craft tied, moored, or kept within the said rectory; whether the said sea fish were taken in or with nets called seynes, or in or with nets called drift nets or driving nets, or by or with any other fishing craft, (except only such fish as were taken and used for bait for other fish, and excepting fish meased in the sleeves of seynes, whether used for bait or not,) which this court declares not to be titheable; that the payment of the tenth penny of the money, for which the fish were sold, was, in effect, a payment of the tithe in kind; and that the late usage of taking pilchards there in drift or driving nets, for other purposes than for bait, was fraudulently put in practice, to defeat the custom and the plaintiff's inheritance therein, and ought not to be admitted, to avoid payment of tithes for pilchards so taken (except for such pilchards only as are used for baits, or were meased in the sleeves of seynes); and therefore,

It is ordered by the court, that the said defendants do come to an account with the plaintiff for the tithes of all such fish, as have been taken by them since the 25th of March, 1669, in, by, or with boats, nets, whether seyning nets or driving nets, or other fishing craft whatsoever, tied, moored, or kept within the said rectory or parish (excepting only such fish as have been used by them respectively for bait for other fish, and excepting fish meased in the sleeves of seynes as aforesaid); with costs.

WM. MONTAGU.  
EDW. ATKYNS.  
WM. GREGORY.  
RD. WESTON.

M. 32 Car. 2. Scacc. *Star v. Ellyot*. [1 Freem. 299.]

**A** PROHIBITION was granted to stay a suit for tithes in the ecclesiastical court, upon a suggestion, that the lands were part of the possessions of the priory of St. John's of Jerusalem, and so discharged by stat. 32 H. 8. And though there be difference of opinions in the books, yet the later judgments are, that they are discharged. *Whitton v. Weston*, Jones, 182. Godb. 391. Latch, 89. 2 Cro. (*Ante*, 340.)

Prohibition was granted upon suggestion that the lands were part of the possession of St. John of Jerusalem, and so discharged by 32 H. 8.

1680.

A prohibition *quousque*, &c. lies for refusing a copy of articles as well as a copy of a libel.

M. 32 Car. 2. B. R. *Manling v. Smith*. [2 Show. 132.]

**I**N case of articles in the Arches, if a copy of them be denied, a prohibition lies, as well as in case of a libel when a copy of that is denied, (1) but it is only *quousque*, &c.

(1) See the statutes of 2 Hen. 5. c. 3. and 2 Edw. 6. c. 13.

Prohibition after sentence and appeal where no jurisdiction.

M. 32 Car. 2. B. R. *Tomlinson v. Freeman*. [2 Show. 145.]

**P**ROHIBITION granted after sentence and appeal, it appearing upon the libel itself, that the cause was out of their jurisdiction.

1681.

No prohibition shall be granted for citing out of the diocese after plea pleaded.

H. 33 Car. 2. B. R. *Anon*. [2 Show. 155.]

**I**N case one be cited out of the diocese, no prohibition is to be granted after plea, for thereby the defendant has owned the jurisdiction of the court; and none can be granted after a plea of a general negative, though that court will perhaps admit a new allegation. Agreed by the whole court.

Tr. 33 Car. 2. Scacc. *Camell v. Ward*. 1 Wood, 209. 2 Gw. 531. Suffolk, 20th June, 1681.

Tithes are not payable for wild ducks, or for ducks or other fowl taken in a decoy, nor for the eggs of tame ducks kept for the service of a decoy.

**T**HE scope of the bill was to compel the defendant, being the executor of John King, to set forth and discover what yearly profit the testator made in his life-time, of a decoy of fowl, in the parish of Worlingham, in the county of Suffolk, which the plaintiff alleged the said John King had been occupier of for several years, and wherein he had yearly taken and killed ducks, mallards, teals, and other fowls, and had eggs therefrom; whereby he made great profit, and ought to have paid to the plaintiff yearly, as rector there, the tithes thereof in kind, or made some composition to him for the same.

The defendant said, that he knew not that John King was ever owner or farmer of the said decoy, but believed that he was servant to Sir John Duke, the owner thereof, and gave him an account thereof; that the said decoy was only of wild fowl, and that the plaintiff and his predecessors never, since the making of the said decoy about forty years ago, had paid any tithes for the same, or made any satisfaction in lieu thereof.

Upon opening the bill and answer, and upon debate of the matter, it appeared to the court, that the ducks taken in the said decoy were wild ducks, for which the court was of opinion, that tithes are not payable; and there being no proof of any custom for the payment of tithes for ducks and other fowl taken in decoys, or for the eggs of tame ducks kept for the service of the said decoy, the court was also of opinion, that tithes ought not to be paid for the eggs of such ducks.

The bill therefore was dismissed; but without costs.

WM. MONTAGU.  
EDW. ATKYNS.  
WM. GREGORY.

Tr. 33 Car. 2. Scacc. *Margetts v. Butcher*. 1 Wood, 210.

Northamptonshire, 13th June, 1681.

Of common right tithes of after-math, or the after crop of grass mowed (there being no prescription or custom against, or in discharge of the same) ought to be paid.

**T**HE bill stated, that for four years past, the plaintiff had been and then was farmer of the parsonage and rectory impropriate of Sutton, otherwise called King's Sutton, in the county of Northampton, and of all the tithes thereof; that there was an ancient custom within the said parish, that the occupiers of meadow and mowing grounds should pay tithes of the latter math, or second crop of grass, or herbage cut in the meadows there, whereof the tithes of the first

first crop of herbage there mowed were set out in grass, and not made into hay by the occupiers of such meadow ground.

The defendants, as to the tithes of the latter math, said, that they had heard that the same had been sometimes paid by some land-holders, but that they believed it was paid in their own wrong, and confessed that they had themselves paid the same in their own wrong.

The defendant Butcher said, that he rented six yard lands in the parish of Astropp, and had four acres of his own, and that three of the six yard lands, and the four acres, were in the parish of Sutton; that the messuage and the three other yard lands were in the parish of Newbottle, and that the small tithes belonged to the vicar of that parish; that there were one hundred and forty-four sheep commons belonging to the said messuage and six yard lands, and none belonging to the four acres; that in the first place, he sheared no sheep fed in the parish of Sutton, but sold several of them before shearing time, for every sheep whereof an halfpenny only was due by the custom of those parishes; that since, one year with another, he had sheared several sheep in the parish of Newbottle; that, during the time in the bill mentioned, he had sheared no sheep in the parish of Sutton; that every year he had several lambs of the ewes kept on the commons of the said farm; and he confessed that he did not pay the privy tithes of the said farm to the plaintiff, for that the sheep and cattle going on the commons of the said farm did feed, during the said term, for the most part of the year, on the waste and unknown grounds in Astropp, and for the rest of the year on the lands lying within the parishes of Newbottle and Sutton; that the waste and common grounds lie within the said parishes, and are unknown and undivided; that the defendant residing in the parish of Newbottle, had paid the vicar there all tithes of wool and lamb arising out of the said messuage and six yard lands, and was advised that he ought not to pay to the plaintiff any privy tithes for the lands in the parish of Sutton.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides. The cause came on to be heard the ninth day of May last; and on debate of the matter,

The court delivered their opinion, that as to the tithes of wool and lambs, the same ought to be paid rateably, according to the value of the lands which the defendants respectively held in each parish, and that they were respectively to account for the same, only that if there were any odd sheep or lambs under seven, there is, by the custom, only an halfpenny a sheep and an halfpenny a lamb due for the same to the vicar of King's Sutton, and nothing to the parson, and therefore for those odds the defendants are not to account, save only that where the sheep have been divided amongst the children, the defendants ought to account for the tithes of the lamb and wool of the said sheep rateably as aforesaid, the court declaring that such gifts to children are fraudulent.

As to the tithe of the aftermath, or aftercrop of grass mowed, there being no custom or prescription alleged or set forth by the defendants in discharge thereof, the plaintiff's counsel insisted, that the tithes thereof ought, by common right, to be paid by the plaintiff.

But the court took time to advise of the same until the day after the term, when the court declared, they would further advise touching the payment of the tithes of the said aftermath, or aftercrop of grass.

The cause now came on for their judgment therein, and after hearing counsel on both sides,

The court delivered their opinions *seriatim*, "that of common right tithes of aftermath or of the aftercrop of grass mowed (there being no prescription or custom against, or in discharge of the same) ought to be paid and set forth by the defendants to the plaintiff."

WM. MONTAGU.  
EDW. ATKYNS.  
WM. GREGORY.  
THO. STREET.

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M. 33 Car. B. R. in Error from C. B.  
*Trollop v. James.* [Pollexf. 623. Skin. 51. 239. 2 Show. 439.  
 2 Mod. 520.]

A *modus* may be good though not paid to the parson of the parish, but to one who has a portion of tithes.

Though a layman was not capable of tithes in *prebend*, yet he was by way of retainer upon a composition: therefore where there was a grant of a manor and a portion of tithes of the manor, rendering a rent of 5*s.* such payment was held to be a good ground of discharge, and tho' the grant was before the time of legal memory, yet constant usage being shewn under it, it was held to be sufficient.

Though grants of franchises and liberties from the King made before time of legal memory must be allowed in eye, or some court of record, within memory, or they cannot be pleaded; yet where a private deed of a thing which may be claimed by usage, is by usage supported, such a deed may be pleaded but cannot be relied upon *virtute cus-jus*, &c. without evidence of usage. Where land is alleged to be demesne it must be intended to be part of the manor, for the tenancies are not part of the manor.

**E**RROR upon a judgment in C. B. in an attachment upon a prohibition, in which the plaintiff declares,

That William, late Prior of Stotesbury, in the county of Stafford, was seized as well of all the tithes arising in or upon the manor of Norbury, in Com. Derby, and of two hides of land in Norbury, *præantea* time out of mind, parcel of the manor, as of a certain portion of tithes then and theretofore in like manner from time whereof, &c. to the said Prior and his predecessors Priors of the said priory together, *simul et semel* in right of the said priory belonging.

That the said prior so being seized with the assent of the convent, under seal of the convent here in court produced, gave the manor aforesaid and two hides of land, and the tithes of the manor aforesaid, to William Fitzherbert and his heirs, rendering 100*l.* per annum.(1)

And further the said prior and convent, by the said deed granted to the said William Fitzherbert and his heirs, that for the tithes of the manor and two hides of land, they should pay to the prior and his successors the payment of 5*s.* per annum.

That by virtue of this grant William Fitzherbert entered and was seized, and held discharged of the payment of tithes.

That he died seized of the said manor and two hides of land, and [the same] descended to his son, who entered and held the same discharged of the payment, and so draws down the title by descents from the year 1125, which was 25 Hen. 1. through about 30 descents, to one Sir John Fitzherbert, and that he was seized of the manor and lands, and also held the same discharged of the payment of tithes.

And that he so being seized, his estate by assurance in law at Norbury aforesaid, was conveyed to one William Fitzherbert of Stammerton and his heirs, by which he was seized, and held the same discharged of tithes; and he so being seized,

By indenture of one close, called Knaveholme, parcel of the said manor, enfeoffed Dorothy James, *habend'* to her and her heirs (*riens in le grant de dimes*), by force of which she entered and was seized of the close, and held the same discharged of tithes.

And from Dorothy descended to the plaintiff William James, who entered into the close and is seized in fee.

And the said William James and his predecessors, and all those whose estate the said William now has, from the time of the gift and grant aforesaid by the prior, ought annually to pay the prior for the time being, before the dissolution of the priory, and after the dissolution to our lord the King, his *progenito. et assig.* aforesaid, five shillings for the tithes of the manor and two hides of land, according to the form of the grant aforesaid, and for all that time have held and ought to hold the demesnes of the manor, and the two hides of land discharged of the payment of tithes, for and in consideration of the payment of the said 5*s.*

And that Trollop, being rector of the parish, nevertheless sued him in court-christian of the Bishop of Coventry and Litchfield, and thence James appealed to the Arches, and there also Trollop sued him for tithes of this land.

Trollop prayed oyer of the deed of the prior, and the deed was that the prior and convent gave to William Fitzherbert Norburium in fee, to hold to him and his heirs, rendering 100 shillings every year.

Then proceeds with other clauses not easily understood.

For reliefs and aids when the prior should buy lands, and to be justified by the prior, or else *Norburium* to be seized, and to be tried in the prior's courts, and then the clause about the tithes is,

Besides this, however, for the tithes of the manor, and for two bovates of



land belonging to the tithes, William or his heirs shall give yearly five shillings : for this grant William gave to the prior and monks one bushel of wheat.

And thereupon a demurrer, and adjudged for the plaintiff in the common pleas, and error brought.

In this case oyer of the prior's deed being prayed, and the deed set forth in *hæc verba*.

I. The declaration is naught because the deed does not warrant what the declaration says is granted thereby.

1. The declaration says, That the prior granted the manor of Norbury, and the two hides of land and the tithes of the manor by the name of Norbury, to William Fitzherbert. The deed only says, *Willielmo filio Herberti Norburiam in feodo*. Why should *Norburian* be taken to be the manor, perhaps the mansion-house, farm or demesnes so called? Next there is nothing in the deed of any grant of tithes, only this.

*Præter hæc autem pro Decima Domini et pro duabus bovatis terræ decimæ per timent, dabit Willielmus aut Hæres ejus singulis annis quinque solidos.*

There are words of the grant in the former part of the deed, which shews they then used words of grant, but in the latter none.

2. But supposing the deed to make what the declaration says it does.

Whether the plaintiff has made himself a good title to have a prohibition?

The title that he has made, is,

That the prior was seized of the manor, and of the tithes of the manor, as a portion of tithes.

That he, anno 1125, 25 Hen. 1, granted the manor and tithes to Fitzherbert in fee, paying five shillings per annum for the tithes.

That by virtue hereof Fitzherbert and his heirs have enjoyed the lands discharged of payment of tithes, till at last his estate was conveyed to one William Fitzherbert; and that he by indenture enfeoffed the mother of the defendant of the close called Knaveholme, which descended to the defendant.

And that the defendant and his ancestors, and all those whose estate he now has, from the time of the grant by the prior, have yearly paid the prior till the dissolution, and after the dissolution to the king, his progenitors and assigns, five shillings *pro decimis manerii*, and two hides of land, according to the form of the grant, and by all that time have holden the demesnes and the two hides discharged from payment of tithes. He has nowhere said, that his close was parcel of the demesnes, or of the two hides.

Upon this suggestion what kind of a discharge to call this, I do not know.

Here is much matter massed together, and there having been a long non-payment, it is hoped that the court, though no particular or legal discharge appears, yet all being blinded, will make it reach the end, and to be a discharge.

But one of these I think must be either

1. By grant.

2. By prescription in *non decimando*.

3. Or by *modus decimandi*, paying five shillings to I know not whom.

(1) That in this case the grant cannot make a good title of discharge, and the grant, I take it, is the whole foundation of the suggestion. And the grant being made anno 1125, which was 25 Hen. 1. which is 65 years before 1 R. 1. the time of memory, therefore, not pleadable.

*Homo neminem aduantage per allegation de un foundation ou autre matter en fact d'estre fait deuant temps de memorie per ceo que ne poest estre trie.* (1) And in the next section,

A man shall not have any advantage by allegation of a deed or specialty made before time of memory, for that it cannot be tried.

For if in judgment of law before memory, then no account can be given of it. And, therefore, say the books, it cannot be tried, no issue can be joined upon it. No jury shall, upon their oaths, try that of which there is no memory.

(1) 2 Rol. Abr. 268. 4. 5.

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It is true that by matter of record it may be helped. As by any allowance in Eyre, judgment in the courts of Westminster, or the like. Then the credit that these records have may help it.

But no usage in *pais* forty descents, and never so long a possession, will never make a deed before time of memory made pleadable.

That grants made before time of memory of themselves, are not pleadable, (1) though the King's grants and of record, unless they have allowance of record. And that usage in *pais* will not support it.

So that upon this grant you cannot make a title.

2. Supposing that this could make a title, and were pleadable in the same manner as if it had been made since time of memory; yet before the statute of Hen. 8. that made laymen capable of tithes, if a prior had been seised of a portion of tithes, and had granted them to a layman in fee; this grant had been void. For though a layman were capable of a discharge of tithes, yet he could not claim, nor was he capable of taking tithes, or having a grant made to him of a portion of tithes. (2)

Then to apply this to our grant as they have suggested it.

That the prior gave the manor and the tithes of the manor.

This is a grant of the tithes, not a grant to be discharged of tithes. And if you construe it to amount to a discharge of tithes; yet you must then construe it so only as to the lands which were in the lord's hands, not to all the manor. For the tenants of the manor they are not to be discharged; as to them, their tithes must be paid to the grantee, if this grant of the tithes of the whole manor be good, as they suppose. And the plaintiff in this case has alleged, that Knaveholme, for the tithes whereof he is sued, is parcel of the manor, but not said that it was parcel of the demesnes: so that if the grant should be good for the demesnes by way of discharge, it does not extend to him. And this that I have said herein, does not oppose the authority of *Pigot* and *Heron's* also: (3)

That the lord of a manor may prescribe that he and all whose estate he has in the manor, have *temps devant pay al Parson tiel pension annualment in contentation de tous dismes le mannor. Et per aver dismes del tenants deins le mannor surdant.*

Because it shall be intended that the lord was seised of the land of the whole manor, before the tenancies termed out, and then by composition, or other lawful means, the lord had the tithes for the pension. But our grant shews quite contrary, that when made it was a manor which could not be without tenants, and therefore as to those tenants it could not go by discharge, but enure as a grant of those tithes; which was impossible.

And in truth, in the case of *Pigot* and *Heron*, that which the lord prescribes to have from the tenants in that case was not properly tithes, but *decimam garbam* or *decimum cumulum*. And in that the prescription was not to have *decimas*, but *decimam garbam et decimum cumulum garbarum*, and not as tithes, so it appears in *Sherwood* and *Winchcomb*. (4)

3. Supposing that this grant be good, and do pass the tithes, yet this is no cause for a prohibition, but the spiritual court might have proceeded to have tried this grant, they having the proper jurisdiction of the principal cause.

*Fuller* against *Clemens* and *Whiskerd*, (5) suit for subtraction of tithes. *Whiskerd* came in *pro interesse*, and alleged, that this rectory was inappropriate to the monastery of *Wendling*, and that it came to the King by dissolution, and draws down the title from the crown to himself; they went on in the spiritual court, and sentence against the plaintiff. Thereupon the plaintiff appealed to the arches, and a prohibition prayed. For that the matter was properly triable at the common law, depending upon statutes, letters-patent, feoffments and conveyances, and all a title at common law.

(1) Abbot de *Strata Marcella's* case, R. 9. 28. express.

(2) *Sydowne* and *Holmes's* case, antè, 363.

(3) *Pigot* and *Heron*, antè, 135.

(4) Antè, 106.

(5) Antè, 194. cited in *Roberts's* case.

Resolved that the original belonged to the ecclesiastical court; that the determination of all that belongs unto it, shall be triable there, though properly otherwise belonging to the common law.

(2) If so be that the deed be not sufficient, whether any thing of a prescription in this case be a title or a ground for a prohibition.

I cannot find any prescription in the suggestion. Formal or like other prescriptions there is none. But this there is, it is alleged after all the descents, and drawing down the title to the defendant in this manner.

*Idemque Willielmus James et antecessores sui ac omnes illi quorum statum idem Willielmus modò habet à tempore doni et concessionum predict' pro le prior, have yearly paid the prior till the dissolution, and after the dissolution to the King, his progenitors and assigns 5s. for tithes of the manor, and two hides of land, according to the form of the grant, ac per totum tempus predict', have holden and ought to hold the demesnes of the manor and two hides of land discharged from payment of tithes, for and in consideration of the said 5s. per annum.*

1. I think this no prescription, because it is not positive, and *per se*, but relative to the deed, that from the time of the making of the deed have yearly paid 5s.

If so be that that deed, being beforetime of memory, be neither pleadable or triable, as I have before shewn and proved; then this claim, or affirmation, or supposed prescription, referring itself to that which cannot be pleaded, or which cannot be tried, this supposed prescription can never be tried. For it is impossible to try whether from the time of making that deed hitherto they have paid this 5s. unless you try whether such deed were made or not.

2. It does not agree with the deed, for thereby I suppose the whole manor was charged with the payment of the 5s.

The defendant has but one close, and he says, that he and all those whose estate he has in that close, have paid the 5s.

3. He says, that *per totum tempus predict'* for this 5s. they have holden the demesnes of the manor and the two hides of land discharged, and so ought to hold.

But says not, that his close is parcel of the demesnes or two hides. I think it is not intended for a prescription, but only conclusion at large upon the deed, shewing a possession or usage according to the deed.

But supposing it a kind of prescription, it cannot be good in law. A prescription to pay a *modus* of 5s. to any other than the parson to whom the tithes belongs is naught; it gives no recompense.

A *modus decimandi* is either another different sort of tithing, or a recompense for the tithe. Therefore, to prescribe, that they have paid such a prior till the dissolution, and afterwards to the King, his predecessors and assigns, 5s. for tithes of the manor, and for it holden discharged; this can never be a good *modus*. Suppose it were to pay his landlord so much a year in discharge of tithes. If this be good, this will quickly be practical.

Prescription to be discharged of tithes in consideration of his repairing of the body of the church, with the profits of the land; adjudged to be no discharge, because no recompense to the parson. Otherwise if to repair the chancel: for there is a recompense to the parson. (1)

So upon the whole matter I think:

1. That there is not in the suggestion any discharge by prescription.
2. That the deed being before time of memory, is neither pleadable nor triable without some matter of record, or allowance of record to help it.
3. That usage in *pais*, or enjoyment, cannot help it.
4. That no title can by any such deed be pleaded or founded.
5. That it is not by law triable, and therefore his foundation fails.

The judgment was affirmed. [*Pollexfen.*]

Error in a prohibition; wherein suggestion was, that the prior of, &c. was seised of a portion of tithes in, &c. and of the manor, &c. *simul et acmel*; and

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that in the reign of H. 1. he granted the manor to W. Fitzherbert in these words, *Dedit W. filio Herberti Norburiam in feodo*; and afterwards, *pro decimis Domini et duabus carucatis terre*, he should pay to the prior 5s. per annum, and that the family of the Fitzherberts had ever since held the lordship discharged of tithes, paying 5s. per annum to the prior and his successors until, &c. and since to the King, &c. *Polluxfen* said, that it is not shown that the land whereof the parson demands tithes, was parcel of the demesne of the manor: that this is a deed before time of memory, and therefore not pleadable, having not been allowed in eyre, nor can be good by usage in *pais*; and for this cited Roll. Prescription, 268. 4, 5. and 9 Rep. 28. that it cannot be a *modus*, because it was not given in satisfaction to him, that should have had the tithes; and for this cited Roll. Dism. 649. he said this case contradicts not *Pigot* and *Heron's* case. (1) *Saunders*, on the other side, said, that here was sufficient shewn for a prohibition, for that it is shewn that the prior was seised of the manor, and of all the tithes, &c. and that the close where, is parcel of the manor, and was granted; as to non-allowance in Eyre, he said, that was only intended of grants of franchises and liberties by the King, not of private deeds for inheritances. As to its not appearing to be part of the demesne, the court said, that then the lord might have enfeoffed another to hold of himself, and so it might have been part of the demesne, when the prior granted it, and be afterwards granted and held of the manor; and as to the *modus* not being good, because not paid to the parson, the court said it might be well enough, paid as a *modus* to one who has a portion of tithes; and that then he has *quid pro quo*. *Cur. advisare vult*.

This case was again spoken to by *Trinder* for the plaintiff in the writ of error, and it was insisted on by him, that this deed was before time of memory, and therefore not pleadable; that the seisin of the prior was likewise before time of memory, and so not issuable, nor triable by a jury; that a lay person was not capable of tithes in *prender*, and that the council of Lateran had restored all tithes to the proper pastors.

*Holt è contrà*: That where a deed before time of memory is supported by usage after, such deed is pleadable and good; but that the books which say, deeds before time of memory shall not be pleaded, are to be intended deeds of such liberties and franchises, as cannot be claimed or supported by usage in *pais*: as if one claim goods of *felo de se* by deed before time of memory, he cannot shew his deed and say *virtute cujus*, &c. but must shew an ancient confirmation, or a claim and allowance in Eyre; so in this case if they had pleaded the deed, and relied upon it, *virtute cujus*, &c. it had been naught; but when they shew the deed, and likewise an usage to support it, it is sufficient. As to the juries not trying a seisin, or thing before time of memory, he said, they do it in trial of all prescriptions. As to lay persons not being capable of tithes in *prender*, be it so; but sure they were capable of tithes by retainer, upon a composition, and that this was no more than a *modus* paying so much; and for the council of Lateran, if it should have any influence upon this case, it would destroy all the *moduses* in England; and so he prayed that the judgment might be affirmed.

*HERBERT*, Ch. J. said, that all the prescriptions are founded upon a supposition in law, that at the first there was a grant, though now not to be produced; and though it falls out in this case, that the grant is produced, shall that make the case the worse? by no means. And as to its being before time of memory, he approved the difference taken by *Holt*, that where a deed before time of memory of a thing which may be claimed by usage, is by usage supported, such deed may be pleaded, &c. *WITHERS* concurred as to the substance of the pleading; but whether it be not informal, he would consider; and so *curia advisare vult*. [*Skinner*.]

*ERROR* on a judgment in the Common Pleas, on a declaration in a prohibition, suggesting a composition before the time of memory, and that the same had been observed ever since, &c.

I have not seen the pleadings, but the exceptions Mr. *Trinder* took were these:

(1) *Anté*, 135.

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First, That no layman can be entitled to tithes *in prebender*, but only by way of retainer, 3 Cro. 599. that the grant was in the year 1125, so that your deed is pleaded to be in time before the memory of man, of which no issue can be taken, nor ever can it be tried; and that time of memory begins from the beginning of Richard the First, and therefore it is not pleadable, *Litt. Sect. 1* Edw. 4. 6. 14 Hen. 7. 1. Abbot of *Strata Marcella's* case, Coke's Rep. Bro. Prescription, 22. 44 Edw. 3. 5. 5 Assis. 5. 8 Edw. 4. 13, 14. Pasch. 1678. *Hoskins and Owen's* case. *Bowles v. Atkins*, in Hil. 18, 19 Car. 2. B.R. Rot. 586.(1)

Secondly, Supposing that these tithes were well vested by the grant, yet they entered and revested again in the parson, by the council of Lateran, in the year 1215, or else by the dissolution of monasteries.

Thirdly, They have not shewn that the bishop was party to the composition or grant. Bishop of *Winchester's* case, 2 Rep. 2 Inst. 490, 491. 655.(2) Regist. 38. Selden's Hist. 302. 2 Roll. Abr. 265. Trin. 26 Car. 2. Rot. 461. 471. *Wilkinson v. Richardson*; and 2 Roll. Abr. 306 tit. Prohibition, num. 20. this is between spiritual persons, 3 Cro. 307. and Moor, 907. I could not well hear his argument, but these authorities he did cite.

Mr. Holt *à contrà*: The general question is, whether this composition as pleaded, be good to support this prohibition?

And as to the first exception argued, that the deed makes no composition, because it contains no words of grant in it, and there needs it not, for the ancient way was composition, and agreement of rendering *quid pro quo*.

Secondly, That it is not said to be part of the demesnes of the manor; I think it is said so, it is alleged to be the demesne, and in possession, and then I hold it to be part of the manor; it must be demesne, for it cannot otherwise be intended, for the tenancies are not part of the manors. *Mountjoy's* case, 5 Rep.

Thirdly, It is true, a layman is not capable of tithes *in prebender*; but I think a layman is capable of paying and taking a *modus* in lieu of tithes.

Fourthly, As for the council of Lateran, I never knew it pleaded in my life: some say that tithes were payable of right before, but how an ecclesiastical constitution can institute and create a temporal right is somewhat strange; besides, if this created the parson's right, it would destroy all the prescriptions and *moduses* in the nation.

Fifthly, The concurrence of the bishop: that was not necessary in this case, for he had nothing to do with a priory which has an absolute estate, which a patron has not.

Sixthly, As to that of the dissolution of monasteries, that may as well argue away our lands which we had on this composition, as our tithes: and as to the rent, it is neither out of the lands nor out of the tithes; it is a composition, and that is a sufficient answer, but this is well here. We might have prescribed generally, that time out of mind five shillings were paid annually in lieu of tithes. Then the setting this forth so specially is well enough. Whatsoever may have a reasonable commencement may be good by way of prescription; a *modus* may be good, payable to another person capable of tithes, as well as to the party himself, for he may have tithes in kind, and by the same reason he may have a *modus*: he cited 3 Cro. 317. 1 Cro. 317. Litt. 62. The alleging it in this special manner is a good way of pleading: see West. 1. cap. 39. A writ of right was to be brought on a deed. If this act has set up this way of pleading, why may not I, in pleading, pursue the statute? As we have pleaded a deed from before time of memory, so we have pleaded an usage from thence, which is time out of mind: suppose we had said, that a long time before the first year of Richard the First, and ever since, we had paid, &c. that would have been good, because in pursuance of the statute: it is most true, we are not to plead a deed before time of memory, and so to rely on the deed, as to say *virtute* of the deed we had been discharged of, &c. but when we come and plead the usage that we rely on, the design of the statute was not to take away right in possession, but to prevent the setting up old dormant titles by deeds where the possession has been otherwise: suppose an ancient charter before the time of Richard the First, for felons goods, that cannot be pleaded;

(1) *Antè*, 450.

(2) *Antè*, 119.

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but suppose a confirmation since, then the charter with the confirmation may be pleaded; or suppose an allowance in Eyre since: he cited F. N. B. 91. k. 8 Edw. 4. 13, 14, and so he prayed the judgment might be affirmed.

The Court. The sole objection against this prescription is, because it shews the reason of the prescription. If they had relied on the deed it might be otherwise: the council of Lateran can affect nothing in this matter.

Judgment was affirmed. [Shower.]

ERROR of a judgment in the Common Pleas on an action upon a prohibition, where the plaintiff did suggest, that William, late prior of Norbury, in Staffordshire, was seised of the said manor and of the tithes thereof *simul et semel*, as of a portion of tithes, &c.

That the said prior, 25 H. 1. granted the same manor and tithes to William Fitzherbert and his heirs, rendering rent; that the said Fitzherbert did enter and was seised, and held it discharged of tithes; that his heirs afterwards granted two hides of land, part of the said manor, to S. with the tithes, at 5s. rent; and so draws down a title by descent for 300 years to F. who being seised, devised the same to Dorothy Jamsa, (under whom the plaintiff in the prohibition claimed) and then concludes, that Fitzherbert and all those whose estate, &c. did pay the said rent to the said prior, which since the dissolution was paid to the King and his assigns, in discharge of all tithes, &c.

The defendant, having cravedoyer of the deed, demurred to the suggestion; and judgment was given for the plaintiff in the Common Pleas.

And it was now said for the plaintiff in the errors, that it does not appear by the pleadings, whether the plaintiff in the prohibition would discharge himself by a prescription in *non decimando*, or in *modo decimandi*; for the grant from the prior being the foundation of his title, he could not thereby be discharged, because a deed before memory cannot be pleaded, unless it has been allowed in a court of Eyre, or some court of record since memory; and this deed being dated in the reign of King Henry the First, which was sixty-five years before the time of memory by the common law, that beginning in the reign of Richard the First, whatever is before that time cannot be tried by law; if it had been allowed in Eyre, or in some of the courts of record, it may be pleaded, but no usage in *pais* can confirm it.

1. But supposing the deed to be good, the plaintiff has alleged a grant of a portion of tithes which he cannot have; for at the common law a layman was not capable of tithes in *prender*, for no one had capacity to take or receive them, save only spiritual persons: for which reasons a layman could not prescribe in *non decimando*, but in *modo decimandi* he might, because there is still an annual recompense in satisfaction thereof.

2. It is not alleged, that the place where, &c. was parcel of the demesnes of the manor, therefore, for what appears, it might have been always in tenancy: and though a prescription to a *modus* by the lord for himself and all his tenants, is good, because it might have a lawful beginning; for the lands at first might be all in his hands before it was a manor, and so much paid for the tithes thereof; yet such a prescription by a tenant is not good.

3. He has alleged payment to the prior, and afterwards to the King, and so would infer a *modus*, to which he has not positively prescribed, but by an old deed, upon payment of 5s. to all those whose estates, &c. and this will not do; for unless the *modus* does go to the person who by law ought to have the tithes, or unless it be for his benefit, it is not good; as where it was alleged that he ought to be discharged, because time out of memory he employed all the profits of the land for the repairs of the body of the church, and to find necessities, &c. this was not a good *modus*, because it is no recompense for the parson.

But it was said by Saunders for the plaintiff in the prohibition, that by the suggestion there was a good title alleged to be discharged of tithes; for it is set forth, that the prior had a portion of tithes, and the lands *simul et semel*, and being a corporation they might prescribe for tithes in *prender*, and the tithes being well in them, they may well grant it to Fitzherbert paying 5s. and constant payment being alleged ever since, it is a good title.

As to the deed, it is true, it is dated before the time of memory; but yet it

is pleadable because it is a private deed, and so need not be allowed in Eyre or in courts of record; for such as are not to be pleaded unless allowed there, are only grants of franchises and liberties from the King; but the confession of the deed to be beyond memory, and the constant payment of 5s. is a sufficient title to the plaintiff if the deed is not pleadable; and if it be, then it is a good discharge that way.

And as to the objection, that the *modus* is payable to a wrong person; there are many such which are not paid to the parson of the parish, but to laymen; but in this case it does appear that there was a *modus* in the prior, which being received till it came to the crown, it is good, although now paid to others; so that for that reason the spiritual court ought to be prohibited. And of that opinion was all the court; for if a *modus* be payable to him who has the right of the tithes, though it be not to the parson of the parish, it is well enough; especially where the plaintiff (as here) alleges it to be *portio decimarum* belonging to the prior, so that it cannot be said that the parson has not *quid pro quo*; for he had nothing at first.

This composition was made with the prior, and the plaintiff is only to shew payment to him, and to those who have his right.

And as to the date of the deed, it is pleadable though time out of memory, because it is a private deed; but grants of franchises and liberties must be allowed in Eyre; and so is *say* Lord ROLLE to be understood in his Abridgment: whereupon judgment was affirmed.—[2 *Modern*.]

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#### H. 34 Car. 2. B. R. *Anon.* [2 Show. 184.]

**A** GREED by PEMBERTON, Ch. J. in evidence on debt for treble damage for not setting out of tithes, that the setting them out and taking them away himself is not good within the statute 2 & 3 E. 6. c. 15. otherwise if they are taken away by a stranger.

Setting out tithes by the owner who takes them away is not good

within 2 E. 6. otherwise if taken away by a stranger.

#### E. 34 Car. 2. B. R. *Owen's Case.* [2 Show. 195.]

**P**ROHIBITION. There was a suit for tithes, and a prohibition granted hence upon a suggestion of the lands being barren and newly improved.

Hereupon a trial is had on a declaration on the prohibition, and a verdict for the parson, that the lands were not barren; and thereupon there is a consultation, and he proceeding there, gets a sentence; from thence there is an appeal to the Arches, and there they enter an allegation that the land is barren; and the court there is proceeding to repeal the sentence because barren land; though contrary to the verdict at law.

And upon all this matter the court grants a prohibition, *quoad* the allegation of barren land.

proceed contrary to the verdict at law, a prohibition shall go, though after sentence.

1682.

On a trial in prohibition if lands be found to be not barren, and a consultation be awarded in a suit for tithes of such land, and the spiritual court (upon appeal to the Arches)

#### M. 34 Car. 2. B. R. *Bonsey v. Lee.* [3 Lev. 72.]

**A** PROHIBITION was moved for, suggesting that the trial of letters-patent and all grants from the crown are triable at common law, and not in the spiritual court; and that the defendant had libelled there against him for tithes, upon title to the rectory by letters-patent; whereas the plaintiff had a precedent right to the rectory by letters-patent from the crown more ancient. *Nota*, the libel is only in common form, *scil.* that he is proprietor of all the tithes without making out his title in the libel; but upon the pleadings, titles are made by letters-patent on both sides; and now by NORTH, WYNDHAM and

Prohibition was granted upon suggestion that the defendant had libelled for tithes upon title to the rectory by letters-patent, whereas the plaintiff had a precedent

CHARLTON, right by earlier letters-patent; the libel was in the common form, *viz.* that he was proprietor, &c. without making any title in it, but on the pleading, titles were made on both sides by letters-patent.

1682.  
BONNEY v. LEE.

CHARLTON, a prohibition was granted, for the spiritual court are not to try the validity of letters-patent. — LEVINZ *contra*. The suit is founded upon the tort only, in withdrawing the tithes, and the title, if it comes in question, falls in only as an incident; and in all suits at common law for tithes, the declaration is general as proprietor without shewing a title in the declaration: and when the foundation of a suit is spiritual, and a temporal matter falls in question incidentally, the ecclesiastical court shall try the temporal matter so long as they proceed as the temporal law would in such case; but when they proceed in a temporal matter otherwise than the temporal law would, they are to be prohibited, but not before. Co. 12. 65. a rule is cited out of the register, *quod non est consonum rationi quod cognitio accessorii in curia Christianitatis impediatur, ubi cognitio principalis pertinet ad forum ecclesiasticum*, 1 R. 3. 4. When a thing determinable in the spiritual court is well commenced there, though a matter triable at law comes in question, they shall not be prohibited thereupon, so long as they proceed therein according to the common law, Co. 12. 65. Libel for tithes upon a lease of a rectory; defendant pleaded a former lease, and that he had but one witness; yet they shall proceed, unless they refuse the testimony of one witness. Co. 12. 66. *Futter v. Whiskard*, (1) the validity of livery came incidentally in question between two grantees of rectory, and was tried there. Reg. 57, 58. And the rule already cited from Co. 12. Rep. that rule is part of the writ of consultation. 3 Cro. 466. *Nelson v. Sharp*. Whether one taken upon a *capias utlagat*. five years after the judgment be in execution for the party was tried there, 3 Cro. 788. *Baker v. Royes*, a general act of pardon incidentally in question there was tried there. Trin. 24 Car. 2. B. R. Sir William Juxon v. Lord Byron, (2) Mortgage was of a rectory; proviso that the mortgagor shall retain possession till default of payment: default was made, and the rectory being in Story a trustee, it was by act of parliament taken out of him, and vested in Sir William Juxon, who before entry sued for tithes there, and they sentenced that he could not; and a prohibition was denied *per HALE et totam curiam*; for before entry made, or a recovery of the rectory, he could not at common law maintain debt for the tithes. But in the principal case here, the prohibition was granted, *ut supra*.

(1) *Ante*, 194. cited in *Roberts's case*.

(2) *Ante*, 496.

1683.

If the executor of a parson bring a bill for tithes, he need not offer to accept the single value, he not being entitled by stat. E. 6. to the treble value.

M. 34 Car. 2. Canc. *Anon.* [1 Vern. 60.] 2 Gw. 532.

A MAN having brought a bill for tithes, the defendant demurred, for that he had not offered by his bill to accept the single value, and yet had alleged in the bill, that the defendant had carried away the corn, &c. without setting forth the tithes according to the statute. And it was insisted for the defendant, that if he should be put to answer this bill, the plaintiff would presently go to law, and give his answer in evidence, and recover the treble value of the tithes: and the court of equity ought not to assist a man in recovering a penalty, nor compel a discovery of a forfeiture.

Afterwards at another day, upon a motion, this demurrer was over-ruled, the plaintiff in this case being only the executor of a parson, and not the parson himself, and so not entitled to a forfeiture upon the statute.

H. 35 Car. 2. Scacc. *Fish v. Wimberley*. 1 Wood, 222. 2 Gw. 532.

Lincolnshire, 4th February, 1683.

Coleseed is a small tithe: in this case however the vicar was endowed with all tithes whatsoever, other than the tithes of corn.

THE plaintiff, as vicar of the vicarage and parish church of Gedney, in the county of Lincoln, demanded the tithe of coleseed.

The defendant Wimberley acknowledged, that since the plaintiff's induction he had occupied in the said parish several acres of improved lands, and had reaped therefrom coleseed, the tithes whereof he did not set forth to the plaintiff, because, by law, he should not have been charged with any for seven years to come.

The defendant Waterfall confessed, that he had reaped several acres of coleseed,



seed, the tithes whereof he did not set out to the plaintiff, because it was newly improved ground, and he had agreed with the plaintiff for the tithes of the coleseed for 10l. and that he believed coleseed was a great tithe, and belonged to the rector of Gedney, and not to the vicar.

Upon reading the endowment of the said vicarage, dated in the year 1209, and also the depositions of witnesses taken on both sides, it plainly appeared to the court, as well by the endowment as by the testimony of the said witnesses of the usage there, that the vicar of the said parish was endowed with, and accordingly did always, from time to time, receive and take, not only all manner of small tithes within the said parish, but also all tithes whatsoever, other than the tithes of corn; and that the rector had the tithes of corn only, and no more, within the said parish.

And upon debate of the matter, the court delivered their judgment unanimously, that the tithe of coleseed is a small tithe; and the plaintiff being endowed with or being possessed of all manner of small tithes within the said parish, it is ordered by the court, that the defendant Wimberley do forthwith satisfy and pay to the plaintiff the value of the tithes of the coleseed, which he inned in the said year; and that it be referred to the deputy remembrancer to state the values thereof; and that the defendant Waterfall do pay to the plaintiff ten pounds, in full for his tithes of coleseed according to agreement; with three pounds for his costs.

1683.  
FISH  
v.  
WIMBERLEY.

Tr. 35 Car. 2. Canc. *Somerset v. Fotherby*. [1 Vern. 185.] 2 Gw. 534.

**T**HE bill being to examine witnesses in *perpetuum rei memoriam* to prove a *modus decimandi*, the defendant demurred, for that the bill was to establish a custom against the church, and in prejudice of tithes, that are due of common right; and several precedents were cited, where bills to have a *modus* decreed were, upon a demurrer, dismissed. But this bill being only to preserve testimony, the lord-keeper thought it reasonable the defendant should answer, and over-ruled the demurrer.

Bill lies to perpetuate the testimony of witnesses to prove a *modus*. But *quære* if it will lie to establish a *modus*.

Tr. 35 Car. 2. B. R. *Eaton v. Sherwin*. [2 Show. 307.]

**C**ASE upon a special promise for tithes for six years.

On a motion in arrest of judgment it was held good; though such an agreement be not a good lease, nor does any interest pass by the same in the tithes; yet it is good to ground an *assumpsit*, and the action lies.

Judgment for the plaintiff.

ment; though such agreement be not a good lease, nor does any interest pass thereby in the tithes.

Case upon special promise for tithes for six years, held good upon motion in arrest of judgment.

Tr. 35 Car. 2. Scacc. *Hall v. Babb*. [1 Wood, 220.]

Devonshire, 5th July, 1683.

**T**HE bill stated, that the plaintiff had been rector of the parish and parish church of Upton Pine, in the county of Devon, for five years past, and ought to have received all tithes and customary payments for the same, and particularly the tithes of the aftermath of clover grass.

The defendants said, that no tithes ought to be paid for the second mowing of clover grass; which was the only dispute in the cause.

The court, upon hearing counsel on both sides, are of opinion, that the tithes of the aftermath of clover grass are due and ought to be paid, but not for after-feeding and depasturing.

Tithes are due for the aftermath of clover grass, but not for the after feeding and depasturing.

WM. MONTAGU.

WM. GREGORY.

THO. STREET.

1683.

The six months required by 2 Edw. 6. c. 13. for proving the suggestion, shall be reckoned from the issuing of the prohibition.

Tr. 35 Car. 2. B. R. *Straker v. Baynes*. [2 Show. 908.]

**P**ROHIBITION was prayed, and a rule for it *nisi*, &c. and all things to stay in the interim: and the rule made absolute for a prohibition the last Hilary Term, and a prohibition then went.

Resolved, that the six months for the suggestion shall be reckoned only from the time of the issuing of the prohibition, and no longer.

The suggestion ought to be entered in the office, or else a consultation shall go.

The suggestion must be entered in the office, else a consultation.

E. 36 Car. 2. Scacc. *Troutbeck v. Lawson*. 1 Wood, 223.

Cumberland, 5th May, 1684.

The court took notice of the greatness of certain farm *moduses* in respect of the yearly values, and ordered that they should be attended with precedents, where great *moduses* near the value of the tithes had been referred to trials at law: they afterwards decreed the payment of the *moduses* without costs on either side.

**T**HE plaintiff, as rector of the rectory and parish church of Downes, in the county of Cumberland, demanded of the defendants tithe in kind of corn and hay growing upon several lands and tenements within the said parish in their possession, which they had detained from him for several years past.

The defendants answered, and said, that no tithe in kind for corn and hay was due or payable within the said parish to the rector there, but only a *modus* or certain sum of money by way of prescription, except for the township of Downes, which always paid tithe corn and hay in kind, and insisted on a *modus* payable in lieu of tithes for their lands, viz. for two tenements of the defendant Lawson's, containing thirty acres, and lying within the township of Whitrigg, within the said parish, ten shillings and five-pence; for two tenements of the defendant Wilson, twenty acres, lying in the townships of Langroft and Amthorne, within the said parish, ten shillings and two-pence; for a tenement of the defendant Winder, fourteen acres, lying in Whitrigg, five shillings and two-pence; and for the defendant Farlam's tenement, in Whitrigg, sixteen acres, eight shillings and sixpence.

Upon opening the pleadings, and reading the *nones* of this parish, taken in the fourteenth year of Edward the Third, concerning the valuation of the *nones* of corn, wool, and lamb, of the church of Downes; and also a record in the custody of the remembrancer of the first fruits, touching the tithes and profits of the said rectory of Downes, taken in the twenty-sixth year of Henry the Eighth; and upon reading some proofs concerning the payment of the respective *moduses* or sums of money set forth in the answer; and upon debate of the matter; the court taking notice of the greatness of the *moduses*, or payments alleged by the defendants to be in lieu of the tithes of corn and hay of their respective tenements, in respect of the yearly values of the same,

It is ordered by the court, that the cause stand over; and in the mean time the court are to be attended with precedents where great *moduses* near the values of the tithes have been referred to trials at law.

The court having been attended with precedents pursuant to the said order; and now on debate of the matter, the defendants by their answers having offered to pay the sums set forth as *moduses* or prescription money, think fit, at present, to decree the payment of the *moduses* or prescription money set forth in their answer to be paid to the plaintiff, as heretofore has been usual.

It is ordered by the court, that the said defendants do pay to the plaintiff the same accordingly; and that costs are to be spared on either side.

WM. MONTAGU.  
EDW. ATKYNS.  
WM. GREGORY.  
THO. STREET.

E. 36 Car. 2. Scacc. *Eve v. Wightwick*. 1 Wood, 226.

Kent, 1st of May, 1684.

**T**HE bill set forth, that the plaintiff was lawful rector of Midley, otherwise Midleley, in the county of Kent, and entitled to all tithes, compositions, and customary payments, belonging to the said rectory; that the plaintiff's predecessors had had 1*s.* by the acre, in lieu of tithes, for all pasture ground in the said parish.

The defendant denied all knowledge of any custom for payment of 1*s.* an acre for the tithe of all pasture land within the said parish; but said, that he used 420 acres of pasture land in the parish of Midley and Old Romney, but which lands lay in Midley he knew not; that for several years together, so long as W. Carr, who was then rector of Old Romney, lived, he paid him 18*l.* per annum for tithes of all the said lands; and after his death, he paid, several years together, 14*l.* per annum, for tithes of part of the said lands, to the then rector of Midley; and for some years he paid to the then rector of Old Romney, 4*l.* per annum, in lieu of the tithes of the residue of the said land; that the rector of Old Romney claimed the said tithes.

The plaintiff put in a special replication; and thereby said, that the lands used by the defendant in the parish of Midley were 420 acres; and that if the rector of Old Romney did claim the tithe of the said lands, yet the same were not within the tithery or titheable places thereof.

Upon hearing counsel on both sides, and reading the depositions of several witnesses taken in the cause, and a copy of a composition, dated the 15th of February, 1547, made between M. Colyn, then rector of Midley, and E. Sponer, then rector of Old Romney, and remaining in the registry of the prerogative of the archbishop of Canterbury, and upon much debate;

It is ordered by the court, that the defendant shall forthwith satisfy and pay to the plaintiff 20*l.* viz. twelvepence an acre, for 400 acres of pasture land lying in the parish of Midley, in the defendant's occupation; and that the defendant do forthwith pay to the rector of Old Romney 4*l.* per annum for all the lands mentioned in the aforesaid composition; and that the said defendant shall not pay costs in this cause, the rector of Old Romney being present in court, and consenting to accept the said 4*l.* per annum for all the lands in the said composition, for such time as the plaintiff had been, and should continue to be, rector of Midley aforesaid.

WM. MONTAGU.  
WM. GREGORY.

Tr. 36 Car. 2. Scacc.

*Atterbury, D. D. v. Turner, Kt.; and Lord Nottingham v. Atterbury.*

Buckinghamshire, 23d of June, 1684.

**T**HE plaintiff, as rector of the parish-church of Milton, otherwise Middleton Keynes, in the county of Buckingham, by his bill stated, that he, for many years, had been, and still was rector and lawful incumbent of the said rectory, and was entitled to the glebe lands; that parcel of the said rectory, lying in Milton, containing thirty-nine acres, whereof one piece, called Chapel Close, containing one acre and a half, and another piece called Rye Croft, containing four acres and a half, remained in the plaintiff's possession; the other parcels, containing thirty-three acres, were in the possession of the defendants; that he was also entitled to several commons to be taken in the meadows, fields, lands, and pastures of the manor of Milton, for four horses, ten beasts, and thirty sheep, the said right of common being yearly worth 40*l.*; that he had

An agreement made between a former rector and the lord of the manor in 1593, established by the Exchequer, on the ground that it would be very mischievous, and of dangerous consequence to question such ancient ex-

changes, and throw open such ancient inclosures, after so long an enjoyment on all sides, although it might not appear that the consent of the ordinary was at first had thereto, and a perpetual injunction issued to the rector to stay all suits brought or to be brought, touching any matter settled by the decree.

1684.

One shilling per acre for all pasture ground in a parish, decreed.

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also yearly taken, in the meadows, thirty jogs or loads of hay; and that he ought to have and enjoy all manner of tithes arising within the said parish in kind, and in particular in the fields called Ten Pound Close, Great Pasture, Lady Mead, and Little Ham, lying within the said parish; that about the year 1593 there was an exchange and agreement made between J. Stafford, then lord of the said manor, and R. Smith, then rector there, as stated in the bill; that the said R. Smith, during his life, and to the year 1640, permitted the substance of the said agreement to continue after the death of the said J. Stafford; that the plaintiff, being entitled to the said rectory, and finding that the lands set out by the lord of the manor, in lieu of the ancient glebe, were not the same in quantity with the ancient glebe by six acres and a half, and that the said composition was made when the lands of the manor were let for about the value of 300*l.* a-year, which lands were now let for near 2,000*l.* a-year, intreated the present owners to restore to the church its proper rights, which they had not only refused to do, but had entered on thirty-three acres and a half of glebe land, and taken the profits thereof, under a pretence that the said agreement was perpetual; that they had also entered on the dove-house, and had refused to give the plaintiff 40*s.* a-year in lieu thereof, and had let the aforesaid closes to tenants who had subtracted their tithes of hay and of grass, and refused any sort of payment for the same for several years past. The plaintiff therefore prayed a full discovery of their right and title, and relief in the premises.

The defendants admitted the plaintiff, Dr. Atterbury, to have been rector of the said parish for the time in the bill mentioned, but denied knowing where the glebe lands lay; and said, that the plaintiff might be entitled to such tithes as in the bill were set forth. But they positively denied that he was entitled to any common or pasturage to be taken in the fields of the said manor or parish, or to any composition in lieu thereof, other than what he at present enjoyed; or that he or his predecessors had or ought to have, in any meadows, parcel of or belonging to the said manor, any quantity of hay whatsoever; or that he, in right of his said rectory, ought to have any tithes in kind whatsoever, coming, &c. within the several fields aforesaid. And they insisted, that, during all the time, whereof the memory of man is not to the contrary, there had been paid to the rector or parson of the said rectory for the time being, by the owners or occupiers of the said fields or closes, the following annual sums, for and as a rate tithe, and customary payment, in lieu of all tithes arising, &c. on the said closes, viz. 20*s.* a-year for the Ten Pound Close, 3*l.* a-year for the Great Pasture, and 6*s.* 8*d.* a-year for Lady Mead; and that the rector of the said parish had enjoyed, time out of mind, a small parcel of meadow in a place called Bird's Meadow, in lieu of all tithes from Little Ham Meadow. They said also, that they believed the agreement between the lord of the manor and the rector was made and entered into as stated in the bill; and that the said agreement was beneficial to the rectory. As to the dove-house, they confessed that they had, under the title in the bill set forth, entered into the same, and taken the profits thereof; but they denied that they had disturbed the plaintiff in the enjoyment of any of the exchanged premises, or of any commons or pasturage, or that they had built any cottage in the homestall of the parsonage-yard, or taken any orchard out of the Chapel Close, or that, to their knowledge, Sawpit Yard was enjoyed by the plaintiff's predecessors; and averred that it had been, time out of mind, part of the wastes of the manor. They then set forth a conveyance of the said manor from W. Stafford to them for 1,000 years, under certain trusts. The defendant H. Stafford also set forth a settlement of inheritance of the said manor upon himself in tail, with divers remainders over. They confessed the letting the aforesaid closes, and that they had not paid tithes in kind to the plaintiff, but alleged that they had paid to him the several rates aforesaid; and insisted thereupon. And they prayed, that the inclosure, after so long a space of time, and after such great charges had been incurred by inclosing the same, might not be laid open; the rectory and the glebe now enjoyed by the plaintiff being better than it was before the said inclosure.

The plaintiff replied; and witnesses were examined.

The cause came on to be heard the 26th of January, in the twenty-second year of his present Majesty's reign; and upon full and solemn hearing thereof, the court referred the matter in question to a trial at law, in a special action upon the case, the plaintiff to declare, "That whereas the defendants, " R. Smith and three others, being possessed of Ten Pound Close, of which " Buckingham Way, Foddering Yard, and Wrenn Park are parcel, and like- " wise of lands called Great Pasture, whereof eighty acres, called the Warren, " are parcel, and of Lady Mead and Little Ham, the said defendants did pro- " mise, that if tithes in kind were due for the same land, they would pay for " the same."

A trial was accordingly had. It was admitted by pleading, and by the parties, that tithes in kind were payable for the close called Buckingham Way, being two acres, and for Foddering Yard six acres and a half, and for Wrenn Park three acres and a half, and for the Warren seventy-four acres, parcel of the close called Great Pasture; and a verdict, upon long and full evidence on both sides, passed for the defendants in all the issues, in affirmance of all the said customary payments, and discharge of tithes set forth in the answer, save what was admitted by pleading as aforesaid to pay tithes in kind.

But in the Easter term following, upon the plaintiff's motion, it was ordered, that there should be a trial at bar of this court upon the same issues.

And the court being informed that all the defendants, except J. Smith, were dead, it was, on the 37th day of June, in the thirtieth year of his present Majesty's reign, ordered, by consent, that the defendant, H. Stafford, owner of the premises, should stand and be in the place of the defendants that were then dead, without any bill of revivor for that purpose.

In pursuance of which orders the plaintiff declared, and the defendants pleaded; and the cause came on the 24th of November following, upon the said issues before a jury of the county of Buckingham. Upon which trial (there being the same admissions as before) the jury found, first, That as to Ten Pound Close (whereof New Close is parcel) the sum of 20*s.* was, time beyond the memory of man, paid, and is payable to the rector of Milton aforesaid, for the time being, in full satisfaction of all tithes thereof; secondly, as to the close called the Great Pasture (not including the seventy-four acres now called the Warren, in Wadd Ground) the jury found, that 60*s.* a-year are payable to the rector for the time being, in full satisfaction of all tithes thereof; thirdly, as to the close called Lady Mead, the jury found, that 6*s.* 8*d.* are payable yearly, in full satisfaction for the tithes of that close; fourthly, as to the close called Little Ham the jury found, that tithes in kind are payable for the same to the rector of the parish of Milton.

But the Earl of Nottingham, having purchased the manor of the defendant, H. Stafford and his trustees, filed his cross bill against Dr. Atterbury and his lessee; and the Bishop of Lincoln, stating his title to the said manor, the agreement and exchange of lands, the customary payments, the verdicts, and other proceedings; and prayed that the said rate tithes and customary payments, and exchange, and the inclosure, might be established, by the decree of this court, for ever; and that the defendants might answer the premises.

The defendant, Dr. Atterbury, admitted the Earl of Nottingham's title to the manor, and the said exchange, agreement, inclosures, and enjoyments accordingly; and stated, that 5*l.* a-year, for many years after the said exchange had been made, and before he became rector, and afterwards, had been paid for the commons; and that the lord of the manor and his tenants, for six years after he became rector, rented their tithes of him; but that he afterwards, conceiving that the church had not its full right, filed his bill, and brought his ejectment, as in the bill are set forth; and that he was willing to comply and submit if he might have his just dues. (1)

The Earl of Nottingham replied; and witnesses were examined on both sides.

This cause came on to be heard in Easter term last; and on reading the agreement, touching the said exchange, and the several depositions taken in

(1) The book does not state the answers of the other defendants to the cross bill.

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the first cause, on both sides, and upon long debate of the matter, the court did not think fit to deliver their opinions, but adjourned the said causes.

And now, upon hearing several counsel, and upon long debate, it appearing to the court, that the said exchange and inclosure were very ancient, and that great sums of money had been laid out in fencing, quick-setting, and inclosing the said manor; and that it would be very mischievous, and of dangerous consequence, to question such ancient exchanges, and throw open such ancient inclosures, after so long enjoyment on all sides, although it might not appear that the consent of the ordinary was at first had thereunto; and that for the said rectory and glebe, as now held and enjoyed, together with what is hereby decreed to the rector and his successors, will be of better value than it was before the inclosure; and the court holding it just and reasonable that there should be a settlement of the rights, both of the lord of the manor and the rector,

It is ordered and decreed by the court, that all the inclosures of and in the said manor and parish of Milton, otherwise Middleton Keynes, be, and hereby are, for ever settled and established, as now they are; and that the said Earl of Nottingham, his heirs, and assigns, lords and owners of the said manor and premises, and his and their farmers and tenants for the time being, do, and shall for ever hereafter, peaceably and quietly hold and enjoy the said manor and lands so inclosed, and all the glebe lands which formerly lay promiscuously in the fields, and are now inclosed and lie in any the grounds or inclosures of or in Milton aforesaid, held or enjoyed by the said Earl of Nottingham, or his tenants, against the said Dr. Atterbury and his successors, rectors of the rectory of Milton for the time being, and freed and discharged of and from all his and their claims and demands for or concerning any of the said glebe lands.

And it is also further ordered, &c. that the aforesaid customary yearly rents or payments of 20s. 3l. and 6s. 8d. for the lands aforesaid, called Ten Pound Close, Great Pasture, and Lady Mead, shall be, and are hereby settled and established; and that the said Earl of Nottingham, his heirs and assigns, lords and owners of the said closes and grounds, and the tenants and farmers thereof, shall ever hereafter respectively hold and enjoy the said closes and grounds (excluding those before excluded) freed and discharged of and from the payment of any manner of tithes for the same, save and except only the said yearly rates.

And it is further ordered, that the said Earl of Nottingham do forthwith set out, convey, and assure, unto or to the use of the said Dr. Atterbury and his successors, rectors of Milton, lands in the said manor of the yearly rent of 15l. (and until such settlement that he do pay the said 15l. yearly) and which lands, when so set out, are to be, and by this court are declared and decreed to be, for and in lieu and full satisfaction and discharge of the barn, and the commons, and pasturage in the meadows, pasture lands, and fields of Milton, for four horses, ten beasts, and thirty sheep, and of all other commons and pasturage claimed or pretended to by the said Dr. Atterbury's bill, and in lieu and satisfaction of all the glebe lands of or belonging to the said rectory, which are intermixed with, or lie promiscuously in or amongst the lands or grounds of or belonging to the said Earl of Nottingham or his tenants, and of all claims and demands which he shall or may have or claim, for or upon the account of the said barn, commons, and glebe lands.

And it is further ordered, that a commission do issue, under the seal of this court, for setting out the two acres called Buckingham Way, and also the lands of 15l. a-year value, to be conveyed as aforesaid.

And it is further ordered, that the said Dr. Atterbury and his successors, rectors there, shall, for ever hereafter, hold and enjoy the several lands and grounds heretofore inclosed and set out, and now held and enjoyed by him, for and as the glebe of the said rectory, or in lieu thereof; and shall also hold and enjoy the said dove-house, and the tithes in kind, or the close called Little Ham, and the said yearly customary payments in lieu of tithes, and for the said close called Ten Pound Close, Great Pasture, and Lady Mead, as aforesaid.

And it is further ordered, that the said Earl of Nottingham and H. Stafford,

do pay to Dr. Atterbury all such arrears of tithes in kind of Little Ham, and of the said annual rents and customary payments aforesaid, and of the ancient commons claimed by his bill, after the rate of 5*l.* a-year, and 40*s.* a-year for the dove-house, as demanded by the bill.

But as to the thirty loads or jogs of hay, and the cottage, alleged by his bill to be built on the freeboard of the homestall of the parsonage-yard, and the pretended parcel of glebe called Chapel Close, and the orchard taken out of the Chapel Close for the said cottage, and also the Sawpit Yard, and other the matters claimed by his bill, and for which there is no decree, there not appearing any right to the court for the same, the bill is to be dismissed without any costs.

And it is further ordered, &c. that a perpetual injunction do issue for establishing the inclosures aforesaid, and for staying the action of ejectment brought by the said Dr. Atterbury, and all other actions and suits that may be hereafter brought by him or his successors, for recovering any of the glebe lands of the rectory, which lie intermixed with or amongst any other lands or inclosures of the said Earl of Nottingham and his tenants, or touching any other matters settled by this decree; and it is referred to the deputy remembrancer to take the second account, and to report the same to the court.

And the said defendant, the Earl of Nottingham, is to pay to the plaintiff, Dr. Atterbury, 60*l.* for his costs.

WM. MONTAGU.  
EDW. ATKYNS.  
WM. GREGORY.  
THOS. STREET.

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In pursuance of the said order, a commission issued forth, under the seal of this court, for setting out and ascertaining the said two acres called Buckingham Way, and the said lands of 15*l.* a-year value, directed to several commissioners; in pursuance of which, six of the commissioners returned the said commission and certificate annexed, dated the 2d of February, in the second year of James II. certifying that the lands set out for glebe by the Earl of Nottingham, called Betts his Home, and the three acres, one rood, and five poles, in Thomas Rents his Home, do amount to the value of 15*l.* a-year.

And also, in pursuance to the said order, the deputy-remembrancer made his report touching the arrears of tithes.

And upon hearing counsel on both sides, and reading the said commissioners certificate, and also the deputy-remembrancer's report,

It was ordered by the court, that the said certificate do stand, and is hereby ratified and confirmed; and that the lands mentioned in the same, be held and enjoyed by the said Dr. Atterbury and his successors, rectors of Milton aforesaid, for the time being, for ever hereafter, for and in lieu, and full satisfaction and discharge of the barn, and the commons, and the pasturage in the meadows, pasture lands, and fields of Milton aforesaid, for four horses, ten beasts, and thirty sheep, and of all other commons and pasturage claimed or pretended to by the said Dr. Atterbury's bill, and in lieu and satisfaction of all the glebe lands of or belonging to the said rectory, which are intermixed with, or lie promiscuously in or amongst the lands or grounds of or belonging to the said Earl of Nottingham, or his tenants, in Milton aforesaid, and of all claims or demands which the said Dr. Atterbury or his successors, rectors of Milton, shall or may have or claim for or upon the account of the said barn, commons, or glebe land, according to the purport and effect of the said decree.

And it is further ordered, that the deputy-remembrancer's certificate do stand, and hereby is ratified and confirmed; and that the said Earl of Nottingham do forthwith pay to the said Dr. Atterbury 35*l.* 0*s.* 10*d.* mentioned in the said certificate to be due unto him.

EDW. ATKYNS.  
THOS. JENNER.  
R. HEATH.  
CHR. MILTON.

1684.

Tr. 36 Car. 2. Canc. *Bonsey v. Lee.* [1 Vern. 247.]

Impropriator of the small tithes bound to maintain a priest, where no vicarage endowed; and in such case the King may assign to the curate such proportion of the small tithes as he thinks fit. Otherwise where there is an endowment, though never so small.

**W**HERE there is no vicarage endowed, the impropriator of the small tithes is bound to maintain a priest; and upon an information by the attorney general for that purpose, the King may assign to the curate such an allowance or proportion of the small tithes, as he shall think fit: but otherwise it is, when the vicar is endowed, though but of never so small a matter. The case of *The King and Sutton* in the King's Bench was cited.

M. 36 Car. 2. Scacc. *Cotterell v. Athrop* and others. 1 Wood, 235.

Gloucestershire, 20th November, 1684.

A farm *modus* denied on the ground that the greatness of the sum was evidence that it could not have been an ancient agreement.

**T**HE bill stated that the defendant Sprigg, clerk, being seised of several closes of pasture, called Middle Norton, lying in the parish of Weston Subedge, in the county of Gloucester, by indenture, dated the twentieth of October, in the twenty-ninth year of his present Majesty, demised the same to the plaintiff, to hold for twelve years, at two hundred and sixty pounds a-year, tithe free; that in lieu of tithes for the said farm, there was a composition or rate tithe of twelve pounds three shillings and six-pence, payable half-yearly to the rector of Weston Subedge, being the proportion for that farm; the farm called Upper Norton and Lower Norton, lying within the said parish, paying the remainder to make up the *modus* or ancient composition of sixty pounds a-year; that the other defendant Athrop, clerk, being rector of the said parish, and well knowing the customs to be as aforesaid, for several years had received the ancient *modus* of sixty pounds a-year for the said three Nortons, and still did receive the same from Lower Norton; the proportion being thirty-one pounds seventeen shillings and sixpence, and for Upper Norton fifteen pounds nineteen shillings; yet to reap advantage, he did endeavour to set aside the said ancient composition, and threatened to sue for tithes in kind. The plaintiff therefore prayed that the defendant Athrop might answer the premises; that the ancient composition of sixty pounds a-year might be established by the decree of this court; that the plaintiff might examine his witnesses for the preservation of their testimonies; and that an injunction might be awarded to stay the defendant Athrop from proceeding at law for treble damages.

The defendant Athrop answered, and believed the plaintiff had been tenant and occupier of Middle Norton, as in the bill is mentioned; but what title the defendant Sprigg had made to him concerning the same, he knew not, nor of any *modus* or customary payment of sixty pounds a-year for the tithes of the three Nortons, or of the twelve pounds three shillings and six-pence, for or as a proportionable rate for Middle Norton; that the said three Nortons laid in the parish of Weston Subedge, of which he had been rector for sixty years past, being presented by Lord Say and Sele, who was the owner thereof; that he knew not of any *modus decimandi*, or customary rate of sixty pounds a-year, or any other sum in lieu of tithes in kind payable for the three Nortons when ploughed or sowed, or at any other time; or that any such rate was anciently received by the rectors there; and denied that there had been, time out of mind, twelve pounds three shillings and sixpence, or any other sum paid, either as parcel of the said sixty pounds a-year, or otherwise, as a *modus* for the tithes of Middle Norton; and if any such payment of sixty pounds a-year had been paid, he believed the same was by some temporary composition or agreement between the rectors and the owners of the said three Nortons; and that the greatness of the pretended *modus* is an evidence against itself; for that the tithes in the time of King Richard the First would not be worth half so much; and therefore the said sixty pounds a-year could not be a perpetual *modus*.

The court declared, that so large a *modus* or composition of sixty pounds a-year could not be anciently, or time out of mind, the full yearly value of the



the said three Nortons, when the same were improved by a long inclosure thereof, and immediately before the late ploughing thereof, not exceeding three hundred pounds a-year, the tithes included. And upon producing divers ancient deeds and leases, it appeared that M. Hinmer, the rector of Weston Subedge, on the eleventh of December, in the tenth year of Queen Elizabeth, demised the whole rectory to one W. Hodges for eighty years, at the rent of thirty-one pounds a-year; and that the assignees of the said W. Hodges, by indenture dated the fourteenth of July, in the first year of King James, demised the tithes of the said three Nortons (except the Grove there) to Sir Richard Fines, the then owner of the same, in consideration of one hundred pounds fine, and at the rent of sixty pounds a-year; which term was afterwards, by another indenture of the tenth of February, in the sixth year of King James, in consideration of fifty-six pounds thirteen shillings and fourpence, enlarged to continue to the end of Hinmer's lease at the like rent of sixty pounds a-year; which the court conceived to be the first rise or ground of the said pretended *modus*; and that the same was but a temporary composition; wherefore, upon full debate of the matters,

The court declared that they saw no reason to relieve the plaintiff upon his said bill; the said pretended *modus* being in no ways binding upon the defendant; and thereupon ordered, that the defendant Athrop shall be, and is hereby dismissed this court, with costs.

WM. MONTAGU.  
EDW. ATKYNS.  
WM. GREGORY.  
ROB. WRIGHT.

1684.  
COTTERELL  
v.  
ATHROP  
AND OTHERS.

M. 1 Ja. 2. Scacc. *Turnor v. Payne* and another. [1 Wood, 239.]

1685.

Kent, 19th November, 1685.

**T**HE bill stated that the defendants then were, and for the space of ten years last past had been owners, occupiers, or proprietors of several farms and lands in the parish of St. John's, in the Isle of Thanet, in the county of Kent; that the tithes of wheat, barley, oats, rye, pease, beans, and other grain, belonged to the parsonage impropriate of Salmerton, and that the tithe of hay, of the herbage of land, of orchards, gardens, wool, calves, lambs, and other small tithes, belonged to the vicar of the said parish of St. John's; that the plaintiff for several years past had been farmer of the rectory of Salmerton, and was also entitled to the vicarial tithes aforesaid; that the defendants refused to discover their farms, and to shock their corn as the custom was, and had hindered him taking the tithes thereof.

In the parish of St. John's, in the Isle of Thanet, tithes for the herbage of arable lands are by custom due to the vicar for the same year in which the said lands have been sowed with corn.

The defendant, William Payne, said, that he had been occupier of a farm in St. John's called Twenties, and admitted that both the great and the small tithes of that farm belonged to the plaintiff, but denied that there were any tithes due for the herbage of any arable lands.

The defendant, Elizabeth Payne, said, that she was occupier of a farm called Shouken Dean, in Saint John's, and also of a messuage and farm there, and that the corn tithes of each farm belonged to the plaintiff, but denied that any tithe of herbage was due for any arable lands.

Upon reading the proofs, and upon debate of the matters as to the tithes demanded by the plaintiff of the herbage of arable grounds in the same year after the corn is carried off, and while the same remain fallow ground, for which the defendants by their answers deny any tithe to be due, the court directed a trial to be had upon this issue, viz. "Whether by custom, time out of mind used, "tithe herbage of arable lands, within the said parish of St. John the Baptist, "were due to the impropriator of Salmerton, or the vicar of St. John the Baptist, for the same year in which it has been sown with corn?"

A trial was accordingly had; wherein a verdict was given, "that, time out of mind, tithes, or a composition or payment for and in the name or lieu of "tithes, had been paid for the herbage of arable lands, within the said parish

of  
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1685.

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v.

PAYNE.

" of St. John the Baptist, to the proprietor of Salmerton, or vicar of St. John the Baptist, for the same year in which the said lands had been sown with " corn."

This cause came on to be heard the twenty-first of April, 1687, both in relation to the plaintiff's demand of tithe herbage, as also for his other demands in the bill for tithes due from the defendants; and,

Upon reading the said decree, and the return of the *postea* upon the said trial,

It is ordered and decreed by the court, that the defendants shall account for, satisfy, and pay to the plaintiff the tithe of herbage, and all other tithes and titheable matters due from them respectively to the plaintiff to the time of exhibiting his bill; and it is hereby referred to the deputy remembrancer to take the said account. (1)

(1) No costs mentioned.

1686.

A prohibition was granted upon a suggestion of a custom to pay a *modus* of a groat for every hogshead of cider, or 2s. per annum in lieu of all tithes of all grain and fruit growing in any such orchard.

H. 2 Ja. 2. B. R. *Hill v. Harris.* [2 Show. 460.]

**P**ROHIBITION on a suggestion of a *modus* laid by way of custom, for a groat to be paid for every hogshead of cider, or two shillings *per annum* in lieu of all tithes, of all grain and fruit in any such orchard growing: and another custom of the parson's having the sole milking and milk of all our milch kine, for so many weeks after Midsummer, and so many weeks after Michaelmas, in lieu of all tithes of milk: and we suggested the statute of improvement as to part.

Upon this suggestion I prayed a prohibition to a libel in the court-christian, for tithes *quoad hoc*; and upon debate it was granted.

Mr. Pollerfen *ex adverso*.

I argued that a prohibition may be granted as to part, is every day's practice, and so is the case of *Lush v. Webb* (1), in which there is another case cited to have been so adjudged the term precedent; and as to the last part nothing can be said, but we must have a prohibition *quoad* the part; and nothing was said against it.

And as to the first I argued, that it must be agreed, that if the soil of an orchard be sown with any kind of grain, tithes shall be paid of the fruit trees and the grain both; and so is 2 Inst. 65. a. because they are of several natures and kinds, but yet this *modus* is good. This is different from what is by law due of common right, and it is that which can never turn to a *non decimando*, but is as perdurable as the claim of tithes. It is certain enough; we fix it in a certain tenement; and this is as certain as any *modus* whatsoever that is in lieu of any particular grain, because that may be sown sometimes in one place, sometimes in another; or that of the shoulder of a deer, or two shillings, in *Cowper's* case (2), and agreed to be good if the park be continuing, though never a deer be killed in the year; or that of Dr. *Grant's*, of so much *per* pound for rent of houses in St. Martin's Le Grand (3), which may sometimes be higher, and sometimes lower. It is as certain as a common to be taken this year in one acre, and the next year in another acre, unto which another prescription may be made; and so may a man have such a moveable inheritance, as one of two manors changeably every year; so that the objection of the uncertainty here cannot have much weight: a *modus* may be for a garden or orchard, which shall cease when converted into arable; and if a penny may be paid for the fruit and herbs, two-pence may be paid both for the fruit and grain. *Reynolds's* case. By 13 Rep. 14. it appears that in all *moduses* no respect is to be given to the value of what is yielded in satisfaction of tithes. If a *modus* be for hay in Black Acre, and the party sow the same with corn seven years together, that does not destroy the *modus*, but whensoever it shall be made into hay, the *modus* shall be in force. *Brown's* case. (4) So if a prescription be for a *modus* of an orchard or garden, and it ceases to be such, the

(1) *Antè*, 447.

(2) *Antè*, 240.

(3) *Antè*, 222.

(4) *Antè*, 203.

*modus* shall cease and the tithes be paid in kind; but if it afterwards be restored to an orchard or garden again, the *modus* shall be paid; this is agreed in the case of *Cooper v. Andrews*, (1) from whence it may be inferred, that if so, the prescription is good enough in any orchard, because if it cease, the tithe in kind is to be paid in any orchard, that is, so long as it continues such: grain growing in *hujusmodi pomario* is so long as it is *pomarium*.

We had a prohibition, and ordered to declare thereon, and upon it issue was taken.

(1) *Ante*, 240.

H. 2 Ja. 2. Scacc.

*Wardell* and others v. *Squire* and others. [1 Wood, 246.]

Yorkshire, 11th February, 1686.

THE bill stated that C. Tanckred, of Whixley, was seised of the inheritance of the tithes of corn, of arable land, of meadow, and pasture of Greenhamerton, in the county of York, and of the small tithes of the said township; that by indenture dated the eighth of November, in the thirty-fifth year of Charles the Second, he let to the plaintiffs the great and small tithes within the said township, to hold for twelve years, at forty-two pounds a-year; and that by the said indenture the said plaintiffs became entitled to all the said tithes.

The defendants said they believed that C. Tanckred was seised in fee of the tithes of corn, but not of meadow or pasture, within the said township; and that a *modus decimandi* of a half-penny a year for an *oxgang* had been customarily paid in full satisfaction of all the tithes of hay, herbage, and agistment; that the said C. Tanckred was not seised of small tithes, but that the vicar of Whixley had right to some part of them, and that they had paid the same to him, and tendered the other tithes, according to the custom, to the plaintiff.

A trial at law was directed upon this issue, viz. "Whether there be a custom within the township of Greenhamerton, time whereof the memory of man is not to the contrary, that a half-penny an *oxgang per annum* ought to be paid in full satisfaction for all the tithes of hay, herbage, and agistment of all the meadow and pasture grounds within the said township, or not?" The other matters in the cause to be reserved till the said trial shall be had.

A trial was accordingly had; and upon full evidence given on both sides, a verdict was given for the plaintiff, that there was no such *modus*.

The court therefore decreed, that the defendants do pay to the plaintiff the values of their respective tithes of all corn and grain, meadow and pasture ground, together with all their small tithes happening and arising upon the premises in question for the time demanded by the bill.

E. 2 Ja. 2. Scacc.

*Townson*, D. D. v. *Hungerford*, Kt. [1 Wood, 247.]

Wiltshire, 6th May, 1686.

THE vicar of Bremhill, in the county of Wilts, demanded tithes in kind for the lands which the defendant held within the manor of Cadenham, in the said parish.

The defendant pleaded a *modus* of twenty shillings a-year in lieu of all manner of tithes within the said manor, and the demesne lands thereto belonging.

On the third of February last it was ordered, that the defendant should take out a commission, and appear gratis; and by another order, made the first instant, the depositions taken in the court of chancery were to be made use of at the hearing.

On reading the depositions and ancient acquittances for the said *modus* of twenty shillings a-year payable in lieu of all tithes for the said manor of Cadenham,

1686.

HILL  
v.  
MARRIS.

An issue was directed to try whether there was a custom to pay 1*½*d. an *oxgang per annum* in full satisfaction for all the tithes of hay, herbage, and agistment of all the meadow and pasture grounds within a township.

A *modus* of 20*l.* a-year to the vicar of a parish, in lieu of all tithes arising within a manor, and the demesne lands thereto belonging.

1686.  
TOWNSON  
v.  
HUNGERFORD.

The court declared the defendant to have well proved his *modus*, and ordered that the said bill be dismissed without costs, upon the defendant paying to the plaintiff the arrears of the *modus* of twenty shillings a year.

ATKINS, C. B.  
JENNER, B.  
HEATH, B.  
MILTON, B.

M. 2 Ja. 2. B. R. *Anon.* [Comb. 291.]

Prohibition was denied on a suggestion of a title by letters-patent and that they are consuable by the common law, for having consuance of the principal matter, they have consequently of the patent.

**M**OTION for a prohibition on a libel for tithes, and suggests letters-patent of Queen Elizabeth, and a title under them, &c. and for that the letters-patent are consuable at common law; but it was denied by the court, because they have consuance of the principal matter, and consequently of the patent.

they have consuance of the principal matter, they have consequently of the patent.

1687.

Where the court is divided no prohibition.

H. 3 Ja. 2. B. R. *Buckworth v. Salmon.* [Comb. 43.]

**W**HETHER a prohibition, the court was divided, therefore no prohibition.

Tr. 3 Ja. 2. Scacc.

*Chitty v. Reeve.* [1 Wood, 251.] Bunb. 20. 1 Rayn. 67.

Surry, 2d June, 1687.

The manner of paying the tithe of hops in the parish of Farnham, in the county of Surry, is that the occupier shall set out every tenth row or hill of hops, without any fraud, as they arise, before the same are gathered, or the binds thereof cut; but the court declared that where there was no such usage, the tithe of hops ought to be paid in kind, viz. the tenth part of the whole after picking.

**T**HE plaintiff, as executrix to her husband, who was farmer of the tithes within the rectory of Farnham, in Surry, under Sir Thomas Vernon, the impropiator of the said rectory, filed her bill to be relieved for tithes in kind of hops, stating a particular manner of taking the tithe of the same, according to a custom in the parish, viz. that the occupier should set out every tenth row or hill of hops, without any fraud, and as they arise, before the same are gathered, or the binds thereof cut.

The defendant, by his answer, admitted the custom to be to set out every tenth hill, but alleged, that the custom also was for the occupier to cut the tithe hills, at the same time with his own, and to strip the binds and hops from off the poles and lay them upon such tenth hill, from whence the farmer was to remove them in a convenient time, and pick them elsewhere.

The plaintiff replied; and witnesses were examined.

Upon hearing counsel on both sides, and on reading several of the depositions taken in the cause, the court decreed as follows. It fully appearing to the court, that the custom, usage, or practice of paying tithe hops, in that parish, for above sixty years past, hath been, that the impropiator, or his lessee, hath had the tenth row when equal, or else the tenth hill; that the same have been left standing, with the hop-binds uncut; that the impropiator, or his lessee, or agents, have always had convenient time to come and cut the binds and pick the hops upon the grounds; and it further appearing, that if the owner of the hops should take down the poles and cut the binds of the tithe hops, when he cuts his own, the tithe of hops would be much prejudiced and made worth little or nothing, it being the nature of hops to spoil if they lie twenty-four hours upon the ground, before they are picked, and it being impossible for the impropiator, or his lessee, or agents, to have persons to pick the tithe hops of the whole parish, who generally pick all together, and have very great quantities growing, before they are spoiled, in case the owner should cut the binds of the tithe hops when he cuts the other nine parts. And the court was of opinion and declared the said custom, usage and practice to be reasonable and fitting to be observed; and the court also declared, that in case there was not any such usage, the tithe of hops ought to be paid in kind, viz. the tenth part of the whole after picking. (1)

(1) See *Bate v. Spracking*, Bunb. 20.

Whereupon it is ordered, adjudged, and decreed by the court, that the defendant shall account for and pay to the plaintiff the full value of the tithes, or tenth part of the hops, which he had growing within the said parish of Farnham, in and during the time in the bill set forth; and that it be referred to the deputy remembrancer to take the said account.

The deputy remembrancer, on the 22d of June, 1688, made the following report, "In obedience to an order of the court made the 9th of June, 1687, I have examined the matters thereby to me referred, and find that the defendant was occupier and possessor of six acres and an half of land well planted with hops, for the year before the bill exhibited; and that he had more than two loads of hops growing thereon in the said year, every load consisting of twenty hundred weight, and every hundred weight was worth five pounds, and, allowing liberally for the picking and drying, the tithe thereof was well worth fifteen pounds; and I find by the proofs, that the plaintiff stript and carried away half a hundred weight of the said hops, which, according to the rate aforesaid, comes to twenty-five shillings, which being deducted out of the aforesaid fifteen pounds, the rest will remain due to the plaintiff."

And the said report was confirmed.

EDW. ATKYNS.  
RICH. HEATH.  
CHA. INGLEBY.  
J. ROTHERHAM.

1687.  
CHITTY  
v.  
REEVE.

H. 4 Ja. 2. Scacc. *Umfreville v. Hodges* and others. [1 Wood, 253.]

1688.

London and Middlesex, 26th January, 1688.

**T**HE plaintiff, as executrix of the last will and testament of W. Umfreville, stated, that her husband, for twenty years and upwards before his death, was impropriator of the rectory impropriate of Saint Botolph without Aldgate, and entitled to all tithes, oblations, and Easter offerings within the said parish; that part of the parish laid within the city of London, and the other part in the county of Middlesex; that the defendants were occupiers of several houses within the same during his life-time, and ought to have paid their tithes, oblations, and Easter offerings to him; but that the same not being paid to him they became due to the plaintiff.

A *modus* of 18s. for the tithes of a house in London, to be paid by 4s. 6d. a quarter, decreed.

The defendants appeared and answered; the plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; upon reading the several depositions taken in the cause, and on full debate, a trial at law was directed, upon the following issue, viz. "whether any rate or sum, and what rate or sum of money, is payable in lieu of tithes for such house or houses of the defendants as lie in the parish of Saint Botolph without Aldgate, in the county of Middlesex?" To be tried before the Lord Chief Baron, in Middlesex.

And as to the house of the defendant Box, the same being within the city of London, and his counsel insisting that the same was discharged from the payment of tithes, it is ordered by the court, that all further proceedings against him shall be staid till the said trial be had, and, in the mean time, he is to give a note to the plaintiff's attorney of such grants and records and where they are to be found, as discharges his house from the payment of tithes, and to produce them at the trial.

A trial against the defendant Thomas Heath was accordingly had before the Lord Chief Baron; and the jury found that there is a *modus* of eighteen shillings a year for the tithes of his house to be paid by four shillings and sixpence a quarter.

The cause now came on for further directions; and upon reading the *postea* of the verdict, the defendants' counsel prayed a new trial; but upon reading an affidavit on his behalf, and on debate,

It is ordered and decreed by the court, that the defendant Heath shall satisfy and pay to the plaintiff, or her assigns, the said *modus* of eighteen shillings a year,

1688.

UMFREVILLE

v.

HODGES.

year, viz. four shillings and six-pence a quarter, for the time he hath been occupier of the said house, and it is hereby referred to the deputy remembrancer to state and compute how many years the defendant hath been occupier of the said house, and what is due from him to the plaintiff, both for the *modus* and Easter offerings.

R. ATKYNS.  
ED. NEVILL.  
N. LECHMER.  
JOS. TURTON.

H. 4 Ja. 2. Scacc.

Crossman v. Goodridge. [1 Wood, 254.] 1 Rayn. 66. Bunb. 26.

Somersetshire, 24th February, 1688.

If a defendant refuse to appear and answer, the bill shall be taken *pro confesso*, and on the plaintiff making oath of the value, the payment of the tithes be decreed, but according to Bunb. this was by consent.

**T**HE plaintiff, as vicar of the vicarage and parish church of Banwell, in the county of Somerset, filed his bill against the defendant for small tithes,

The defendant, being duly served with a process of *subpoena*, neglected to appear to and answer the said bill, and being committed to the Fleet, was brought up to the bar of the court by *habeas corpus*, on the 28th of November last, to appear and answer the same, and the bill being read to him the first time, and he then refusing to appear and answer the same, he was remanded, and brought up a second time on the first day of this term, and still refusing, he was again remanded, and brought up a third time, on the 1st day of February instant, and again remanded, and brought up a fourth time on the 7th day of February instant, on which day he, having neither appeared or answered, obtained an order for time to Easter Term next, to answer the said bill, without oath, unless cause was shewn to the contrary, and on the 13th day of February, the plaintiff shewed cause, and prayed the said bill might be taken *pro confesso*, he, the plaintiff, refusing to accept the defendant's answer without oath, when it was ordered, that the order of the 7th of February instant, should be discharged, and that the defendant should put in his answer by this day; and that if the defendant did not put in his answer, the warden of the Fleet should attend the court with the body of the said William Goodridge, on the 24th of February.

The defendant not having put in his answer to the bill, as by the said order he was directed, the warden attended with the defendant accordingly, and it was prayed, that the bill might be taken *pro confesso* against him.

And on hearing several counsel for the said defendant, and what could be alleged on both sides,

It is ordered and decreed by the court, (1) that the said bill be, and it is hereby taken, *pro confesso* against the said defendant.

And it is further ordered, that the plaintiff do make oath of the value of the tithes in the bill charged, not exceeding the sum of seventy-eight pounds in the whole for the twelve years in question, which sum, so to be made oath of as aforesaid, is hereby ordered, adjudged, and decreed (2) to be paid by the said defendant to the plaintiff accordingly.

(1) The Right Honourable Sir John Ernley, knight, chancellor and under treasurer of his Majesty's court of Exchequer, the Right Honourable Sir Edward Atkyns, knight, lord chief baron, Sir Thomas Jenner, knight, and

Sir Thomas Powell, knight, two other of the barons of the court.

(2) The decree was signed by all present in the court, the chancellor, &c.

E. 4 Ja. 2. Canc.

Buxton v. Hutchinson. [2 Vern. 46.] 2 Gw. 535. 1 Eq. Ca. Abr. 366.

Tithe ore is not due of common right, but by particular custom only.

**T**HE plaintiff's bill was to be relieved for tithe ore in Brassington, a township within the rectory of Blackborne, in the county of Derby.

By the court. Tithe ore is not due of common right, but by particular custom only; and the court therefore directed a trial to be had at law, whether

there was any and what custom, and within the said township, for the payment of tithe ore, with direction for the judge to indorse the *postea*, how the custom was found upon the trial.

1688.  
BUXTON  
v.  
HUTCHINSON.

Tr. 4 Jac. 2. Scacc. *Simpson v. Hill; et à contra.* [1 Wood, 255.]

Yorkshire, 2d July, 1688.

**T**HE bill stated, that W. Pinkney, being seised in fee of and in the rectory or parsonage impropriate of Fishlake, in the county of York, and of all tithes, both great and small, to the said rectory belonging, by indenture, dated the 1st of May, 1683, demised the same to the plaintiff for three years, whereby the plaintiff became entitled to the said rectory and tithes.

The defendant said, that, during the years 1684 and 1685, as stated in the bill, he was owner of a messuage in the said parish, and eight acres and a half of arable, meadow, and pasture ground, and was also farmer of several parcels of arable, meadow, and pasture ground therein; that in the year 1683, he had growing on his said lands, wheat, barley, beans, peas, line, and flax, which he gathered without setting out his tithes, having compounded with the plaintiff for the same, and paid him the composition agreed on, and that the plaintiff accepted the same, in discharge of the said tithes; that he had paid to the plaintiff twenty shillings by composition, in full discharge of all tithes of wool and lamb, and other his small tithes and Easter reckonings, for the said year; that in the year 1684, he had growing on the said lands, wheat, &c. the tithe whereof he duly set forth, and the plaintiff's servants gathered the same, and that he had paid the plaintiff one pound, fifteen shillings, by way of composition, in full of his tithes of wool and lamb as aforesaid, which he accepted; that in the year 1685, he had the same kinds of grain, the tithes whereof he duly set forth, and the plaintiff's servants gathered the greatest part thereof, and that he paid the said plaintiff forty shillings for his tithe wool and lamb, &c. for the said year due, before the answer, and should be willing to pay the plaintiff for all his small tithes and Easter offerings, as they shall become due; that in the said years he had made great quantities of hay, and carried same away from off the ancient inclosures, without setting out the tithe thereof, as he lawfully might do, for by prescription and custom the farmers and occupiers of land, within the said inclosure in Fishlake, have customarily, and time out of mind, been discharged of tithe hay in kind, by payment of four-pence an acre at Easter, to the occupiers, owners, and farmers of the said tithes, in lieu and satisfaction thereof, and that the defendant has paid for the year 1683 and 1684, after that rate, and is willing to pay the same for 1685; that the manner of setting forth and paying tithe corn, in the ancient inclosures and common pastures, hath been sometimes by throwing out the tenth from the nine sheaves, when the inhabitants reaped and bound up their corn, and sometimes the inhabitants have set up the same in stacks which he believed was in kindness to the farmers and occupiers of the said tithes, and not of right; that the inhabitants never considered themselves obliged to stack their corn in the ancient inclosures; and that the general custom in the common arable fields is to set out their tithes by separating the tenth sheaf from the nine, and whensoever the same was set in stacks it was kindness, and was never required as a duty until of late by the said plaintiff.

The defendant exhibited his cross-bill against the plaintiff, and prayed a discovery, whether the plaintiff had not gathered and received the tithes, as well great as small, claimed by him, or the greatest part thereof, in kind, or some, and what satisfaction by agreement, composition, or otherwise in lieu thereof, and particularly, if there be not a custom within the said rectory of Fishlake, that the farmers and occupiers of meadow ground in the ancient inclosures there have constantly, and time out of mind, paid four-pence an acre yearly at Easter, in lieu, satisfaction, and full discharge of tithe hay, in the said ancient inclosures, and what is the manner of tithing corn as well in the ancient inclosures, as in the common arable fields there.

A custom that the owners, farmers and occupiers of any meadow ground within the ancient inclosures of a parish, should pay a *modus* of 4d. per acre for hay, held good. An issue directed to try whether corn in the ancient inclosures ought to be set out in sheaf or in stack found to be in sheaf, and decreed accordingly.

1688.  
 SIMPSON  
 v.  
 HILL.

The plaintiff answered, and confessed, that in the year 1683, he had received six pounds in satisfaction of tithe corn, line, and flax, but denied that he received twenty shillings in discharge of tithe wool and lamb, small tithes, and Easter offerings for that year, but that he received two pounds, six shillings, for tithe wool of thirty sheep, and five shillings for tithe of twenty lambs, which was all the plaintiff paid after the 1st of May in that year, except a tithe pig; that in the year 1684, the defendant Hill reaped and carried away the greatest part of the corn he had growing that year, before he had notice thereof, and believed the tithe thereof was not duly set forth, but his servants gathered what tithes were set out; that in the said year, the said Hill paid him two-pence halfpenny for house dues; for offerings for himself and wife four-pence; for six new led cows nine-pence; for a foal one penny; for twenty-two acres and a half of meadow in the said ancient inclosures four-pence an acre; for the tithe of wool for one hundred sheep, one penny a sheep; and for sixty lambs three-pence a piece; which was all the defendant Hill paid him that year; but he denied that he received the same in full, and believed several tithes were not accounted for in that year; that in the year 1685, the defendant Hill pulled and carried away a good quantity of flax or line without setting out the tithe thereof, or compounding for the same; and as for the corn in that year, he believed that the tithes thereof were not justly set out, but what was set out he gathered, except about twelve thrave, which Hill had thrown out in sheaves, contrary to the custom in the place where the corn grew; and he set forth the quantities and values of the several species of tithes he had received from Hill, on the 15th of June, in the said year, and denied that he received the same in full. He also said that Hill offered to account with him for twenty acres, and two roods of meadow in the ancient inclosures, which he had mowed and made into hay in that year, and to pay him four-pence an acre for the same, which he refused, as tithe-hay was due in kind that year, by reason the plaintiff had not in that year set out his tithe-corn growing in the ancient inclosures, in stacks; that for fifteen years then last past (during which time he farmed the parsonage of Fishlake) it was reputed that it hath been a custom for every inhabitant within the said parish of Fishlake, being the occupier of any of the ancient inclosures, to pay four-pence for every acre at Easter, upon condition of setting forth the tithe-corn he had growing within any of the said ancient inclosures, in stack; that the manner of setting forth tithe corn in the ancient inclosures there by the inhabitants of Fishlake, all along, since he was farmer, hath been to set out the same in stack, and not in sheaf; that the manner of paying tithe-corn, in the common fields in Fishlake, hath ever been to pay the same in sheaf, and whenever any person stacked their tithe-corn there he looked on the same as a kindness only; and that hay gotten in the common fields is titheable in kind.

The plaintiff Simpson replied, and the defendant rejoined: and witnesses were examined in that cause only.

A trial at law was ordered to be brought by the plaintiff Simpson, against the defendant Hill, the issue to be, "Whether there be not a general custom, time out of mind, within the parish of Fishlake, throughout the said parish, that all the inhabitants of the said parish, occupiers of lands in the ancient inclosures within the said parish, ought yearly to set out their tithe corn, which grew upon those lands, in stacks, and to pay their tithes thereof in stacks, or to pay their tithes thereof in sheaf, before the same be stacked?" The question as to the small tithes demanded by the plaintiff Simpson, and the matters comprised in the cross-bill, to stay until the said trial be over.

A trial was accordingly had on the said issue, and after a full and fair trial, a verdict passed for the defendant Hill, upon the said issue.

The cause now, viz. the 25th of November, 1689, came on for further directions. The defendant's counsel prayed that the custom might be decreed according to the verdict. The plaintiff's counsel insisted that there was money due and in arrear to Simpson from Hill for tithes, as also to have costs spared in this court.

But forasmuch, as upon reading divers depositions of witnesses, it appeared



to the court, that there is and hath been a general custom used in Fishlake; that the owners, farmers, and occupiers of any meadow ground within the ancient inclosures, in Fishlake, and particularly of the inclosed meadow ground there, (whereof the defendant is owner) time out of mind, had been and ought to be discharged of tithes of hay yearly coming and renewing on the said meadows, by payment to the owners, farmers, and occupiers of the said tithes of four-pence an acre, for every acre of the said meadow mowed by them, yearly at Easter, and that the same, time out of mind, had been constantly so paid to and accepted by the said owners, farmers, and occupiers of the said tithes accordingly, and that the said defendant Hill had paid and satisfied the said Simpson the same *modus* in discharge of all his tithes of hay of his said inclosure and meadow ground in the bill mentioned, and that he hath also paid all other his tithes mentioned likewise in the said bill.

The court doth therefore hereby order, that the said Hill stand and is hereby absolutely dismissed this court of and from the said bill, and the matters and things therein contained, with his costs.

And that as to the custom set forth in Hill's cross bill, and for which a verdict had passed for him,

It is further ordered, adjudged, and decreed by the court, that as well the said plaintiff Hill, as all other the inhabitants of the said parish of Fishlake, being owners and occupiers of lands in the ancient inclosures, within the said parish, may, for the future, pay to the plaintiff their tithe corn, which shall for the time to come happen and grow upon those lands, in sheaf, before the same be stacked, according to the said verdict, and according to the custom and usage of the same parish, and shall not be obliged to pay the same in stack, or otherwise than as aforesaid.

And the said Simpson shall likewise pay to the said Hill his costs expended in this suit and at law, to be taxed by the deputy-remembrancer of this court.

EDW. NEVILL.

NICH. LECHMERE.

JOS. TURTON.

Tr. 4 Jac. 2. Scacc. *Washburne v. Nunnely*. [1 Wood, 259.]

Northamptonshire, 12th July, 1688.

**T**HE bill stated, that the plaintiff, as owner of the rectory impropriate of Pitchley, in the county of Northampton, had been for seventeen years before the filing of this bill, entitled to all sorts of tithes, both great and small, arising therein; that the defendant, for the same time, had been possessed of land in the said parish, and in the adjacent parishes of Orlingbury and Cransley, and kept sheep in a close called Kenningham, within the said parish of Pitchley; that with intent to defraud the plaintiff of the tithes thereof, he had removed his ewes before and near the time of yeaning, and his other sheep before and near the time of shearing, out of the said parish into the said parish of Orlingbury, the tithes of lambs and wool whereof the plaintiff had always demanded, but which the defendant had refused to pay; that the defendant had, for several years, wintered on his lands in Orlingbury and Cransley, numbers of his sheep, and about Lady-day yearly removed them into his lands in Pitchley, and kept them till about Midsummer, about which time the plaintiff demanded tithe wool, which the defendant refused to pay; that the defendant stocked yearly his land in Pitchley with barren and unprofitable cattle, and refused to pay tithe of the herbage of the same, after the rate of 2s. in the pound.

The defendant confessed that he had for several years rented of Lord Crew several lands in Pitchley, and kept thereon horses, cows, sheep, and bullocks, and made profit of his lands, for which tithe were paid in kind; that he also rented lands in Orlingbury, and occupied the said close called Kenningham, in Pitchley, and lands in Cransley, and depastured thereon ewes and other sheep, and cows, but denied all fraud in removing them, with intent to hinder the plaintiff of the tithes of lambs and wool, or other tithes; and as for the tithe of

herbage

1688.  
SIMPSON  
v.  
HILL.

A custom that on the 1st of January in each year the number of sheep is to be computed, and if there be so many sheep at shearing time, full tithe should be paid of those shorn; and if the number should be smaller or greater than on New Year's-day, then a half-penny for each sheep over or under the number held to be good.

1688.

WASHBURN

v.

NUNKELLY.

herbage of dry and unprofitable cattle, he insisted upon a custom, time out of mind used within the said parish, of paying one penny for every barren cow, in lieu of the tithes thereof; and for tithe wool, that the manner of tithing within the said parish of Pitchley, time out of mind, was as follows, viz. that on the 1st of January in every year, the number of sheep are computed, and if there be so many sheep at shearing time, the impropiator has his full tithe-wool, and so many as are shorn; and if the number which was at New Year's-day fall short, the impropiator has for each sheep a halfpenny, and if more only a halfpenny for every sheep above the number that was there on the New Year's-day; and he said, that according to the usage aforesaid, he had constantly paid his tithe wool.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides.

Upon reading the depositions on both sides, and on full debate, it sufficiently appeared, by the proofs taken in the cause, that the defendant had, for several of the years mentioned in the bill, driven away his ewes depasturing upon his lands within the parish of Pitchley, near before the time of their yeaning, to his lands in the parish of Orlingbury, which the court adjudged to be an apparent fraud, and done with intent to deceive the plaintiff of the tithe of the lambs of those ewes, so removed as aforesaid, and for which the defendant ought to be accountable to the plaintiff.

It was thereupon ordered by the court, that the defendant do account with and pay to the plaintiff for the value of the tithes of the lambs of those ewes, which, by the proofs taken in the cause, appear to have been depasturing upon the said defendant's lands in Pitchley, for and during the years mentioned in the bill, or any of them, and which were, near before the time of their yeaning, driven away out of the said parish of Pitchley, into the said defendant's lands in Orlingbury aforesaid; and it is referred to the deputy remembrancer to take the said account.

And as to the *modus* of one penny for every barren cow set forth in the answer, in lieu of tithe herbage, and also as to the said manner of tithing or paying tithes for wool, within the said parish, set forth in the said answer; and as to the payment of costs, the court reserve the consideration thereof.

In pursuance to the said decree, the deputy remembrancer made his report, dated the twenty-second of October last, and no exceptions having been taken, the cause came on, on the eighteenth of November 1689, for further directions upon the said report; and upon reading the same,

It is ordered and decreed by the court, that the said report be, and the same is hereby ratified and confirmed, and that the said defendant do pay to the plaintiff nine pounds, so reported to be due for tithe lambs in 1685.

And it is further ordered, that the said defendant do account with and pay to the plaintiff, for the value of the tithe herbage of the dry and barren bullocks depastured by the defendant upon his said lands in Pitchley, for the time demanded by bill, according to the proofs in the cause, and it is referred to the deputy to take the said account.

But as to the said custom or manner of paying tithes for wool, within the said parish, set forth in the answer,

The court adjudges the same to be a good custom.

THE COURT FULL.

Term. Ja. 2. Scacc.

Anon. [Dodd's MSS. 4 Rayn. 68.] 2 Gw. 535.

The seed and stalk of cinquefoil to pay tithe as grass to the vicar who had tithe hay.

**T**HIS case was before the Lord Chief Baron Mountague, viz. arable land pays tithe in kind to the impropiator; *cinquefoil* was sowed upon this land, and it stood to seed, and the profit was in the seed, and not in the stalk; there was a custom of two-pence an acre for hay, payable to the vicar; and it was resolved, that notwithstanding the stalk and seed were in nature of corn, yet it should be looked upon as grass and payable accordingly.

E. 1 W. &amp; M. Canc.

*Bentham v. Alston.* [2 Vern. 136. 204.] 1 Rayn. 69, 70.

1689.

**T**HE plaintiff was successor to a parson, who had made a lease to the defendant of his tithe and glebe, for three years; two years and a half expired in the life-time of the lessor, and the lessee had taken the profits of the whole year in the parson's life-time, who died before the last rent day; the plaintiff's bill was to have that half-year's rent; see stat. 28 Hen. 8. c. 11. the plaintiff had not made the executor of his predecessor a party.

By the court, Dismiss the bill. [2 Vern. 136.]

half year against the lessee, omitting to make his predecessor's executors parties, the court dismissed the bill.

Where a parson made a lease for three years and died at the end of two years and a half, and his successor filed a bill for the profits of the last

Doctor Tudor the incumbent, having leased the rectory and tithes to three of his parish at three hundred and twenty pounds a year, for three years, rendering rent half yearly, at Midsummer and Christmas; the doctor being old, the lessees, upon taking a new lease, desired the plaintiff, who had a grant of the next avoidance, to join therein, that they might be sure to enjoy their bargain, who agreed accordingly. Doctor Tudor died before Midsummer the last half-year's day, the lessees having first collected and got all, or greatest part of the tithes, &c.

The plaintiff in equity would have had a decree for the half-year's rent, first because he was bound by the agreement, for if the doctor had died before any tithes collected, yet he was bound, and must have permitted the lessees to have enjoyed; and secondly, because the lessees had received some tithes after the death of Doctor Tudor, which was an evidence, that they looked upon their leases as continuing, and acted under the agreement made by the plaintiff.

But it was objected, if the rent was payable to any one, the executors of Doctor Tudor had a better right than the plaintiff, and they no parties.

By the court. Of opinion in the old books, that the fee is in the patron, during the vacancy, and a release to him alone is good. Recommended it to the parties to make an end of it by compromise.

Incumbent of a parsonage, being old, he, together with the grantee of the next avoidance, join in lease of the tithes, rendering the rent half yearly; incumbent dies before first half year; lessee gathered in the tithes, except a small part, which he got in afterwards. Who shall have the rent?

Tr. 1 W. &amp; M. C. B. Anon. [2 Vent. 47.]

**A** MOTION was made for a prohibition to a suit for tithe-lamb, upon a suggestion of a *modus* to pay two-pence, falling in the plaintiff's farm in the parish.

Objection. A prohibition was granted before to stop this suit upon a suggestion, which was tried and found for the plaintiff, and a consultation granted.

Answer. That suggestion was for two-pence to be paid for every lamb which fell in the parish, and this only to a particular farm, and so not within the statute of 50 E. 3. that a second prohibition shall not be granted after a consultation awarded in the same suit. *Vide* 1 Cro. 151. *Stroud and Hoskins*, 1 Roll. Rep. 378.

Note here, If this matter had been found by the verdict, no consultation had been granted. *Hob.* 192.

But here the court inclined against a prohibition by reason of the said statute of 50 E. 3.

But if this matter had been found by the verdict no consultation had been granted.

Prohibition was denied upon suggestion of a *modus* of 2d. for every lamb which fell on a particular farm, on the ground that a consultation had been granted in the same suit on suggestion of a *modus* for 2d. for every lamb which fell in the parish, and so within 50 E. 3.

1689.

The court were all of opinion that no notice need be given to the parson of setting out tithes, though notice must be given before action brought for not taking away tithe after set out.

Tr. 1 W. &amp; M. C. B.

*Periam v. —, Vicar. Comb. 128. Anon. [2 Vent. 48.]*

**A** PROHIBITION was granted to a suit for tithes, upon a suggestion that the tithes were set out; and it was moved for a consultation, That he did not allege notice given to the parson: And the bishop of *Carlisle's* case, Hob. 107, was cited, where a custom was laid to set out tithe-wool, *absque aliquibus visu & tactu*, of the nine parts by the parson, &c.

But the court were all of opinion, that the case having been twice moved, that no notice need be given to the parson. And so it is said to be adjudged in Noy, 19, though the ecclesiastical law is otherwise. So is the case of *Chase and Ware*, Roll. Tit. Tithes, 643. Style, 342, where it is held, That if an action be brought against the parson, for not taking away his tithes after set out, notice must be given before such action. For the Bishop of *Carlisle's* case in Hob. does not make against this; for there a custom was laid to excuse the parson from seeing the tithe which is to be set out, which custom is not to be admitted *Vide* Roll. Abridg. Tit. Dismes, 647. And 2 E. 6. c. 13. enacts, That it shall be lawful for every person, to whom tithe ought to be paid, to view his tithe set forth and severed from the nine parts.

M. 1 W. &amp; M. B. R.

*Bradshaw v. Swanton. [Carth. 70.] Holt, 671. 1 Show. 81.*

No prohibition will lie upon any composition for any tithes, whether for life or years, and the remedy is to appeal to the arches, if the inferior court should refuse a plea of composition.

**P**ROHIBITION to the consistory court of Durham, where the libel was for subtraction of tithes; the suggestion now was, that a verbal composition was made between the plaintiff and the defendant, for all manner of tithes for two years; and the libel was for tithes arising within the said time; and a difference was now taken between a composition for life and for years, for in the first case a prohibition lies, but not where the composition is for life; and to prove this, the cases in the margin(1) were cited.

To which *HOLT*, Ch. J. answered, and so it was resolved, that though several books tell us, that a prohibition would lie where the composition is for years; and where the difference is taken *ut supra*; yet the law for several years past has been clearly taken, (2) that no prohibition will lie upon any composition, whether for life or years, for any tithes; and therefore the proper remedy is to appeal to the arches, if the consistory court should refuse a plea of composition.

In this case a prohibition was denied, *quod nota*.

(1) Yelv. 94. 2 Cro. 157. Cro. Eliz. 188. 249.

(2) F. N. B. 43, 44. 41. G. 2 Roll. Abr. 63. Litt. Rep. 155. Hob. 176. 2 Cro. 668. See Reg. 38, 39.

M. 1 W. & M. Scacc. *Strode v. Bickham and Elliot. [1 Wood, 268.]*

Somersetshire, 29th November, 1689.

In answer to a bill for tithes the defendant alleged that the land was formerly a fish pool containing 500 acres, which had been drained about seventy years, which

pool belonged to the abbey of Glastonbury, and held to be a good discharge; and that the decoy pool in which he had taken wild fowl having been part thereof, was for the same reason discharged.

A custom within the manor of Godney within the parish of Meere, that for all copyhold tenements thereof, there had been paid where the lord's rent reserved for such copyhold was above twelpence an acre, three halfpence an acre, &c. in lieu of all tithes for such copyhold lands and tenements, held good.

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STRODE  
v.  
BICKHAM  
AND ELLIOT.

Farm, within the said parish, and had great quantities of titheable matters; that the defendant Bickham possessed several acres of land, called Meere Pool, and had divers quantities of corn and other titheable matters, and also a decoy pool within part of Meere Pool, whereof the tenth wild duck, by custom, ought to be paid for tithe; that the defendants had divers other lands within the said rectory, for which they ought to have paid tithes; but that they refuse to pay the same.

The defendants appeared; and the defendant Bickham insisted, that there was an ancient pool of water, which was formerly a fish pool, called Meere Pool, containing five hundred acres, within the said parish, which had been drained about seventy years, whereof he possessed great part, and some part called New Cutts, but that no tithe was payable for the same, for that the said parcel of ground, called Meere Pool, was formerly a fish-pond belonging to the abbot of Glastonbury, and in his hands at the time of the dissolution of that abbey, and on that account was, by law, discharged from the payment of tithes. He confessed, that he possessed the decoy pool, and took one hundred couple of wild fowl; but insisted that the same being parcel of the fish pool, called Meere Pool, was, for the same reasons, discharged from payment of tithes. He also insisted that there was a custom, time out of mind, within the manor of Godney, within the parish of Meere, that for all lands and tenements within the said manor, which are or were copyhold tenements, there have been, time out of mind, paid, in lieu of tithes for the same, the rates following, viz. where the lord's rent reserved for such copyhold was above twelpence an acre, three halfpence an acre; where such lord's rent reserved was but twelpence, then one penny an acre; where such lord's rent reserved was under twelpence, then one halfpenny an acre, in lieu of all tithes for such copyhold lands and tenements; and he confessed that he possessed copyhold lands, and was ready and offered to pay to the plaintiff after that rate for his tithes; but said, that the plaintiff had refused to receive it.

The defendant Elliot confessed, that he possessed several acres of Meere Pool; and insisted that as it formerly belonged to the abbot of Glastonbury, it was, by law, discharged from the payment of tithes. He insisted that the farm called Godney Farm, did formerly belong to the said abbey of Glastonbury, and was so discharged as aforesaid. He said that he likewise possessed copyhold lands in the said manor of Godney, and insisted on the same *modus decimandi* as the other defendant; and averred, that he was always ready to pay the plaintiff after that rate; but that he had refused to receive the same.

Upon hearing what was alleged by counsel on either side, and on reading the proofs taken in the cause, and on debate,

The Court was of opinion, and so declared, that the parcels of land which were part of Meere Pool and Godney Farm were, for the reasons set forth in the defendant's answer, discharged from the payment of tithes, and that there was such a *modus decimandi* for such copyhold lands and tenements as are or were parcel of Godney manor, and within the said parish of Meere, as in the said answer is set forth.

It is thereupon ordered and adjudged, that the said bill be dismissed with costs to be taxed.

R. ATKYNS.  
ED. NEVILL.  
N. LECHMERE.  
J. TURTON.

M. 1 W. & M. Scacc. *Bullin v. Brecknock*, [1 Wood, 272.]

Lincolnshire, 21st November, 1690.

1690.

**T**HE plaintiff was farmer of the tithes of the impropriate rectory of Weston-in-Holland, in the county of Lincoln. The defendant was vicar of the vicarage and parish church of Weston. The scope of the bill was to have a discovery respecting the tithes of corn and grain, wool and lamb, which the defendant in several years had renewing and increasing in and upon the several grounds

Tithes of coleseed, mustard seed, hemp seed, and flax seed, decreed to the vicar according to usage.

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BULLIN  
v.  
BRECKNOCK.

grounds by him farmed and held within the said parish of Weston, and to have satisfaction of the defendant for the same.

The defendant by his answer claimed tithes of wool and lamb, as belonging to him in right of his vicarage, by virtue of an ancient endowment, made in the year 1280, and, as to the tithe of corn, he alleged that he and his predecessors, vicars of Weston, had all along paid a rent or pension of thirteen shillings and fourpence a-year to the crown in lieu thereof; and by means thereof they had been exempted and discharged of and from payment of any manner of tithes of such corn and grain of what kind or nature soever, which they sowed or reaped within the said parish only for the maintenance of their families.

Upon reading the depositions of the several witnesses examined on both sides, and also the endowment mentioned in the answer, and an account of the bailiff and collector of the revenues of the possessions of the late monastery of Spalding, in the thirty-second year of Henry VIII., and a lease made by the prior and convent of the said monastery, in the twenty-fourth year of Henry VIII. to Sir John Poynton, priest of the vicarage of Weston, with the tithes thereto belonging, during the life of the said Poynton, wherein the tithes of corn and line of the parishioners only, and tithe wool and lamb, are excepted; and forasmuch as the usage and custom for the payment of some of the tithes in Weston had gone contrary to the endowment,

The court was of opinion, that the tithes of corn and grain, wool and lamb (except as after-mentioned), are due and payable to the impropriator of Weston, and not to the vicar; and thereupon ordered and decreed, that the defendant shall account with and satisfy the plaintiff for the value of all such tithes of corn and grain, wool and lamb, as the defendant hath had renewing, &c. upon the ground by him farmed, held, and enjoyed within the parish and the titheable places thereof, not being glebe lands, belonging to the vicarage, except the odds of wool and lamb, viz. under seven lambs and under seven fleeces, and also except the tithe or other composition usually paid of and for hay, barren and other cattle fed and depastured within the said parish of Weston, as well by the parishioners of the said parish as by strangers and foreigners, and also except the tithe of colseed, hempeed, flaxseed, calves, foals, orchards, gardens, fruit, roots, herbs, milk, honey, eggs, and all other small tithes yearly arising and renewing within the parish; which several tithes of and for the said odds of wool and lamb, hay and pasture ground, fed as aforesaid, colseed, mustard seed, &c. have, as it appears, for several years last past been paid to the vicars of Weston, and so ought to be paid to the said defendant.

R. ATKYNS.  
EDW. NEVILL.  
N. LECHMERE.  
JOHN TURTON.

H. 1 W. & M. Scacc. *Edgerton v. Follett* and another. 1 Wood, 277. Devonshire, 20th February, 1690.

A *modus* of 4d. for every hogshead of cider in lieu of all orchard fruit growing within a parish, is void in law.

THE plaintiff, as rector of the rectory and parish church of Lympton, in the county of Devon, demanded tithes of apples in kind.

The defendants insisted that the tithe of apples ought not to be paid in kind, for that a *modus* of fourpence for every hogshead of cider had been, for time beyond memory, paid to the rector there, in lieu of all orchard fruit growing within the parish.

The court was of opinion, that the pretended *modus*, set forth in the answer, in discharge of orchard fruit not made into cider, is a void custom in law.

E. 2 W. & M. Scacc. *Barker v. Clarke.* [1 Wood, 277.]

Suffolk, 26th May, 1690.

1690.

**T**HE bill stated, that A. Rouse deceased, was seised in his demesne as of fee of the manor of Worlingworth, in the county of Suffolk, and of the demesne lands belonging to the said manor, and of two parts in three of all the tithes of corn and grain yearly growing on the said demesne lands, and of the advowson and rectory of Worlingworth, all which were granted to him and his heirs by Henry VIII.; that the same, on the death of the said A. Rouse, descended to his son and heir, who afterwards conveyed the same to J. Thurston; and that after his death they came to his son, who conveyed the same to the plaintiff's father.

A custom to pay the thirtieth shock of corn grown on the demesne lands of a manor in satisfaction of all tithes, held good. (The manor had been granted by H.8. and therefore the lands had probably belonged to a spiritual body.)

The defendant stated, that in the year 1685 he held under the title of J. Thurston, forty-six acres of land, parcel of the demesne belonging to the manor of Worlingworth, and had that year about two acres of oats; that he set out the thirtieth shock for tithe to the parson as a *modus*, in satisfaction of all tithes thereof; and that the owners and occupiers of the demesne lands never paid any tithes to the lord of the manor.

Upon reading the proofs taken in the cause, and upon debate of the matters in question,

It is ordered by the court, that the said bill be, and the same is hereby dismissed.

R. ATKYNS.

EDW. NEVILL.

N. LECHMERE.

JOHN TURTON.

E. 2 W. & M. Scacc. *Alcock v. Hilgard and Le Grand.* [1 Wood, 279.]

Lincolnshire, 22d May, 1690.

**T**HE bill stated that C. Westead, being owner of the impropriate rectory of Marsh Chapel in the county of Lincoln, and of all tithes any way due to the rector of the said rectory, demised all the said tithes to the plaintiff from Lady-day, 1683, to Lady-day, 1685, at sixty pounds *per annum*, and that by virtue thereof he became entitled to the same.

Derelict lands reclaimed from the sea, and rendered arable, are subject to pay tithes.

The defendant said, that he was owner of several pieces of ground lying near and adjoining to the sea, which being embanked, were become firm and dry ground, but which were esteemed derelict lands; that he ploughed part thereof, and sowed the same with rapeseed and coleseed, and reaped the same; that no tithes were payable for the same, nor had any been demanded, before the rapeseed was disposed of; and therefore he did not set out any tithe; and that if any tithe be due, the same is due to the vicar and not to the impropriator.

It is ordered and adjudged, that the defendants shall account for and pay the tithes of the said lands to the plaintiff; and it is referred to the deputy remembrancer to take an account of the same.

ROBT. ATKYNS.

EDW. NEVILL.

NICH. LECHMERE.

JOHN TURTON.

Tr. 2 W. & M. Scacc. *Staines v. Wells and others.* [1 Wood, 280.]

Essex, 10th July, 1690.

**T**HE plaintiff, as rector of the parish church of Langdon Hill in the county of Essex, demanded tithes in kind of calves and milk.

A *modus* of one shilling for every calf under ten, and of fifteen

cheeses every year, in lieu of tithes of milk, each of the cheeses to be made of the whole milk, except such as the calves suck from their several dams, every tenth day between the 10th of May and Michaelmas, in lieu of tithe milk of the cows, &c. within a parish, decreed.

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WELLS, AND  
OTHERS.

The defendant insisted upon two *modus*; the one of twelvence for every calf under the number of ten yearly fallen to be paid to the rector at Michaelmas: the other of fifteen cheeses every year, each of which cheeses is to be made of the whole milk (except such as the calves suck from their several dams) proceeding or coming every tenth day, between the tenth day of May and Michaelmas-day, in full satisfaction of all tithe milk coming from all and every cow and cows fed and depastured within the said parish and titheable places thereof.

A trial at law upon two issues was directed, to try the validity of the said *modus*; and on the said trial, after hearing much evidence on both sides, a verdict passed for the defendants.

The court therefore ordered, that the said defendants shall be and are hereby dismissed of and from the said bill, and the matters therein contained; but without costs on either side.

ROBT. ATKYNS.

Tr. 2 W. & M. Scacc.

*Attorney General*, at the relation of *Sutton v. Oldys*. [1 Wood, 280.]

Surry, 7th July, 1690.

The demesne lands of the crown called Byfleet Park, which lie in the parish of Wisley, in the county of Surry, are tithes free, although they are now disparked, and converted into arable lands. And a perpetual injunction awarded to quiet the possession of the crown and the tenants and lessees.

THE bill stated, that the king and queen and their progenitors had, time out of mind, been seised in fee of the manor of Byfleet, in the county of Surry, and of several demesne lands thereto belonging, whereof the lands called the Park were parcel; that the said lands, time out of mind, had been tithes free, and so enjoyed both by the king and his tenants, and that no manner of tithe had ever been demanded of paid for the same in the memory of man: that the defendant Oldys, pretending to be parson of Wisley, had brought several actions against the relator's tenants for tithes in kind of that part of the said land called the Park, that lies in Wisley; that the other defendant Smart, as rector of Byfleet *cum* Wisley, had filed his bill in this court for tithes of the same land, pretending it to be within the parish of Byfleet, and that Wisley is no parish of itself, but part of the parish of Byfleet. The bill, therefore, prayed that their majesties' tenants might be quieted till the matters should be settled.

The defendant Oldys answered, that their majesties were seised of the manor of Byfleet, and of the demesne lands thereto belonging, in right of the crown; that the lands called Byfleet Park are part of the demesne lands of the said manor; that that part of the park that lies in Wisley, whilst it continued a park and was stocked with deer, and afterwards, when it was converted into a warren, might possibly pay no tithes; but that it is now disparked, and the coneyes destroyed, and the land ploughed and sowed, and had been so for about three years past, and therefore the tithes were become due to him; and that he, as rector of Wisley, brought an action at law against the relator's tenants for the tithes arising out of that part of the Park lying in Wisley, which is a parish of itself.

The plaintiff replied; the defendant rejoined; and witnesses were examined; and upon debate of the matter, a trial at law was directed to be had at the bar of this court by a special jury of Middlesex upon this issue, "Whether that part of the park called Byfleet Park, which lies in the parish of Wisley, is discharged of the payment of tithes or not?"

A trial was accordingly had at the bar of this court; and upon full evidence the jury found that that part of the park called Byfleet Park which lies in the parish of Wisley, is discharged from the payment of tithes.

It is thereupon finally ordered, adjudged, and decreed, that their majesties, and the said relator, and all persons claiming by, from, or under them, shall for ever hereafter have, hold, and enjoy that part of the park called Byfleet Park that lies in the parish of Wisley, in the county of Surry, freed and discharged from the payment of any manner of tithes to the defendant Oldys, or any other claiming title thereto; to which purpose a perpetual injunction is to be



awarded, for the quieting their majesties and the said relator, their tenants and lessees, in the peaceable enjoyment thereof; but without costs on either side.

ROBT. ATKYNS.  
EDW. NEVILL.  
NICH. LECHMERE.  
JOHN TURTON.

1690.  
SUTTON  
v.  
OLDYS.

Tr. 2 W. & M. Scacc. *Knight v. Mawe.* [1 Wood, 281.]

Lincolnshire, 18th July, 1690.

THE scope of the bill was to have an account of a portion of tithes of corn and grain, hay, hemp, and flax, called St. Leonard's tithes, which, at the time of the dissolution of the late monastery or priory of monks of the Carthusian order, in the Isle of Axholme, in the county of Lincoln, the prior of the monastery or priory for the time being, was and had been, time out of mind or otherwise, by some ancient grant, reservation, endowment, or composition in right of the monastery or priory, and as belonging to the house, site, precinct, or church of and within the same, entitled to, and had, from time to time, received and enjoyed, and were issuing out of certain lands lying in the parishes of Epworth and Haxey, in the said county, in the possession of the said defendants; which said portion of tithes were due and ought to be paid over and above the tithes due to the rectors of the said parishes.

A portion of tithes decreed, which portion was due over and above the tithes due to the rector.

The defendants denied that at or before the dissolution of the said priory or monastery, the prior *pro tempore* was or had been, time out of mind or otherwise, by any legal grant, endowment, or composition, lawfully entitled to the said tithes; and insisted that the lands, out of which the plaintiffs demanded the tithes, being copyhold lands, held of the manor of Epworth, by copy of court-roll, ought not to be charged with the tithes; that in case the prior *pro tempore* did receive the said tithes, it was incumbent on the plaintiff to shew how he came to do it, and what endowment, grant, or other thing he had which might in law charge the said lands, the said lands being copyhold, and nothing thereof to be found in the court-rolls; and therefore they conceived that the said lands could not be charged with such an unusual burden, except by some surrender from some former owners of the said lands, according to the custom of the said manor, and enrolled and entered in the court-rolls of the said manor; and that, in case the said lands be charged with the said tithes, and considering the great charge of tillage, fallowing, manuring, seed-cutting, lord's rents, taxes, and other charges, they conceived the lands were not worth tilling, but must lie uncultivated; and therefore hoped the court would not decree the payment of the said tithes till the plaintiffs proved by good evidence how the lands were originally charged, and what legal endowment, grant, or other thing the prior had thereof, and from whom.

The plaintiffs replied, the defendants rejoined, and witnesses were examined on both sides; and upon reading the several depositions taken in the cause, and a deed, dated the twenty-seventh of April, 1652, made between Sir P. Tyrwhitt and J. Dillingham; and on debate of the matter,

The court directed a trial at law in an action of trover and conversion, to be brought by the defendants against the plaintiffs; in which action the plaintiffs in this cause are to admit that the defendants set out a stack of corn and a cock of hay for tithes over and above the tithes due to the parson, and also that the plaintiffs carried the same away, and converted the same to their own use; and the only question upon the trial to be, "Whether the plaintiffs are entitled to the said portion of tithes called St. Leonard's tithes, lying in the parishes of Epworth and Haxey, or not?"

A trial was accordingly had, and a verdict was found for the defendants in the action (who are plaintiffs in this suit).

This cause, and also a cross-cause, wherein the defendants in this cause were plaintiffs,

1690.  
KNIGHT  
v.  
HAWK.  


plaintiffs, and the plaintiffs defendants, came on the twenty-ninth day of June, 1692, to be heard; and upon reading the *postea* of the verdict, and after a new trial being prayed for, and on debate,

It is ordered and decreed, that the defendants shall satisfy and pay to the plaintiffs the tithes due for the lands they severally hold in the said parishes of Epworth and Hawxey, or the value of the same; and it is referred to the deputy remembrancer to take the account.

And as to the cross-bill, it being for the same matters, it is ordered to be dismissed with costs to be taxed.

ROBT. ATKINS.  
NICH. LECHEMER.  
JOHN TURTON.  
JOHN POWELL.

Tr. 2 W. & M. Scacc.

*Dodderidge v. Startop.* [1 Wood, 283. Ch. Ba. Dodd's MS. 108.(1)]

Sussex, 10th July, 1690.

A *modus* of 2s. in the pound, according to the yearly value of the farm, held good.

**T**HE plaintiff claims tithes of the rectory of Whatlington, in the county of Sussex.

The defendants state a custom of paying two shillings in the pound, according to the yearly value of their farms, by half-yearly payments, at Lady-Day and Michaelmas, in full satisfaction of all tithes whatsoever.

On reading the depositions of divers witnesses in the cause, and on full debate of the matter, the court ordered the bill to be dismissed without costs. [*Decree Book.*]

Resolved, that a custom of two shillings in the pound, according to the value of the land, or as the same is let for, is a good custom by the whole court, and not tithes in kind, and the parson's bill for tithes in kind dismissed. See *Browne & Chaplin* and *Bean & Lee contrà*. 11 Rep. 16. Hob. 11. [*Dodd's MS.*]

(1) There are two copies of MSS. containing reports said to be by Ch. Baron DODD, in the Hargrave collection. Mr. Rayner and Mr. Gwillim have copied from No. 70, which has but little claim to authenticity when compared with No. 71, which I have followed; the former is by an unknown copier, the latter

contains at the end this entry: "N.B. I transcribed these cases from a Manuscript belonging to the late Chief Baron Dodd, written with his own hand. I began it last long Vacation, and finished it this day, viz. the 21st day of December, 1723. John Wainwright."

Tr. 2 W. & M. Cam. Scacc.

*Dummer v. Wingfield.* [Dodd's MS. 111.] 1 Wood, 273.

The year for sheep ends at shear-day.

A pasturage tithe is due for sheep kept after shear-day, and sold out of the parish.

Full tithe of wool decreed, though the sheep had been kept but two months in the parish where sheared.

**T**HE plaintiff was rector of Hardwick cum Weedon, in Bucks, and brought his bill against the defendant for tithes; and the court resolved, 1st. That the year ends at Shear-day for sheep: 2d. That for such sheep as were kept after Shear-day, and sold away afterwards out of the parish, that the parson should have a pasturage tithe for them; and these two points were affirmed upon a rehearing. Note, the parishioners had a *modus* for tithe sheep from Candlemas till shear-time, as follows: viz. the sheep to be sold at Candlemas, and the parson to have the tenth fleece, or the value thereof, for all those at shear-time; but for such as are bought in after Candlemas, the parson is to have four-pence a score, by the month. Note, the sheep for which the court decreed a pasturage tithe were bought in after Candlemas, and sold out after shear-time, but no profit was made of them. See Bro. *Dismes*, 18. F. N. B. 1029. a. Degge, 246. 256. 1 Ro. 640.

Note, a bill of review was brought, and the case argued at length, and the Chancellor of the Exchequer was there, and was against the decree; but the other barons affirmed it, and allowed a demurrer to the bill of review. E. 3 W. & M. and H. 3 W. & M. the court decreed the full tithes in kind of wool, although the sheep had been but two months in the parish where sheared, between

between *Perne* and *Swaine*, of *Leverington*, in *Ely*; for, by the court, wool is tithe in kind.

1690,  
DUMMER  
v.  
WINGFIELD.

Tr. 2 W. & M. Scacc.

*Stumpe v. Aylyffe*. [Dodd's MS. p. 136.] 2 Gw. 536. 1 Wood, 294. Rayn. 72.

UPON an English bill for tithes, the defendant set out and proved that the plaintiff had taken a second benefice which, by the proofs, was above 8*l.* in value, &c. But in the King's books it was below the value, &c. And the court doubted whether the value should be determined by the King's books conclusively, or it should be according to the real value. *Adjourn*. See Dy. 237. Cro. Eliz. 853. Cro. Car. 456. Degg. 29.

The King's books are conclusive as to the value of a living.

Afterwards, 5th December, 1692, it was resolved upon debate, that it should be according to the King's books, and the defendant was decreed to account. I (*Dodd*) was of counsel with the plaintiff.

M. 2 W. & M. Scacc. *Claxton v. Langton*. [1 Wood, 283.]

Lincolnshire, 24th November, 1690.

THE bill stated that the plaintiff, for one year last past, had been rector of Mablethorpe Saint Mary's cum Stayne, in the county of Lincoln, and entitled to all manner of tithes in kind, and to the glebe lands thereunto belonging.

The defendant stated, that within the parish there was a custom, that if any person, dwelling out of the parish, occupy or take to farm any pasture ground, being ancient pasture ground, lying in the said parish, he shall pay to the rector of Mablethorpe the yearly sum of four-pence an acre for every acre of such pasture ground, in full of all tithes yearly arising upon every such respective acre, the same to be paid upon every first day of August, or afterwards, upon request, and that the same sum of four-pence an acre, amounting to four pounds fourteen shillings and six-pence, was tendered to be paid accordingly, but that the plaintiff refused the same, and that the defendant was and is ready to pay it.

A custom that out-dwellers, occupying ancient pasture in a parish, shall pay 4*d.* an acre yearly, on the first of August, in lieu of tithes, is a good custom.

The plaintiff replied, the defendant rejoined, and witnesses were examined on both sides.

The plaintiff's counsel confessed that the custom was fully proved, but denied that the defendant had proved any more than one pound fourteen shillings and four-pence to be tendered, which was not the full customary payment; and insisted that the custom being formerly in issue, in the cause of *Ashfordby*, clerk (the plaintiff's predecessor), against *Newcomen*, gentleman (1), was decreed to be a void custom, and against law, and therefore prayed the like decree might be made in this cause, and that such former decree was the only inducement why the plaintiff brought this suit.

The defendant's counsel insisted, that since the said decree the like custom, being in question once or twice in this court, was decreed to be a good custom. (2)

Whereupon, and upon hearing what was alleged by the counsel on both sides, The court declared, that the custom insisted on by the defendant in his answer, was a good custom.

It is thereupon ordered and adjudged, that the defendant shall be, and is hereby absolutely dismissed this court of and from the bill, and the matters and things therein contained, with costs to be taxed by the deputy remembrancer.

THE COURT FULL.

(1) *Ante*, 511.

(2) *Sec ante*, Tr. 30 Car. 2. M. 32 Car. 2.

1690.

Glebe land is not of common right titheable. Bill by vicar dismissed where no proof of payment.

Tr. 2 W. & M. Scacc. *Streaton v. Downes*. MS. [2 Gw. 536.]

**B**ILL by vicar for tithes: defendant insisted he was tenant of the glebe lands under Eton College, and that no tithe for that land was due to the vicar. By the court, in regard the glebe land of which the plaintiff demands tithe, is not of common right titheable to the plaintiff, and the plaintiff has not made sufficient proof of payment of tithes to him for the same, let the bill be dismissed.

1691.

A prohibition lies to the spiritual court after sentence, and although the libel be for matter within their jurisdiction, if a temporal matter become incidental, and they refuse such proofs as the temporal courts allow, as if they refuse proof of a fact by a single witness; but for prohibition it must be alleged that such proof was offered, and refused.

Though by the ecclesiastical law it is necessary to give notice to the parson of setting out tithes, it is not so by the common law.

H. 2 W. & M. B. R.

*Shotter v. Friend*. [Carth. 142.] 3 Mod. 283. Show. 158. 172. Holt, 752. Comb. 160. 2 Salk. 547.

**P**ROHIBITION to the spiritual court, in which the plaintiff declared to this effect:

That one John Friend made his last will, and bequeathed a legacy of 10*l.* to Mary Friend, and made the wife of Shotter executrix, and died: the plaintiff paid the legacy to Mary Friend, who afterwards died intestate; and the defendant, as her administrator, libelled against the plaintiff for this legacy of 10*l.* to which he alleged in that court by way of plea, that he had paid the said legacy to Mary Friend in her life-time, which payment he offered to prove by one credible witness; but the court refused the plea, because one witness *per se* is not sufficient by their law to prove any matter of fact.

The defendant pleaded, that before the prohibition was brought and delivered, sentence was given in the spiritual court against the plaintiff.

And upon a demurrer to this plea, it was insisted for the plaintiff, that it is a maxim in law, that where the common and the ecclesiastical law differ, the common law shall always be preferred; and that those laws differ in several points concerning evidence; for by that law the father cannot be a witness where the son is a party, *et à contrà*; so in the case at bar, the proof of the fact by one witness, is not good by their law; but it is otherwise at common law; for it is reasonable that the proof which is good for payment of a debt, should be likewise sufficient for payment of a legacy.

Moreover, upon such single proof, the plaintiff would have relief in chancery, and for the same reason shall have a prohibition here; and the cases in the (1) margin were cited to prove that prohibitions have been granted in cases of this nature.

Now, supposing a testator owed money upon bond to the value of the assets, and he had devised several legacies by his will; and this bond is proved by one witness; and the legatees libel against the executors, who plead this bond in that court; and they disallow the plea, because the bond is proved by one witness alone: in this case, if a prohibition should not go, that court would compel the executor to pay the legacies; and yet he (the executor) would be chargeable to the obligee, for as to him the payment of the legacy would be a *devastavit*.

*E contrà*. It cannot be denied but that the spiritual court has consueance of the original cause, which in this case is the legacy, and therefore they shall have consueance of all the (2) incidents and dependencies thereon; besides, one witness is not conclusive evidence at common law, but only evidence to induce the jury to find the matter.

But in Michaelmas Term, Anno 2 W. & M. it was argued and resolved by all the court *seriatim*, that a prohibition should go; and first it was allowed, that regularly where the spiritual court has consueance of the principal, they shall have consueance of the incidents and accessories; but if the incident be a

(1) 3 Cro. 88. 666. Moor, 413. 907. 1 Rol. Rep. 12. 2 Rol. Rep. 42. 439. 490. Hob. 247. Yel. 92. 2 Rol. Abr. 299. Latch, 117. 217. 3 Balstr. 242. Hutton, 32. Poph. 59. Hob. 188.

(2) Roll. Abr. 298, 299. Hob. 12. 12 Rep. 65. Hedley, 87. 2 Inst. 608. Lindw. 174. Sid. 161. 2 Inst. 6. b.

matter merely temporal, they must proceed there according to the course of the common law, and not *secundum jus ecclesiasticum*; for if they do, a prohibition will be granted; as for instance, in the case of a nuncupative will, which is merely spiritual (and such a will is none in their law, unless proved by two witnesses at least), no prohibition shall go, though they disallow the will, because proved by one witness, and no more, for that court has consance of the probate of wills: but yet, if a revocation of such will be pleaded there, and proved by one witness, and they refuse the plea for want of sufficient proof, a prohibition shall go: *quod nota*.

So where a suit is brought in that court for subtraction of tithes, which is of spiritual consance, and the defendant pleads there, that he had set out the tithes, which he proved by one witness, but they refused to allow the plea, because the defendant had not given the parson notice of setting out the tithes; yet upon suggesting this matter a prohibition shall go, because notice is not requisite by the common law; therefore if they will proceed upon such an incident, according to the ecclesiastical law, they shall be prohibited.

But it was agreed that a suggestion that the spiritual court objected as to the credibility of a witness, is not a sufficient ground for a prohibition, for they are the proper judges of the credit of a witness; likewise it is not a sufficient ground for a prohibition to suggest that the plaintiff had only one witness to prove the fact, unless he allege that he offered such proof, and it was refused for insufficiency.

And a case was now remembered between (1) *Richardson* and *Desberow* adjudged in this court, when HALE was Ch. Justice, which was the same with the case at bar, and likewise after sentence; and yet a prohibition was granted.

And HOLT, Ch. J. held, that it was not necessary in any case at common law, that a proof of matter of fact should be made by more than one witness; for a single testimony of one credible witness was sufficient to prove any fact; and that the authorities cited in 1 Inst. 6. b. did not warrant that opinion which was there founded on them.

The plaintiff had judgment for a prohibition.

(1) 1 Vent. 291.

Tr. 3 W. & M. Scacc.

*Pettit v. Churley*. [Dodd's MS. Rayn. 72.] 2 Gw. 536.

**P**LEA to a tithe bill, that the plaintiff was a Frenchman, and not capable of a benefice by statutes Ric. 2. and Hen. 5. The court doubted. See Rol. Abr. tit. Presentment, 348; and note the acts are printed in *Rastal*.

*Quare*, Whether alienage a good plea to a bill for tithes.

M. 3 W. & M. Scacc.

*Birchinshaw v Wilcock* and others. [1 Wood, 287.]

Devonshire, 12th November, 1691.

**T**HE plaintiff, as rector of Lydford, in the county of Devon, exhibited his bill, stating that his predecessors, time out of mind, or by some ancient grant, were entitled to all manner of predial and other tithes within the said parish and the titheable places thereof.

The defendants alleged, that the grounds by them severally held, laid within the forest of Dartmoor; that the said forest was an ancient forest, park, or chase, belonging to the crown; that the tithes thereof, and of all assarted and improved grounds therein, were only payable to the crown, and by law no tithes, or any thing in lieu thereof, could be claimed by any person for the same, but only by such as claimed by matter of record under the crown.

The defendants' counsel insisting that the grounds out of which the plaintiff demands tithes, are not within the parish of Lydford, or the titheable places thereof,

The court directed the plaintiff to bring an action against the defendants; the issue to be, "Whether the tenements and lands in the occupation of the

defendants,

Where tithes were claimed of lands within the forest of Dartmoor, by a rector of a parish, and the defendants alleged that they belonged to the King, an issue was directed to try whether the lands laid with in the parish.

1691.  
SHOTTER  
&  
FRIEND.

1691.

BIRCHINSHAW

v.

WILCOCK.

"defendants, out of which the plaintiff demands tithes, do lie within the parish of Lydford, or the titheable places thereof, or not?" to be tried by a special jury.

A trial was accordingly had by a special jury out of the north grand division of the said county, and a verdict given for the plaintiff.

The defendants' counsel prayed a new trial; but the court seeing no miscarriage in the jury upon the last trial, nor any just exception to the verdict, refused to grant any further trial.

It is therefore ordered by the court, that the defendants shall respectively account with and satisfy the plaintiff for all such tithes as they have severally had in the years 1688 and 1689.

NICH. LECHMERE.

JOHN TURTON.

JOHN POWELL.

1692.

H. 4 W. &amp; M. Scacc.

*Saunders v. Ryall.* [Dodd's MS. 129.] Rayn. 74. 2 Gw. 537.

The vicar is entitled to tithe of corn sown by his predecessor's lessee on the glebe, although the impropiator is entitled to great tithes generally. So decreed by two barons against one, in the absence of the chief baron.

**T**HE vicar is endowed with all small tithes within the parish, and with four acres of glebe, and the parson or impropiator had all the great tithes: the vicar leased the glebe to A. who sowed it with corn, and then the vicar died. B. is instituted and inducted; A. carries off the corn, and B. sues him for the tithes; and held by the whole court,

1st. That A. should pay tithe, but the great point was to whom, for it was objected that now it is great tithe it shall go to the parson and not to the vicar, for he is not endowed with great tithes. But by LECHMERE and POWELL, the vicar shall have it, for the endowment of the glebe carries all the profits of the land with it. But TURTON *contra*, that the parson shall have it, for the land is only discharged of great tithes in the hands of the vicar; but he cannot have them *in prendre*, for the parson has all the great tithes. In the absence of the Chief Baron, it was decreed for the vicar. See Cro. Eliz. 579. *Greisley's case*, cited in *Blincoe* and *Backsdale's case*, (1) to the contrary: but this case was not cited to the court, nor by them, notwithstanding the court took two days to consider. See *post*, *Hawkins* and *Chittle*.

(1) *Ante*, 134.

H. 3 W. &amp; M. Scacc.

*Buckle v. Vanacker.* [Dodd's MS. 142.] 1 Rayn. 79. Bunb. 99.n.

Wood of timber trees cut into faggots and billets, shall pay tithe.

**U**PON a tithe bill for tithe wood in Erith, in Kent, at Serjeant's Inn, the 20th February, resolved that if above twenty years growth be felled, and part used for timber and part made into billets, faggots, &c. that tithe shall be paid for the part so made into billets, &c. And it was said that it is not the thing but the use which exempts from tithes, and notwithstanding above twenty years growth, it shall not avail, &c. ACROW and SMITH adjudged upon hearing, re-hearing, and review. So in *Watts* and *Wendrum*. Quare the law. See *Franklyn* and *Jones*, 1687, and reports confirmed 1690. *Couper* and *Layfield*, of *Burraton*. *Turnell* and *Athill*, *post*.

H. 3 W. &amp; M. B. R.

1692.

*Gumble v. Falkingham.* [Carth. 215. 1 Show. 281.] 4 Mod. 45.

**I**N a prohibition, the case was, viz. Falkingham, rector of H. libelled in the consistory court of the bishop of E. for tithes of two mills, the one a water-mill and the other a wind-mill, and this demand was of predial tithes, viz. the tenth toll-dish.

Gumble pleaded a *modus* of 2s. 6d. as to the water-mill; and as to the wind-mill, if any tithes ought to be paid, it ought to be personal tithes, viz. the tenth of the profits, and not the tenth toll-dish.

Falkingham, the rector, by way of additional libel, as they call it, replies, that as to the water-mill, Gumble had added a pair of new stones to that mill, and by that means the *modus* was destroyed; and as to the wind-mill, he replied, that by the canon law, and by the law of this land, it ought to pay predial and not personal tithes; and thereupon that court proceeded against Gumble.

And now it was moved for a prohibition, suggesting a *modus* as to the water-mill, *ut supra*, and as to the wind-mill, he set forth the statute of E. 6. concerning tithes, viz. "that tithes ought not to be demanded if not anciently paid," &c. and further, that if any tithes were due for a mill, they are only personal tithes out of the clear profits of the mill, and not the tenth toll-dish, as was demanded.

In the arguing this case, two questions were made:

1. Whether the *modus* for the water-mill was destroyed by the addition of another pair of stones under the same roof.

2. The other question upon which the great doubt arose was, what kind of tithes ought to be paid out of a titheable mill; if only personal tithes, viz. the tenth of the clear gain, or else predial tithes, viz. the tenth of all the income in general.

And the cases in the (1) margin were cited for the prohibition, and for the continuance of the *modus*.

*Et per curiam*, the *modus* is not destroyed by the addition of the new pair of stones; but as to the other matter they doubted, and therefore a prohibition was granted generally, on purpose that the point may come before them upon a declaration and demurrer to it, so that the matter might receive a solemn determination by the court.—[*Cartwright*.]

Prohibition: there was one mill for corn, for which a *modus* was paid; and the party adds two new mill-stones. The parson sues for tithes.

Sir Thomas Powis argued, that tithes are payable for corn-mills, *contra* 2 Inst. 621. and he cited 1 Rolls Abr. 641. 642. 652. 656. 1 Rolls Rep. 405. 3 Bulst. 212. Nat. Brev. 51. 2 Inst. 652. Litt. Rep. The tithes of the toll is another profit arising out of the thing, not to the owner, but to the miller; it is a new increase in the hands of another person. Be it predial, personal, or mixed, the court-christian has jurisdiction, 2 Inst. 490. Now here the profit is increased; the *modus* shall not extend to the new profit, Cro. Jac. 429. Right of estovers shall not go to new rooms or chambers newly erected, 1 Rolls Abr. 641. 652. 1 Brownl. 31.

Mr. Wright *è contrâ*. It is but personal: the falling mills are yielding only a personal tithe; and the reason is the same for this, that there ought not to be a double tithe, 2 Inst. 621. 657. Before the statute of *articuli cleri*, 9 E. 2. c. 5. no tithes were payable for ancient mills, 12 Co. 36.

HOLT, Ch. J. The tenth toll-dish is the tithe; (2) it is not the owner of the mill, nor the owner of the grain, that has the profit, but the miller; this is a predial tithe, because payable *rectori loci*, i. e. where the mill is, not merely where the party lives. It seems reasonable, the parson should have the tenth toll-dish. *Adjournatur*.—[*Showers*.]

(1) 2 Roll. Abr. 652. 12 Rep. 36. 1 Roll. Abr. 641. 652. 656. 4 Rep. *Lutterell's* case. *Contrâ*, Sir Thomas Pope's case. F. N. B. 51. H. 2 Roll. Rep. 84. 1 Roll. Rep. 405. 2

Inst. 490. 621. 652. 2 Cro. 429. 1 Brownl. 31. (2) See the case of *Chamberlain v. Newte*, 1 Brownl. P. C. 158. *Carlton v. Brightwell*, 2 F. W. 462.

A *modus* for a water-mill is not destroyed by the addition of another pair of stones under the same roof. *Quere*, Whether of a titheable mill, personal tithes (the tenth of the clear gain), or predial (the tenth of all the income in general) ought to be paid.

1692.

Tr. 4 W. & M. Scacc. *Lister v. Cane and Salmon*. [1 Wood, 293.]

Buckinghamshire, 22d June, 1692.

An alleged custom of setting out tithe wood by single sticks, or stick meal, held to be irregular and illegal, as being unequal and fraudulent. A custom to set it out in loads, &c. was alleged by the rector.

**T**HE plaintiff, as rector of Fulmore, in the county of Bucks, stated that, according to a law or custom used within the said parish, and the adjacent parishes there, the tithe of underwood, when felled, ought to be set forth in loads, half-loads, quarters, stacks, and bundles, viz. fire-wood in loads, half-loads, quarters, and stacks; and hoops, withes, broom-staves, hurdle-rods, and other such like wood in bundles, to be made up and bound with withes, and set forth equally in the same method and manner as the owner and proprietor of such woods, when felled, sets it forth and prepares it for his own use or sale. And that by custom rabbits had always paid tithes to the rectors within the said parish. That the defendant Cane, between Midsummer, 1687, and Michaelmas, 1690, had felled great quantities of underwood, and sold the same, and had also cows and calves for which he paid no tithes to the plaintiff; that the defendant Salmon, for four years past, held and occupied a warren, and killed, sold, and disposed of great quantities of rabbits, without paying the tithes thereof, or making any satisfaction for the same.

The defendant Cane confessed that he had felled, sold, and disposed of twenty-six acres of underwood, worth fifty shillings an acre; that he had also cows and calves; and mentioned, that by an ancient custom there used, four-pence per annum had been paid to the rector for a cow, and therefore no tithe ought to be paid for milk or calves. He confessed, that he had set forth the tithe of the wood by single stick, or stick meal, as by the law he might do, and that the same was a full tenth part of the wood felled by him, and that the plaintiff was contented therewith. He denied, that there was any custom to set forth tithe wood in loads, half loads, &c. as stated in the bill, but that, to oblige the plaintiff, he had, in some of the years mentioned, caused his wood to be set out in quarters.

The defendant Salmon confessed, that for four years he had occupied and possessed a warren in Fulmore, and paid for the warren house and the warren, and killed within the said warren about sixteen dozen of rabbits, which he sold for eight shillings a dozen, and said that he had let the plaintiff have several couple of conies, but not as tithes; and he denied that there was any custom for tithing the same.

Upon reading the proofs taken in the cause, and on debate,

The court was of opinion, that the method, insisted upon by the defendant Cane for the setting forth of the tithe of his wood, is irregular and illegal, as being an unequal and fraudulent way of tithing wood, and therefore ordered and decreed, that he shall pay and satisfy the plaintiff six pounds for the value of his tithes of wood, calves, and milk, viz. five pounds fifteen shillings for the wood, three shillings for his calves, and two shillings for his wool; and that the defendant Salmon shall pay to the plaintiff forty shillings for his tithes of rabbits for the said years; and the deputy-remembrancer is to tax the plaintiff his costs.

Tr. 4 W. & M. Scacc. *Watts v. Watkins* and others. [1 Wood, 296.]

Herefordshire, 22d June, 1692.

Where lands had belonged to an abbey of the Cistercian order, under the value of 200*l.* per annum, and they were not privileged in the abbot's hands, tithes were decreed.

**T**HE bill stated, that the plaintiff was, in the year 1676, presented to the rectory of Doore, in the county of Hereford, and was thereby entitled to all tithes arising within the said parish.

The defendants said, that since the plaintiff had been rector of the said parish, they had severally held messuages, farms, and lands within the grange called Morehampton Grange, within the said parish; and insisted, that they ought not to pay any tithes for the same, for that the abbot or prior of the abbey of Doore was of the Cistercian order, and privileged from the payment of tithes, and was heretofore seised in fee of divers lands, parcel of the demesnes of the said abbey, within the said parish of Doore, and amongst others



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AND OTHERS.

others of the said grange called Morehampton Grange, which was parcel of the said abbey, and that the lands in the defendant's possession were parcel thereof; that the said abbot was also possessed of the appropriate rectory of Doore, and, being so seised, in the twentieth year of Henry the Eighth, demised the said grange and other lands to T. Baskervill, with all manner of tithes, waifs, estrays, fishing, fowling, and pannage, with other profits and royalties thereto belonging, (suit of court only excepted) for ninety-nine years, at the rent of fifteen pounds, six shillings, and eight-pence a-year, and that he held the same discharged from tithes; that afterwards the said abbey, and all the lands, rectory, and the tithes thereof, and the fee thereof, became legally vested in King Henry the Eighth, with all the privileges and exemptions thereto belonging, and that he, in the thirty-second year of his reign, granted the said grange, land, and tithes, so demised to T. Baskervill, to Stephen ap Harry, and his heirs, with all the king's hereditaments belonging to the said grange, or that were in Baskervill's possession, and reserved a rent to him and his successors; that no tithes were ever pretended to or demanded as due to his Majesty, or successors, or other proprietors of the said rectory; that the lands so granted were then in the seisin of Sir H. Hoskin, Kt.; and that the defendants held their farms under him, as part of and belonging to Morehampton Grange.

Upon reading the proofs in the cause, and on full debate, it was ordered, on the sixth day of June instant, that a case should be drawn up, and agreed on by counsel on both sides, and that copies should be delivered to the barons for the opinion of the court; but the counsel not agreeing in one case, the barons were attended with cases on both sides, and the cause came on again the twenty-first instant; and upon long debate of the matters of law arising upon the said cases, and hearing what could be alleged on each side, the court took time to consider of the said matters till this day; the cause then standing for the judgment of the court.

The court now delivered their opinion *seriatim* for the plaintiff; for, that it appears to this court, that the said abbey was one of the lesser abbeyes, but under the yearly value of two hundred pounds, and so not within the statute of 31 H. 8. c. 13; and though the said abbey was of the Cistercian order, yet it appears to the court, that the lands in question were not privileged in the said abbot's hands, in respect of the said order, from the payment of tithes; and also, that the tithes of Morehampton Grange were not conveyed, nor did pass to Thomas Baskervill by the abbot's lease, mentioned in the answers and case, nor to Stephen ap Harry by the letters-patent, in the said answers and case mentioned, to be made to him in the thirty-second year of Henry the Eighth; and as by none of the ways and means in the answers and case, or by the proofs in the cause, there appears any exemption or discharge of the tithes of or for the said grange, or lands in the defendant's occupation, the same ought to be and are titheable to the plaintiff, and this court being upon the whole matter fully satisfied that the plaintiff has a good title to the tithes in question,

It is ordered and decreed, that the defendants do account for and pay to the plaintiff their respective tithes due for the lands and tenements, in and during the several years demanded by the bill, or the value thereof, with costs; and it is referred to the deputy-remembrancer to take the said account, and to tax the costs.

ROBT. ATKYNS.  
NICH. LECHMERE.  
JOHN TURTON.  
JOHN POWELL.

1692.

Tr. 4 W. & M. Scacc.  
*Berwick v. Swanton.* [Dodd's MS. 137.] Bunb. 192. 2 Gw. 537.  
 1 Wood, 295.

A sequestrator cannot bring a bill for tithes.

**T**HE plaintiff brought a bill for tithes as sequestrator of the tithes of Stamford in Norfolk, and upon the hearing the court dismissed the bill, for the sequestrator is but as a bailiff, and accountable (to the bishop) and has no interest, and so it was before resolved in November, 1686, in this court between *Banks and Roy*. Note, the plaintiff was a parson, and served the cure by appointment of the bishop, and had a sequestration of the tithes.

H. 4 W. & M. Scacc.

*Salmon v. Denyer and another.* [1 Wood, 302.]

Surry, 9th February, 1692.

Verdicts on two trials found that the Wild of Surry is exempt from tithes of wood.

**T**HE bill stated, that the parsonage of Frencham, in the county of Surry, was formerly appropriated to the archdeaconry of Surry; that John, late bishop of Chester, and archdeacon of Surry, by indenture of lease dated the seventh of February, 1682, demised the said parsonage, and all manner of tithes and profits whatsoever to the same belonging and appertaining, to the plaintiff, his executors, and administrators for three lives; and that by virtue thereof, he became entitled to all and all manner of tithes whatsoever arising therein; that the defendant, in the year 1690, cut great quantities of underwood in the tithing of Cheart, within the said parsonage and rectory, and carried the same away without setting forth the tithes thereof, or making any compensation for the same.

The defendants said, that in the said year they cut a row of alders in Dinnot's Meade, in the said parish, and about one acre of alder, birch, asp, and withy, in Quinnott's Moore, in all thirty cords of wood, which they sold, and that they did not set out the tithes of the said wood, or agree with the plaintiff for the same, for that the said meadow and moor laid within the Wild of Surry, in the said county, and that the place called the Wild of Surry, and in which the wood grew, was, and had been, time out of mind, free and exempt of and from the payment of all and all manner of tithe wood.

The court directed a trial at law in the Court of King's Bench, upon the following issues:

First, Whether the tithing of Cheart, in the parish of Frencham, is within the Wild of Surry?

Secondly, Whether the Wild of Surry is exempt from the payment of tithe wood?

The cause standing in the paper of causes, pursuant to the order of the seventh instant, it was ordered, on the motion of counsel, that upon the plaintiff paying five pounds costs, for his delay in not going to trial, pursuant to the said order, a new trial should be had upon the former issues; the record to be made up in the office of pleas, and no where else, by express direction of the court, the plaintiff's counsel submitting thereto.

The issues were accordingly tried, and a verdict was found for the defendants on both the issues;

Afterwards at the earnest importunity of the plaintiff another trial was directed to be had by a special jury, on which second trial a second verdict was found for the defendants upon both the said issues.

Upon hearing counsel on both sides, and reading the order and the *postea* upon the last trial, and on debate of the matter,

It was ordered and adjudged by the court, that the bill be absolutely dismissed.

H. 4 W. &amp; M. Scacc.

*Platts v. Cawthorne* and another. [1 Wood, 303.]

Yorkshire, 20th February, 1692.

1692.

**T**HE plaintiff, as vicar of the parish of Topcliffe, in the county of York, stated, that, as vicar of the said parish, he ought to receive all small tithes arising, &c. therein, and for barren and unprofitable cattle, from such of the residents of the said parish, who agist such cattle, the sum of two shillings in the pound, or the sum contracted to be paid for the agistment; and from foreigners for unprofitable cattle depastured in the said parish, two shillings in the pound for every pound rent; that the defendants, in the year 1688, being foreigners, farmed several pasture-grounds therein, and held the same in their own hands, and depastured them with dry and unprofitable cattle.

Where a *modus* of twenty shillings a year was alleged and one of forty shillings proved, tithes were decreed.

The defendants confessed that they were foreigners; that they farmed certain pasture-grounds called Maiden Bower and Manor Wood, and depastured the same with several fat, barren, and unprofitable cattle, but kept no account, as they knew not of any money due to the plaintiff for any cattle depasturing there, saving that twenty shillings a-year prescription money had been always paid to the vicar by Mr. Bickerstaffe and the Duke of Somerset, under whom they claim the said lands, and that he had constantly accepted the same, in lieu of all tithes out of the said closes, and all other the lands aforesaid.

Upon hearing counsel on both sides, in respect the defendants have by their answers insisted on a *modus* of twenty shillings *per annum*, in lieu of tithes of Maiden Bower and Manor Wood, and have proved a *modus* of forty shillings *per annum*, for the tithes of the said lands, and other lands of the Duke of Somerset, in Topcliffe aforesaid:

The court thought fit to decree for the plaintiff.

And therefore it is ordered and adjudged, and decreed, that the defendants do forthwith pay to the plaintiff the tithes for the depasturing of the said lands, called Maiden Bower and Manor Wood, for the said year 1688, amounting to four pounds according to the rent of the said lands for that year.

M. 4 W. & M. Scacc. *Grove's Case*. [Dodd's MS. 137.]

**I**N a prohibition in the Exchequer the case of *Thornton* and *Cromer* was cited, which was resolved in the time of HALE, Ch. B. that an agreement by parol to retain tithes was good and within the statute of E. 6. notwithstanding it was for more than one year, and so it was resolved in *Web* and *Beal's* case in the Exchequer, 28 Car. where it was for three years by way of retainer. And it was said by LUSHINGTON and POWELL, that it was resolved in *Jelus* case upon a prohibition, 1. That for one year an agreement by parol was good and unavoidable.

An agreement by parol to retain tithes is good and within the stat. 2 E. 6. though for more than one year.

2. That an agreement was good for more years and only avoidable by election: but if the years incur the parson cannot after the years make it void, (1) but it ought to be avoided within the time to sue for the tithes, and compared it to a tenancy at will which cannot be determined a few days before the rent becomes due, &c. *Nota*, in the present case the libel was for three years, the defendant insisted upon the agreement for the first year, and said that he set out the tithes the second, &c. and afterwards moved for a prohibition suggesting the agreement; and by the court it appears the agreement is waved by setting out the tithes, and no prohibition was granted.

(1) See 2 Ro. 63.

E. 5 W. &amp; M. Cam. Scacc.

*Wild v. Acton*. [Dodd's MS. 143.] Rayn. 74.

1693.

**T**HE plaintiff was lessee of the impropriation and manor of Kempsey, in the county of Worcester, in which there is a vicar endowed. *Stoulton* is a vill therein, and has a chapel of ease, and the inhabitants hire a curate or chaplain

A vicar is not entitled to tithes without endowment.

1693.

WILD v. ACTON.

A chaplain put in and removed at pleasure cannot claim them.

chaplain to say prayers, and give him a salary; Wild brings his bill for tithe hay in this vill; the defendants, the inhabitants, insisted, that the chaplain had the tithe hay, and that they had agreed with him for the tithes; upon debate, it was resolved,

1. That tithe hay is payable in this case, and so admitted by the defendants, and the common right is with the parson.

2. That either the parson or vicar must have it, and not in this case the vicar, because he does not pretend to be endowed of it.

3. That the chaplain is too uncertain a person, and has too uncertain an estate, to be capable of it, for he is put in and removed at pleasure.

E. 5 W. & M. Scacc.

*Ward and Others v. Hilder.* [1 Wood, 305.] 2 Gw. 538.

London, 18th May, 1693.

The statute 37 H. 8. c. 12. for regulating the payment of tithes in London extends both to lay impropriators and spiritual persons, but the statute 22 & 23 Car. 2. c. 15. for the maintenance of parsons, vicars, and curates, in those parishes which were destroyed by the fire of London, extends to preaching ministers only.

THE bill stated, that Queen Elizabeth, being seised in fee in right of the crown of England of the impropriate rectory and church of St. Lawrence Poultney, in the city of London, and of the vicarage of the said church, and of all tithes, customary payments in lieu of tithes, lands, and hereditaments thereunto belonging, by her letters-patent dated the twelfth of March, in the thirty-third year of her reign, granted to E. Downing and R. Rant, the said rectory with the rights and appurtenances thereof, and the advowson thereof, and all the lands, tithes, and profits to the said rectory and vicarage belonging, to hold to them, their heirs and assigns, under a fee-farm rent of four pounds, six shillings, and nine-pence a-year; that the title and interest of and in the said rectory, vicarage, tithes, and premises, is and are by mesne conveyances come to and vested in the plaintiffs, who were, and for several years past had been duly entitled to, and ought to have had and enjoyed all tithes, rates, and customary payments in lieu of tithes, whether due by custom or common right, or according to the decree made in the thirty-seventh year of Henry the Eighth for the payment of tithes in London, and all dues and profits to the said rectory and vicarage belonging; that anciently, and time whereof the memory of man is not to the contrary, or by other good right and title, there had been due and payable, and till of late had been paid, and of right ought still to be paid by the owners and proprietors of the said rectory and vicarage, their farmers or lessees, for, or in lieu, or in the name of tithes, out of and for the ground, whereon, at the time of filing the bill, a large dwelling-house was then standing within the said parish, which then was, and for three years then last past and upwards, had been in the defendant's occupation, and out of and for a yard and wharf adjoining or belonging to the said house, which was, during the time aforesaid, held by the defendant, the yearly sum of one pound, sixteen shillings, or some such like yearly sum, by four quarterly payments, or in some other manner: that the said sum had been in arrear for three years, ended the twenty-fifth of March, 1692, and ought to have been paid to the plaintiffs, or else the said defendant ought to have paid to the plaintiffs for the premises, according to the said decree, for every ten shillings rent by the year one shilling and fourpence halfpenny; and for every twenty shillings rent by the year two shillings and ninepence, and so above the rate of twenty shillings by the year, ascending from ten shillings to ten shillings, or else the defendant ought to have paid some other rate or customary payment, for or in the name of tithes, for the premises in his own possession for the said three years past, being of the yearly value of sixty pounds and upwards; that the defendant, taking advantage of the houses and buildings, which formerly stood on the ground in question, having been burnt down in the year 1666, and of the present buildings being on new foundations, pretends that no tithes or rates for tithes are payable for the premises, or if any, yet that two shillings and ninepence in the pound are not payable, but some other rate. The bill therefore prayed, that the defendant might discover what houses, wharfs, and grounds he had been possessed of within the said parish for the said three years, and the yearly value thereof,

and

and be compelled to pay the accustomed rates, and might set forth what was due for oblations.

The defendant said, that he knew nothing of the said letters-patent, or of the decree aforesaid, nor upon what account the plaintiffs could demand tithes; he confessed that he had been an inhabitant in the said parish for nine years, and still was a housekeeper there, and that for some of the said years he had paid one pound sixteen shillings, rated and assessed upon him for the dwelling-house, shop and ground, for or in lieu of tithes, oblations, and other ecclesiastical duties, but for how many years he remembered not; that after he had lived some time in the said parish, he found he was overrated, and refused to pay the same: he also confessed that his house was worth forty pounds *per annum*, and that, as he was overrated, he had not paid any tithes for the same for the time in the bill mentioned.

The plaintiffs replied; the defendant rejoined; and witnesses were examined, and after reading the said grant from Queen Elizabeth; and several mesne conveyances;

The defendant's counsel insisted, that the statute 37 H. 8. c. 12. extends only to spiritual issues, and not to impropriators, and that, by the statute 22 & 23 Car. 2. c. 15. a new method is prescribed for the recovery and payment of tithes and duties within the several parishes demolished by the great fire in London, in the year 1666.

But the court was of opinion, that the 37 H. 8. c. 12. extends as well to lay impropriators, as to spiritual persons, and that the 22 & 23 Car. 2. c. 15. extends not to impropriators and their rights, but was passed for the maintenance of preaching ministers; and therefore, that the said defendant is chargeable with, and after the rate of two shillings and ninepence in the pound, unless he can make it appear, that there is some ancient or customary rate or payment in lieu of tithes.

The plaintiffs in this case submitted to accept the said rate of one pound sixteen shillings *per annum* formerly paid for the house and premises in question, which appeared to be of the yearly value of forty pounds, if the defendant (as he had formerly done) would continue to pay the same, which he, being present in court, refused to do.

It is thereupon ordered and decreed, that the defendant shall pay to the plaintiffs or their assigns the arrears of the tithes of the said house and premises in his occupation, for the three years in the bill mentioned, ended twenty-fifth of March, 1692, at two and ninepence in the pound rent, or value of and for his said house and premises, the same to be rated and valued at and after the rate of thirty pounds *per annum*, for the yearly rent or value of the said house and premises, during the said three years, which the plaintiffs submit to accept, though proved of a greater value in the cause; which arrears being computed in court do amount yearly to four pounds two shillings and sixpence, and for the whole three years, ended the twenty-fifth of March, 1692, do amount to twelve pounds seven shillings and sixpence, according to the said decree made in the thirty-seventh year of Henry the Eighth for the payment of tithes in London, which said sum the said defendant is hereby ordered and decreed forthwith to pay to the plaintiffs, or their assigns.

ROB. ATKYNS.  
JOHN TURTON.  
JOHN POWELL.

E. 5 W. & M. Scacc. *Dewey v. Price.* [1 Wood, 308.]

Gloucestershire, 22d May, 1693.

THE bill stated, that the plaintiff was seized in freehold for life, &c. by and under the demise of the dean and chapter of Christ Church, in Oxford, of and in the parsonage of Turke Dean, in the county of Gloucester, and entitled to all corn and hay to the same belonging; that the vicarage of Turke Dean (where the lessee of a rectory alleged that a vicar (who was endowed of Dean tithes of a part of the inclosed grounds in the parish) subtracted tithes of corn grown thereon, and the vicar denied the right, and claimed the tithes under the endowment, the court dismissed the bill and left the plaintiff to his remedy at law.

1693.

DEWEY

v.

PRICE.

Dean had been anciently endowed with the tithes of corn only of certain lands called Three Yard Lands, and with part of the tithe of hay of some of the several inclosed grounds when mowed; that part of the said inclosed grounds called Maw Bush, the Way Longate, the Cow Close, and the Catwells, being no part of the Three Yard Lands, being lately committed to tillage, and the tithes thereof set forth by the occupier of the said ground, the said defendant as vicar carried away the tithe. The bill therefore prayed, that the defendant might set forth his title to the tithe corn, and what quantity he had taken away, and the value thereof, and also set forth the writings he had relating thereto; and that the right of the said tithes might be settled.

The defendant answered, that the vicarage, time out of mind, was endowed with the tithes of hay of the several inclosed grounds before-mentioned, and that the said lands were never tilled till lately, but that the grass thereon was usually mowed and made into hay, and the tithe thereof constantly paid to the defendant and his predecessors; that part of the Maw Bush, and also the Way Longate, and an acre in the Cow Close, and an acre in Little Catwell, in the defendant's tithing, had lately been ploughed up, and corn sown thereon in 1690 and 1691; that the tithes of the said corn belonged to him as part of the endowment of the said vicarage; and that in the said years he did take and carry away the tithes of the said corn. He confessed that he has in his custody a terrier, which he set forth in his answer, but no other writing concerning the said vicarage, or the endowment thereof.

The plaintiff replied, the defendant rejoined, and witnesses were examined on both sides; and upon reading the proofs, and on debate,

The court is of opinion, that the plaintiff's remedy is at common law, and not in equity, against the said defendant for the said tithes taken away as aforesaid. It is therefore ordered, that the said bill be dismissed out of this court.

ROB. ATKYNS.

NICH. LACHMERE.

JOHN TURTON.

E. 5 W. &amp; M. Cam. Scacc.

*Daniel v. Tuffnal.* [Dodd's MS. 144.] Rayn. 75. 2 Gw. 587.

Tithe of turnips sown upon fallow land, fed off with the sheep of a stranger, or with the owner's own sheep fattened for sale, shall be paid as for herbage and agistment.

**R**ESOLVED, that if the occupier sow turnips, and then agist the sheep of a stranger, or fat his own sheep and sell them, he shall pay tithe for such herbage or agistment, notwithstanding they are sown upon the fallow ground (as this case was), and meliorate the land for corn. So if the turnips be sold, or any profit made of them.

T. 5 W. & M. Cam. Scacc. *Watts v. Watkins.* [Dodd's MS.]

Where the deputy reported upon the examination of witnesses, who swore that they knew the lands, which were worth so much, and that they

**T**HE decree was to account for the tithes, or the value thereof; the plaintiff examined the defendant upon interrogatories, who, as far as he could, set out the corn, hay, wool, lamb, &c. The plaintiff also examined two or three witnesses, who swore they knew the premises; that the lands were worth so much, and that they believed the tithes were yearly worth two shillings in the pound, without specifying any particulars, &c.: and upon this the deputy reported, and the defendant excepted, and *per curiam* the report confirmed. *Quod mirum.*

believed the tithes were worth 2s. in the pound, without specifying any particulars: the court confirmed the report upon exception by the defendant. *Quod mirum.*

Tf. 5 W. &amp; M. B. R.

*Wharton v. Lisle*. [Skin. 341. 356. Comb. 201. 209. Carth. 263.

12 Mod. 41.] 3 Lev. 365. 4 Mod. 183. 3 Salk. 349.

1693.

UPON a special verdict in trover, the question was, If tithes of flax, being sown in the common field, are *minuta decima*, and belong to the vicar, who was endowed *de minutis decimis*, or great tithes, and belong to the parson: and it seemed to HOLT, Ch. J. that they are great tithes, and belong to the parson, which are sown in the common field; and they are small tithes which are sown in a garden or orchard; and he said the place shall determine the quality of the tithes, and not the nature of the thing; for beans and pease in a garden and orchard are small tithes, but in a common field are great tithes; and he cited HUTTON, UVEDALE, and *Uvedale's case*(1); DOLBEN and EYRES *2 contra*; for they shall be determined, not according to the place where they grow, but according to the nature of the thing, and therefore *linum*, &c. are, according to the usage of our realm, small tithes; and so it is said by LINDWOOD, who wrote three hundred years ago; and EYRES cited Moor, 909; ruled there in *Beddingfield's case*,(2) that if land heretofore sown with corn, be sown with saffron, they shall be *minuta decima*; and he said that sometimes the vicar by endowment shall have tithes of things which are not small tithes, as of hay; and therefore it has been ruled at the Assizes, that if a man sow his land with clover, and make his profit by the seed, this being a grain, the parson shall have tithe of it; but if he convert it into hay only, and make his profit of the hay, the vicar being endowed of tithes of hay, shall have it as a small tithe. *Curia advisare vult*.

This case being moved again in the absence of HOLT, Ch. J. it was adjudged by DOLBEN, GREGORY, and EYRES, clearly, that in this case, where it was found that twenty-six acres only in a parish which consists of 1,200, being sown by several persons with flax, it was a small tithe; and they said that *minuta decima* shall be construed according to the nature of the thing, and not of the place where it is sown; for if a man convert arable into pasture, though the parson has the tithe of grain, yet the vicar shall have the tithe of milk and cheese; and though in some places the parson has tithes of hops, &c. which is a small tithe, it was said by EYRES, that this was established by usage; and as to the objection which was made, that it shall be a small tithe when it is sown in small parcels; and that if a great quantity of lands be sown with a thing which is a small tithe, that then this shall become a great tithe, by reason of its quantity: the court answered that this is not in the case here, for here but twenty-six acres are found to be sown, when the parish consists of 1,200, and these twenty-six acres may be sown by forty several persons; one man may sow half an acre, and another a lesser part, as may be seen a little part at the end of a land in the common fields frequently; but when the greater part of a parish is sown with flax, then they would consider if it shall be great or small tithes there, or not; but to say that a thing is small tithe if sown in an orchard, and great tithe if sown in a common field, which may be on the other side of the hedge, is a strange opinion; and therefore they thought it more reasonable to hold that to be a small tithe which has been so accounted, as flax has been according to *Lindwood* (which is the best author that we have), than to hold it to be great or small, according to the place where it is sown, or the quantity, which is so uncertain, that the law cannot determine what will make a greater tithe, or what will make a smaller tithe; and so they gave their judgment for the defendant, that it was a small tithe. [Skinner.]

The plaintiff being impropiator of the parish church of T. in Essex, the question upon a special verdict was, Whether flax be great or small tithes? HOLT said, if it were planted in a garden, it were small tithe; but if in a field

It was held by three Judges against HOLT, Ch. J. (who was absent when judgment was finally given) that flax was a small tithe, on the ground that tithes are great or small according to the quality of the thing itself, and not the quantity grown.

EYRES said, that sometimes the vicar, by endowment, (and it shall be presumed that what the vicar has enjoyed, he was originally endowed of) shall have tithes of things which are not small tithes, as hay.

EYRES also said, it had been ruled at the Assizes, that if a man sow his land with clover, and make his profit by the seed, this being a grain, the parson shall have tithe of it; but if he convert it into hay only, and make his profit of the hay, the vicar being endowed of the tithe of hay, shall have it as a small tithe, except only such as is necessarily cut with the corn among which it grew.

By usage the parson may have tithe of hops, which is a small tithe.

If hemp, rye-grass, &c. are sown for seed, the parson shall

upon have them, as of grain; if mowed as hay, the vicar shall have them, as of herbs.

(1) *Ant2*, 339.(2) *Ant2*, 118.

1693.  
WHARTON  
v.  
LISLE.

upon ancient arable land, it were great tithe; which DOLBEN and EYRE denied, for they said the place of sowing could not alter the nature of the tithe. *Nota*, By a particular endowment the vicar may have tithe-hay, and it shall be presumed that what the vicar has enjoyed, he was originally endowed of. *Vide* 1 Roll. 643. (20) *Web's case*. Hutton, 77. *Udal and Tindal*, (1) 3 Cro. 467, and Mo. 909. *Bedingfield's case*. (2) *Adjo*.

It was now argued again upon a special verdict in trover, whether the tithe of twenty-six acres sown with flax be a great tithe or a small (there being 1,300 acres in the parish).

A case was cited for the plaintiff, between *Witherington and Henden*, adjudged in the Exchequer, Pasch. 27 Car. 2. that turnips, when sown in great quantities, were great tithes. But DOLBEN, J. denied that it was so resolved, but that the tithes remain of the same nature, whether in gardens or fields; and of that opinion were the rest of the justices; but they said, if the greatest part of the parish should be sown with flax, perhaps they might alter their opinion. *Vide* Lindwood, 192. *Linum* reckoned *inter minutas decimas*.

Judgment for the defendant, *Nisi*, &c. [*Comberbach*.]

In trover for twenty-cart-loads of flax, a special verdict was found at the Assizes in Essex, (viz.) that the plaintiff was impropiator of the parish-church of Thorp, in that county; and that the defendant was vicar of the same church; and that the impropiators used to have *omnes decimas magnas cujuscunq. generis vel speciei*, coming of all the lands of the same parish, and that there are 520 acres of arable land, 720 acres of pasture, and 60 acres of meadow, in the said parish; and that twenty-six acres of the arable land had, for eight years last past, been sown with flax, and that no flax had at any time before the said eight years been sown in the said parish, and that the flax in the declaration, &c. was the tenth part severed and set out for tithes of the said twenty-six acres of flax; and they conclude that if the said tithe-flax are *magna decima*, then they find for the plaintiff; but if they were *minuta decima*, then for the defendant.

And by the opinion of three Judges, the tithes of this flax are small tithes, and belong to the vicar; and Justice GREGORY cited a case ruled in the Exchequer when he was a Baron, concerning clover-grass, that the tithe of it belonged to the vicar, who had the tithe-hay, except only such clover as was necessarily cut amongst the corn where it did grow.

*Sed per* HOLZ, Ch. J. These are not small tithes, for *decima sunt minuta* with respect only to the quantity, and not to the quality of the thing; but judgment was given for the defendant by the opinion of the other three Judges. [*Carthew*.]

Trover and conversion of several loads of flax. On Not Guilty pleaded, the jury found the plaintiff impropiator of a rectory, and the defendant vicar of the same; and that about eight years since, flax was first sown within the parish; for the first year the parson had tithes of it; for the last seven the vicar had constantly taken them. They find, that there were six hundred and sixty acres sown with corn, and twenty-six only with flax; that the vicar was endowed with small tithes.

The question was, Whether flax were great or small tithe?

HOLZ, Ch. J. The best way to distinguish tithes is the place where they grow and are sown; for sown in a garden, they are small tithes; if sown in a field, great: and this rule extends to corn, hops, &c.

But EYRE, DOLBEN, and GREGORY, JJ., The place is not material, but we should only consider the nature of the thing; if corn be sown in a garden, the parson shall have it; if flax in a field, the vicar; but if the greater part of the parish be sown with small tithes, the parson.

For by DOLBEN and GREGORY, JJ., otherwise the principal part would be transferred to the vicar.

But EYRE, J. said, in that case he should not have them, unless by usage. (3)

(1) *Ant*2, 339. (2) *Ant*2, 118. (3) *Vide* *Smith v. Wyatt*, and *Sims v. Bennett*, post.



**Eyre, J.** took a difference, which was not denied, as to tithes of hemp, ray-grass, &c.; if they be sown for seed, the parson shall have them, as of grain; if mowed as hay, the vicar shall have them, as of herbs. [12 Mod. Rep.]

1693.

WHARTON

v.

LISLE.

Tr. 5 W. & M. Scacc. *Bordley v. Tims.* [MS. 2 Gw. 540.]

**B**ILL for tithe of turnips. Defendant insisted no tithe was due for turnips sown after corn the same year; and that they ought to pay no tithe for any crop or profit of arable land the same year that the parson received tithe-corn of the same ground. The tithe decreed.

Tithe of turnips payable, though the turnips be sown on land that has in the same year yielded tithe of corn.

Tr. 5 W. & M. Scacc. *Nash v. Pocock.* [1 Wood, 311.]

Berkshire, 22d June, 1693.

**T**HE plaintiff, as rector of Binfield, in the county of Berks, stated, that he had been rector for twenty years past, and was entitled to all great and small tithes in the parish; that the defendant, for four years past, held and occupied meadow and pasture ground, and fed the same with unprofitable cattle, and refused to pay any thing for the tithe-herbage; that in the year 1692, he mowed grass, and made the same into hay, and carried it away without setting out the tithes thereof; and in the said years had kept and fed sheep, lambs, horses, cows, &c. and had wool, eggs, milk, &c. the tithes whereof he refused to pay.

*Quere*, Whether hay may be set out in cocks out of the swarth, without teding?

A parson may come for tithes set out, with a cart almost loaded with tithes of other persons.

The defendant stated, that the plaintiff had received the greater part of his tithe-hay, but had refused to receive the rest, because it was cocked out of the swarthy grass, and set out, the plaintiff pretending that the same ought to have been teded by the defendant before the tithe was set out; that before the plaintiff commenced this suit, he in August, 1692, tendered to the plaintiff one pound eight shillings and eleven-pence, for the value of his said tithes, which the plaintiff refused to accept in full, alleging there was more due.

The court decreed the defendant to pay to the plaintiff five shillings for the value of the tithe-grass, which he had mowed in a piece of ground next adjoining to his house, in the year 1692, for that the defendant refused to let the plaintiff's cart, which was almost loaded with the tithes of other persons, come upon the said ground to fetch it away that was set forth; but for the tithe of any other grass or hay which the defendant had in the said year, in the said parish, the plaintiff is left to his liberty to take his course for the recovery thereof.

And it is further ordered, that the defendant shall account with and satisfy the plaintiff for the tithe-herbage, and other the small tithes demanded by his bill, for the said years; the deputy remembrancer to take the said account, and to certify respecting the tender.

M. 5 W. & M. B. R. *Badgerly v. Wood.* [12 Mod. 47.]

**P**ROHIBITION to the spiritual court for tithe-pigeons, on suggestion that they were spent in the house.

Tithe of pigeons spent in the house, not due.

**HOLT**, Ch. J. doubted.

**HOLT**, Ch. J. doubting.

M. 5 W. & M. Scacc.

*Underhill v. Durham.* [Freem. 509.] 2 Gw. 542.

**I**N a trial at bar concerning a lease, and when the same was to take effect in possession, a copy of a survey taken in the late times, in 1647, by virtue of a commission granted by the powers then in being, was admitted as evidence; and it was then said, that those surveys were taken with great care,

Copies of the Parliamentary Surveys taken in 1647, admitted as evidence, and because it was proved that the originals were burnt.

1693.

UNDERHILL

v.

DURHAM.



and had been often admitted in evidence: but the reason why the copy was admitted here was, because it was proved that the originals were removed from Gurney House to St. Faith's under St. Paul's, and were there burnt in the great fire: and *Northey* shewed me a case in Michaelmas, 25 Car. 2. B. R. between *Berry* and *Halsted*, where such a survey was admitted in evidence by *HALE*, Ch. J. [*Freemas.*]

At Bridgewater summer assizes, 1738, between *Bagshaw*, lessee of Sir G. Wynn, and Bishop of *Bangor* and *Manley* and others, on a question about the bounds of a manor; a copy of the survey of Denbigh manor, taken in 1649, from the augmentation office, was objected to, because as these surveys were taken by virtue of commissions, those commissions ought to be produced. But the copy was read, and the above case of *Underhill* and *Durham* was cited. [*Ford's Notes.*]

M. 5 W. &amp; M. Scacc.

*Grant v. Cannon.* [1 Wood, 313.] 2 Gw. 541.

London, 20th November, 1693.

The Red Hart Inn, in Fetter Lane, is within the city of London, and not within the liberty of the Rolls, and therefore to pay 2s. 9d. in the pound according to 37 H. 8. c. 13.

**T**HE plaintiff, being seised in fee of and in the impropriate rectory of St. Dunstan's in the West, within the city of London, and county of Middlesex, and the hamlets thereto belonging, claimed tithes by virtue of the statute 37 H. 8. c. 13.

The defendant confessed, that he was owner of the Red Hart Inn, Fetter Lane, but denied that any part thereof was in the city of London, and said that the same is within the liberty of the Rolls, which liberty is exempt from the payment of tithes. He confessed that he held the said inn, and let the other tenements.

On debate of the matter, and reading the depositions taken on behalf of the plaintiff, whereby it plainly appeared that the premises in question, in the defendant's occupation, are within the liberty of the city of London,

The court was of opinion that the defendant ought to pay after the rate of two shillings and nine-pence in the pound, according to the statute 37 H. 8. c. 13.

M. 5 W. & M. Scacc. *Kenyon v. West.* [1 Wood, 313.] 2 Gw. 541.

Berkshire, 23d November, 1693.

The owner of a single calf shall, of common right, pay the tenth part of its value when taken from the cow, in lieu of tithes.

**T**HE vicar of Warfield in the county of Berks, by his bill stated, that in the years 1690 and 1691, the defendants had brought up divers calves, which they sold, or killed and converted to their own use, without paying the plaintiff the tenth part of the value of such calves for the tithes thereof, but instead thereof would oblige the plaintiff to accept of the shoulders of such calves when killed, without any custom in law so to do.

The defendant West confessed that he had one calf, which he sold for thirty-five shillings, reserving a shoulder for the plaintiff, which he sent, but that the plaintiff refused to receive it.

The defendant Bowyer said, that he owed to the plaintiff for the tithes of two calves, one whereof he had weaned from the pail, and the other he had sold, but had reserved a shoulder for the plaintiff, which he tendered to him, and that he had refused to accept of it.

The question was, whether of common right a single calf is titheable or not; and if titheable, then how and after what manner the tithe thereof ought to be paid?

The court, upon debate of the matter, was of opinion, that one calf is titheable, and that the tenth part of the value thereof, when taken from the cow to be sold or killed, ought to be paid for the tithe thereof.

H. 5 W. & M. Scacc. *Slaughter and others v. Lay*. [1 Wood, 315.]

1693.

Worcestershire, 20th February, 1693.

SEVERAL of the plaintiffs were owners and occupiers of lands and tenements in the parish of Doddenham, in the county of Worcester; the other plaintiffs were owners and occupiers of lands in Knightwick; the defendant was rector of the said parishes.

The bill stated a custom in the parish of Doddenham to pay one penny a hogshead for all apples and pears there growing and made into cider or perry, in lieu of the tithe in kind of all such apples and pears, and the like custom of two-pence a hogshead.

The court, upon reading several depositions of witnesses, and on full debate, ordered the custom of one penny and two-pence aforesaid, for and in lieu of tithes in kind of such apples and pears, for every hogshead of cider and perry as aforesaid, to be ratified and confirmed.

A modus of 1d. per hogshead of cider or perry in lieu of the tithes of the apples and pears of which such cider and perry is made, held good.

H. 5 W. & M. Scacc. *Pindar v. Jackson*. [1 Wood, 315.]

Derbyshire, 8th February, 1693.

THE bill stated, that the plaintiff, for five years past, had been owner and proprietor of the impropriate rectory of Hartington, within the wapentake of Wirksworth, in the county of Derby, and that there was a custom within the said wapentake, that the grovers or miners within the same should pay to the parson or vicar of the respective parishes within the said wapentake a customary duty of lead ore, called the tenth dish, of all lead ore gotten within the said parishes; that more particularly within the said parish of Hartington and the titheable places thereof, there was a custom that the grovers or miners should pay to the impropriate rector of the said parish the tenth dish of all such lead ore as was gotten within the said parish and the titheable places thereof; that the defendants were miners and owners, or partners of mines or groves within the said parish, and had for five years got great quantities of lead ore; but that they had refused to pay the tithes of the same according to such custom.

A custom to pay the tenth dish of all lead ore, held good.

The defendants denied that in the parishes of Matlock and Bradborne, within the said wapentake, there was any custom for the payment of any duty for lead ore to the rector there, and insisted that, in those two parishes, there had been two verdicts at law against the payment of the said duty. They also denied the custom as stated in the bill, or that any tithe or duty was payable for lead ore within the parish of Hartington.

A trial at law was directed on the following issue, Whether within the parish of Hartington, and the titheable places thereof, there is, and time out of mind has been a custom there used, that the grovers and miners there have paid to the impropriate rector of the said parish a customary duty called the tenth dish of lead ore gotten in the said parish and titheable places thereof, or not? to be tried in the county of Nottingham.

A trial was accordingly had upon the said issue by a special jury of the city of Nottingham, and a verdict, upon full evidence, was given for the plaintiff.

The court thereupon decreed the defendants to account with the plaintiff for the value of the tenth dish of the lead ore by them respectively gotten within the said impropriate rectory of Hartington during the time in the bill mentioned.

H. 6 W. & M. Cam. Scacc. *Pocock v. Cole*. [Dodd's MS. 155.]

1694.

IN a tithe bill brought by the rector of a parish in Devonshire, the defendant set out two customs in bar of the plaintiff's bill, which was *inter alia* for tithe clover grass eaten, and for apples, viz. two-pence an acre payable for all tithe hay,

A modus of 2d. an acre for all hay, corn, clover, though a new introduction.

and Cinquefoil, which stood for seed, in which was the profit, and not in the stalk, shall be looked upon (for tithe) as hay. An apple-garden penny for all apples in the garden or orchard, is good; *quere* if it extend to haw. A hearth-penny for wood sold, held good.

1694.

POCOCK

v.

COLL.

and secondly, a penny for all apples growing in a garden or orchard of the party. As to the first, resolved, that it was a good custom, notwithstanding clover is a new grass, for the *modus* is not laid for meadow ground, but for hay; so that if upland or arable, by being sown with clover, bear hay, the *modus* extends to it. And the case of *Stanfast and Hughes*, (1) which concerned Dr. James, head of Queen's college, in the time of MONTAGU, Ch. B. was cited, which was, arable land pays tithes in kind to the improprator, cinquefoil was sown upon it, and it stood to seed, and the profit was in the seed not in the stalk, there was a custom of two-pence an acre, payable to the vicar for hay, and resolved, 1. that notwithstanding that the stalk and seed was in the nature of corn, yet it should be looked upon as grass and paid accordingly; 2. that the *modus* was good.

As to the second custom it was resolved, that a penny for all apples in the garden or orchard was good. *Quare* if it extend to new orchards, *semble* if it be laid for all apples upon the farm, it would be good, otherwise it should be intended ancient orchards. The penny was apple-garden penny, yet it does not alter it, for in *Sparks v. Maxwood*, a penny called a hearth-penny was a good *modus* for wood sold.

(1) In a note upon a loose paper at the end of No. 70, what appears to be the same case is thus reported.

Question, whether clover seed should pay tithes as hay, and should be within a *modus* of 2d. per acre for all meadow and mowing ground, when the clover stands for seed, and a great quantity thereof produced?

Note, The court was divided, MONTAGU,

Ch. B. and ATKINS that it should be accounted hay; RAYMOND, before his removal, and GREGORY to the contrary. And afterwards, WESTERN inclined that it was not within the custom. But the plaintiff, the day after the term, prayed to dismise his bill without costs or prejudice, which was admitted. E. 1680, *Woodford and Standfast*.

### E. 6 W. & M. B. R. *Alston and others v. Buscough*. [Carth. 304.]

The want of an averment in the declaration, that the defendant had not agreed for his tithes, though had upon demurrer, is cured by a verdict; for if any agreement were proved at the trial the plaintiff could not recover.

IN an action of debt upon the statute 2 E. 6. of tithes, wherein the plaintiff demanded treble value, &c.

Upon *nil debet* pleaded the plaintiff had a verdict in C. B. and upon a writ of error brought in B. R. it was very much insisted on, that the declaration was ill, because the plaintiffs had only alleged, that the defendant had carried away the corn, without setting out the tithes; but did not aver that the defendant had not made any agreement with them for the tithes, for the statute gives the penalty where the tithes are carried off without any agreement made for so doing; therefore if the defendant had agreed with the plaintiffs for carrying off the corn, without setting out the tithes, (as it does not appear but he might,) that it had been no forfeiture.

And the court was of that opinion, viz. that the declaration was ill, for the reason *supra*, if it had been upon a demurrer; but this was helped by the verdict; for if there had been any agreement proved at the trial, the plaintiff could not have obtained a verdict.

### Tr. 6 W. 3. Scacc. *Abbott v. Hicks*. [1 Wood, 319.]

Gloucestershire, 25th June, 1694.

Beech found to be timber upon an issue directed to try the question.

THE bill stated, that about twelve years since the plaintiff was presented, &c. into the rectory and parish church of Whitcombe Magna, in the county of Gloucester, and entitled to all tithes; that the defendant, being possessed of a wood containing above half the parish, and consisting chiefly of beech, hazel, maple, ash, and willow, began, about twelve years since, to fell the same, and had continued yearly so to do, the wood of which he had converted in great quantities into charcoal, and sold the rest for fuel and firing, the tithe whereof was yearly worth one hundred pounds.

The defendant insisted, that the wood consisted chiefly of oak, ash, and beech trees, and was upwards of two hundred years old; that the trees grew from the root, and not from any stock or shrub, and were generally converted

into and used as timber, and therefore that he ought not to pay the tithe thereof.

A trial at law was directed upon this issue, "Whether beech, within the parish of Whitcombe Magna, is accounted timber or not?"

The issue was accordingly tried by a special jury, and a verdict passed for the defendant.

In the month of April, 1695, an order was then pronounced, that the bill, as to the plaintiff's demand of beech wood, should be dismissed.

But the plaintiff's counsel insisted there were great quantities of maple, ash, and sawlow, growing in the said wood, which was titheable to the plaintiff; and therefore an account was directed as to the tithe of the said maple, ash, and sawlow, and other titheable wood growing in the said wood not discharged of tithes by the verdict.

On the thirtieth of October, 1696, and before the said order was entered, the cause was ordered to be reheard upon the petition of the plaintiff, but not to impeach the verdict; and on the nineteenth of November, 1696, upon opening the pleadings, and reading the depositions of several witnesses on both sides, and after long debate of the matter, it is ordered that the bill be, and is hereby dismissed as to beech wood, unless the plaintiff can shew better cause.

The cause came on the twenty-seventh of November, 1696, to be further heard; when, upon hearing counsel, and reading several depositions, and on long debate,

It is finally ordered and adjudged by the court, that the said bill be, and is hereby dismissed as to all and every matters and things therein contained, but without costs.

EDW. WARD.  
NICH. LECHMERE.  
JOHN BLENCOWE.  
LITTLETON POWYS.

1694.  
ABBOTT  
v.  
NICKS.

Tr. 6 W. 3. Scacc. *Biggs v. Martin and Letts.* [1 Wood, 321.]

Kent, 18th June, 1694.

**T**HE plaintiff, as farmer and occupier of the rectory or parsonage of Bromley, in the county of Kent, stated, that the defendants were inhabitants, and, in the years 1691 and 1692, occupied several farms, and agisted dry and unprofitable cattle, and cut wood and broom, and made the same into bavins, and disposed thereof without setting out the tithes.

The defendant Letts set forth several customs within the said parish payable in lieu of tithes, and averred that he had paid for all his tithes, except four shillings and four-pence for the small tithes for the year 1692; and he denied that any tithes ought to be paid for broom made into bavins.

The defendant Martin confessed, that he had not paid his rate tithes, but denied that any tithe was due for the tops or lops of old pollard timber trees or dotards, or for wood growing in hedge rows.

The court, upon reading several depositions, and hearing what could be alleged on both sides, ordered and decreed, that the defendants do pay to the plaintiff what, upon the account to be taken before the deputy remembrancer, shall appear to be due for the tithe of broom made into bavins; for the tithe of the lops and tops of old pollard timber trees and dotards; and for wood growing in hedge rows, together with such customary payments as are in arrear and due for the years aforesaid.

Tithes decreed of broom made into bavins; of the lops and tops of old timber pollards, and of the hedge rows.

Tr.

1694.

Tr. 6 W. 3. Scacc. *Grant v. Brown* and another. [1 Wood, 921.]

London, 25th June, 1694.

White Friars is within the liberties of the city of London, and was so when the 37 Hen. 8. c. 12. was passed; but it was not within that part of the parish of Saint Dunstan in the West, which is in the city of London.

THE plaintiff stated, that Mrs. Jevan, at her death in the year 1691, and for twenty-five years before, was seised in fee of the parsonage or rectory of St. Dunstan in the West, in the city of London, and county of Middlesex, and entitled to tithes, &c.; that she made her will in September, 1691, and devised the said rectory to the plaintiff, and made him sole executor; that he proved the said will, and was legally intitled to the said impropriation, and to all arrears of tithes due in her life-time; that the statute 37 Hen. 8. c. 2. enacts, "that the citizens, and inhabitants of the city of London should, yearly, without fraud, pay of every ten shillings rent of all houses, shops, cellars, &c. sixteen-pence half-penny; and for every twenty shillings the sum of two shillings and nine-pence;" that the defendants were, for several years in the life-time of Mrs. Jevan, and also since, tenants, inhabitants, and occupiers of several houses, shops, and cellars, within that part of the parish that is within the city of London. The bill therefore prayed to have an account of what houses the defendants severally held, what time they had occupied the same, and what rents they had paid for the same.

The defendants set forth and specified the particular houses by them occupied, and the rents and values of the same, and insisted that all the said houses were situate in the precinct called White Friars; that the said precinct was no part of the city of London at the time of making the decree and act of parliament in the thirty-seventh year of Henry the Eighth; but that the same was made part of the liberty of the city of London, by the late King James the First, and subjected to the jurisdiction thereof by grants and letters-patent, and therefore the said act and decree did not extend to or concern the defendants. They also insisted, that the precinct of White Friars was not within the parish of St. Dunstan in the West, or the rectory or titheable places thereof, and denied that any rate or *modus* for the tithe was ever payable or paid by them to the parson of the said parish.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and, upon reading several depositions on both sides, as also copies of several ancient records and grants from the crown, a trial at law was directed to be had before the Chief Baron(1) upon these two issues, viz.

First, Whether the precinct of White Friars was within the liberty of the city of London at the time when the act was made in the thirty-seventh year of Henry the Eighth?

Secondly, Whether the precinct of White Friars be within the parish of Saint Dunstan in the West?

The issues were accordingly tried, and the one issue found for the plaintiff, and the other for the defendants; but a new trial upon the said issues was ordered on payment of costs to the defendants; on which trial, before a special jury, it was found upon the first issue, That White Friars was within London at the time the statute was made. But upon the second issue, That the precinct of White Friars was not within the parish of Saint Dunstan in the West.

The cause came on to be further heard on the third of June, 1694; when, upon reading the said order and *postea*, and hearing counsel for the defendants, it was ordered that all the defendants should be absolutely dismissed from the said bill; but before the said order was entered, the plaintiff's counsel, on the eighth of June instant, alleging the cause was brought on sooner than expected, it was ordered to come on this day; and on full debate,

It is ordered by the court, that the said bill be, and is hereby dismissed.

EDW. WARD.  
JOHN TUNTON.  
JOHN POWELL.

(1) The cause was tried before Mr. BARON LECHMERE, the office of Chief Baron being at that time vacant.

Tr. 6 W. 3. Scacc. *Colley v. Smith and others.* [1 Wood, 323.]

1694.

Dorsetshire, 6th July, 1694.

**T**HE plaintiff, as rector of Hampreston, in the county of Dorset, claimed all manner of tithes therein, and stated that the defendant Berbin for five years past, had occupied closes called the Woods, the Lower Mead, and Garland's Gate; that the defendant Smith, in the year 1692, occupied a close, called Butt Close, and that the said defendants sowed the same with clover, and mowed and made the same into hay twice in the said year; and therefore the tithe of the second math ought to have been paid to the plaintiff.

A custom to be discharged of tithes of the second math where the owner makes the first math into grass cocks, is not good.

The defendants, by their answer, confessed that they jointly or severally occupied and enjoyed the said several closes in the said years (excepting the Woods for the year commencing at Lady-day, 1692), and that they kept thereon in each of the said years barren and unprofitable and other cattle; that the tithe of the herbage for feeding and depasturing the barren and unprofitable cattle in the closes called the Woods ought to be paid to the impropriator of a portion of tithes, within the said parish; to which the tithes of the Woods belong, and not to the plaintiff.

The defendant Smith confessed that he mowed the said clover in the Butt Close twice in the said year, and made the same into hay, and averred that he paid tithe of the first math; and that there is a custom within the said parish where the owner of meadow cuts and makes the first math into grass cocks, and pays the parson the tenth thereof, he is discharged of tithe of the second math.

The plaintiff replied; the defendants rejoined; and witnesses were examined; and, upon reading the depositions, and an indenture made the eighth of April in the thirteenth year of James the First, being a conveyance of a portion of tithes in Hampreston, under which the impropriator claims the said portion of tithes; and on full debate of the matter; forasmuch as it appeared to the court that the plaintiff and his predecessors have always quietly had and received satisfaction for the tithe of the herbage for the feeding and depasturing barren and unprofitable cattle in the said closes called the Woods; and for that it does not appear that the impropriator, and those under whom he claims, ever received the tithe herbage in the said closes, nor any small or other tithes, except corn and hay;

The court declared that the tithe of the said herbage does of right belong to the plaintiff, as rector of the said rectory; and that the tithes of the second math of clover grass in the defendant's answer set forth ought to be paid to the plaintiff.

Whereupon it is ordered and decreed, that the defendants shall severally pay to the plaintiff the value of the tithes in arrear and demanded by the bill.

EDW. WARD.

JOHN TURTON.

Tr. 6 W. 3. Scacc.

*Sayer v. Mumford and others.* [1 Wood, 324.]

London, 6th July, 1694.

**T**HE bill stated, that the master and scholars of Baliol College, in Oxford, are seised in fee of the rectory or parsonage impropriate of St. Lawrence Jury, in the city of London, and intitled to all tithes, oblations, ecclesiastical duties, and all customary and other payments in lieu of tithes within the said parish; that being so seised, they, by indenture dated the twenty-sixth of March, 1692, demised all and singular the said tithes, and other ecclesiastical duties, and payments to the plaintiff for twenty-one years, under the yearly rent of forty pounds and seven shillings, payable, viz. to the master and scholars, twenty pounds seven shillings a-year; and to the vicar of the church, twenty pounds a-year; by virtue of which lease, he was intitled to have the said tithes and other ecclesiastical duties for a year and upwards, or else such payments in lieu of tithes as were by custom or common right, or by the decree made in the

The inhabitants of St. Lawrence Jury, in the city of London, pay 2s. 9d. in the pound on their respective rents.

1694.

SAYER

v.

MUMFORD AND  
OTHERS.

thirty-seventh year of Henry VIII., due to him; that, time out of mind, there had been paid by the parishioners, inhabitants and occupiers of houses and other titheable matters within the said parish, to the proprietors of the said rectory, a customary pound rate for or in lieu of tithes, or else, according to the said decree, for every 10s. rent, one shilling and four-pence halfpenny *per ann.*, and for every 20s. rent, two shillings and nine-pence *per ann.*, and so above that rent according to the said rate; that the defendants, or some other of the parishioners, had, for sixty years or upwards, been lessees of the said rectory under the said master and scholars, during which time great alterations were made in the buildings within the said parish by reason of the great fire, so that the plaintiff could not discover what the ancient tithes were, or of whom to demand the same; and they having got into their hands all the ancient books, terriers, and writings relating to the said tithes, did deny to pay the plaintiff any tithes, or any customary or other payments in lieu of tithes, or according to the aforesaid decree of two shillings and nine-pence in the pound. The bill therefore prayed, that the defendants might discover what houses or other things titheable in the said parish they were possessors or occupiers of during 1692, and the time they were charged to be in arrear for their tithes, together with the yearly rents and values thereof, and what customary or other sums of money they had paid for, or in lieu of tithes, or had known to be paid by others, and that they might discover and deliver up the ancient books, &c. and pay the plaintiff their tithes or the customary rate pursuant to the decree.

The defendants, by their answer, confessed the plaintiff's title to the tithes, but said they did not know of any customary rates for assessments or payments of tithes, or any sum of money in lieu thereof, or that any oblations, obventions, or other ecclesiastical duties had been paid, or were payable, other than in the assessments annexed to their answers, which were made by the statute 22 & 23 Car. 2. c. 15. intituled, "An Act for the better Settlement and Maintenance of the Parsons, Vicars, and Curates in the parishes burnt by the late dreadful fire." And the defendants set forth the yearly rents of their houses, and other things in their possessions, and confessed, that some of the inhabitants in trust for the said parish had been lessees of the said tithes upon several leases for the time in the bill mentioned, the last whereof, being made to the defendants Caplin and others, expired at Lady-day, 1692; and that the churchwardens had usually collected the said tithes, and that they were indebted to the plaintiff for the sum rated in the assessments upon their houses from the end of the said lease, which they were ready to pay.

The plaintiff replied; the defendants rejoined; but no witnesses were examined; and upon reading an old book relating to the said tithes in 1643, and several old books and writings produced by both sides, and on full debate of the matter,

It is ordered and decreed, (1) that the defendants shall respectively account to the plaintiff for the tithes of the several houses and other titheable matters in their possession, after the rate of two shillings and nine-pence for every pound of the yearly rents or values thereof from the time the last parish lease expired, being at Lady-day, 1692, to the time of exhibiting the said bill; and it is hereby referred to the deputy remembrancer to take the said account accordingly.

In pursuance of the said decree the deputy remembrancer made his report, dated the fifteenth of October last, and the cause being in the paper, came on to be heard the twenty-fifth of October last, when upon reading the order and report and hearing counsel on both sides, it was ordered to stand over for the court to consider of costs.

Upon the sixth of November instant, on an application by the defendant's counsel, and on reading a petition for a rehearing, and the plaintiff's counsel opposing the same, it was ordered that the cause should be reheard this day, and that the defendants should pay five pounds costs for the rehearing, together with three pounds costs for the last day's attendance.

On the fifteenth of November, 1694, upon hearing counsel; and on reading

(1) By TURTON and POWELL, Barons.



the said act of parliament made in the twenty-second and twenty-third year of Charles the Second; and also on reading the report and on full debate,

It is ordered and decreed by the chancellor(2) and the barons(3), that the former decree, and also the report, shall be, and are hereby ratified and confirmed, and that the said defendants respectively pay to the said plaintiff the several sums reported due from them, with the plaintiff's cost, to be taxed.

(2) MONTAGUE, Chancellor. (3) NICH. LECHMER, JOHN TURTON, and JOHN POWELL.

1694.

SAYER

v.  
MUMFORD AND  
OTHERS.

M. 6 W. 3. Scacc. *Umfreville v. Batchelor and others*, [1 Wood, 326.]

London, 25th of October, 1694.

THE plaintiff, as executrix of the last will and testament of her late husband deceased, in Trinity Term, in the twenty-second year of Charles the Second, exhibited her bill against the defendants, to have two shillings and nine-pence in the pound for tithes due in the life-time of her late husband, he being owner and impropiator of the parish of St. Botolph without Aldgate, part of which parish lies within the liberties of the city of London, and the other part in the county of Middlesex, and the defendant Batchelor being occupier of several houses within that part of the parish which lies within the liberty of the city of London.

Two shillings and nine-pence, in the pound due for houses in that part of St. Botolph without Aldgate, which lies within the city of London.

The defendant by his answer stated, that for the time demanded by the bill, he had been occupier of one house in Rose and Crown Court, in Houndsditch, and of another house in Covent Garden, otherwise called Gravel Lane, within that part of the parish which lies within the liberty of the city of London.

The plaintiff replied; the defendant rejoined; and witnesses were examined on the part of the plaintiff; and, upon opening the bill, and reading an affidavit of the service of a subpoena to hear judgment, and reading the answer, and no counsel appearing for the defendant,

The court(1) ordered, that the defendant shall satisfy the plaintiff two shillings and nine-pence in the pound, according to the 37 H. 8. c. 12. for the house in Rose and Crown Court, in Houndsditch, and in Covent Garden, otherwise Gravel Lane, in that part of the said parish of St. Botolph without Aldgate, which lies within the liberties of the city of London, for the time demanded by the bill.

(1) MONTAGUE, Chancellor, LECHMER, Baron.

M. 6 W. 3. Scacc. *Northleigh v. Collard*. [1 Wood, 328.]

Essex, 6th December, 1694.

THE bill stated, that the plaintiff, for three years last past, had been farmer of the impropriation of Walthamstow in the county of Essex, and was intitled to the tithe of corn, grain, hay and wood, yearly arising, &c. therein; that in the years 1663 and 1694, the defendants held several acres of woodland and underwoods, and particularly the wood called the Sale, part of which said wood was felled and cut in the years aforesaid, containing one third part thereof; that several trees of horn-beam, maple, willow, sawow, prickwood, and bushes growing within the said wood, were lopped and topped in the years aforesaid; and that with the wood arising therefrom the defendants made faggots and bavons, and sold the same without setting out the tithe thereof, or making any satisfaction for the same.

Tithe of wood made into faggots and bavons is due in the parish of Walthamstow, except for oak pollards and standills, called black coates and white coates.

The defendants said that they have known all the said coppices, groves, and wood-grounds several times felled, and never knew any tithes paid for the same; that they are occupiers of the wood called the Sale, and have cut several pollard trees there, and made faggots and bavons thereof, and sold the same without setting forth the tithes thereof, or paying any satisfaction for the same, for that no tithe is payable for the same, they not being subject to pay tithes; and they set forth the quantities and values.

The court declared the defendants ought to account with the plaintiff for the tithes of the wood in question, except for the lops of oak pollards, and except for the standills called black coates and white coates, they being timber.

1694.

M. 6 W. & M. Scacc. *Smelton v. Bridges*. [Dodd's MS. 153.]

A custom to pay 4d. for every acre of marsh land in discharge of all small tithes due to the vicar for marsh land and upland, is good. Tithes are not due of common right to vicar, but only by endowment, of which usage is evidence.

**A** TITHE bill brought by the vicar of A. in Kent; the defendant says, that four-pence an acre is payable for every acre of marsh land, in discharge of all small tithes due to the vicar for marshland and upland, and upon debate the court held,

1. That tithes are not due of common right to the vicar, but only by endowment.

2. That usage is the evidence of his endowment, and where he has had no small tithes, it is an evidence that he was not endowed; and in this case it appears that he has but a groat an acre, but in this point the court doubted, because the four-pence is in discharge of small tithes, so he is admitted to have them, if the *modus* do not discharge them.

3. That this is a good custom, and not part of tithe in discharge of other tithe, as four-pence a hogshead in discharge of tithes of apples, which is naught; but money answers all tithe in this case, and the number of acres is but to ascertain the quantum of the money. And the parson has no wrong, if one have one acre of marsh and all the upland, for though this party pays but one four-pence, yet the rest of the parish pay for the rest of the marshland.

*Note*, Resolved, and the bill dismissed. Sir John Banks and Sir Eliab Harvey, owners of the land.

M. 6 W. &amp; M. Scacc.

*Taswell v. Athill*. [Dodd's MS. 154.] Rayn. 75. 2 Gw. 537.

The vendee of toppings and loppings of oak, ash and elm, bought standing, is liable to pay tithes, if any be due, which is only by custom. Notwithstanding where the mother tenant for life and the son in remainder, joined in a sale of underwood, it had been held that a bill laid against the son for tithes, after the mother's death.

**U**PON an English bill for tithe wood, the case was thus: Athill sold the toppings and loppings of oak, ash, and elm to Cressey, standing; Cressey cuts them, and Taswell brings a bill against both; and resolved,

1. That it does not lie against Athill, because he sold them uncut, notwithstanding in *Franklyn v. Jones's* case resolved *contrà*. 2 J. 2.

2. It was resolved, that without custom they are not titheable.

3. That notwithstanding the statute of *silva cadua* they may be titheable by custom, and accordingly an issue directed to try the custom.

*Note*, The plaintiff was parson of Wood Morton, in Norfolk. *Note*, Athill was dismissed with costs, notwithstanding *Franklyn v. Jones's* case, which was the mother tenant for life of underwood, remainder to the son in fee, both joined in a sale to A. who felled them, and B. the parson brought a bill against the son (the mother being dead) for tithes, and resolved that he should pay them, and decreed to account accordingly. See *Buckle v. Vanacker, antè*, 570.

M. 6 W. S. Scacc. *Umfreville v. Champion*. [1 Wood, 329.]

Middlesex, 26th November, 1694.

There is a *modus* of 5d. a quarter, payable for Hooker's Rents, in Nightingale-lane, and Sun-yard in the parish of St. Botolph without Aldgate, in the county of Middlesex.

**T**HE plaintiff, as executrix of her late husband, filed her bill in the thirty-second year of Charles the Second, against the defendants, to have an account of several tithes due in the lifetime of her late husband, he being impropriator of St. Botolph without Aldgate, part in the city of London, and part in the county of Middlesex, and the defendants being occupiers of houses within the part which lies in the county of Middlesex.

The defendants said that the several houses are part of Hooker's Rents, situated in Sun Yard, in the said parish.

The cause came on to be heard the twenty-fifth of October last, when an account was directed to be taken before the deputy-remembrancer; but before the decree was entered, the defendants moved for a re-hearing on the seventh day of November instant, and the same being ordered, the cause came on this day to be re-heard.

Upon reading the depositions, and several ancient tithe books and accounts of collectors of tithes of the said parish, it appeared that there is a *modus* of

twenty pounds a-year for Hooker's Rents, in Nightingale-lane and Sun Yard, in the said parish, viz. five pounds quarterly.

And upon reading a deed, dated the second of March, 1630, made between C. Godfrey and E. Hooker; and several receipts under the hand of S. E. Rawlinson, formerly collector of the tithes of the said parish, and on long debate, counsel insisting on a trial at law, but the court not thinking fit to grant the same;

It is ordered and decreed, that the former decrees be ratified and confirmed, and that it be referred to the deputy-remembrancer to take the said account, according to the said *modus* in lieu of tithes for the said premises, for the time the said defendants have severally and respectively held the same, at five pounds a quarter, in the lifetime of the said plaintiff's husband, and as charged in the bill.

M. 6 W. 3. Scacc. *Layfield v. Cooper*. [1 Wood, 330.]

Southampton, 15th December, 1694.

**T**HE bill stated, that the plaintiff, for four years last past, had been rector of the parish of Buriton, in the county of Hants, and entitled to all tithes both great and small; that the defendant was an inhabitant, owner, and occupier of wood, wood land, and wood ground therein, and had felled, cut down, and sold at least one hundred and fifty acres of great value, without setting out the tithes thereof, which were worth yearly twenty pounds.

The defendant said, that he was owner of several wood lands and wood grounds called Ditcham Park, and the Hangers, in which there grew many oak, beech, and ash trees, which he cut down, out of which were cut several ton of timber, and the rest he converted into cord wood, and the lops and tops into faggots; that in the year 1690, he cut down several trees, and after the timber lengths were cut off, he converted the remainder into cord wood and faggots, and sold the same, and in the said year sold several hundred of faggots, and also cut down several hedge-rows, and sold the same.

It is ordered and decreed, that the defendant shall pay to the plaintiff tithes for the hedge-rows, willows, maples, hazles, and all other underwood by him felled and cut down in the said years, or the value thereof; and as to the stemmers felled and cut down by the defendant in the said years, the deputy-remembrancer is to report the same specially, with the values of the tithes of the same, that in case such stemmers shall be adjudged titheable, the plaintiff may receive satisfaction for the same.

In pursuance to the said decree, the deputy made his report; to which report the defendant put in exceptions, as the said deputy had made the same *ex parte*.

Upon reading the decree and report, and opening the exceptions, and also reading several depositions, and upon long and serious debate, and due consideration had of all the said matters;

This court is of opinion, and does declare, that no tithe ought to be paid to the plaintiff of the great beech wood cut by the defendant in the said years, the same appearing to the court to be maiden trees, and not stemmers, and that they are timber, and useable for timber uses, and that therefore the bodies and lops and tops of such trees are privileged by law from the payment of tithes.

But it appearing also to the court, that the defendant had cut some underwood in the said several years, the tithes whereof were worth about three pounds, this court does further order and decree, that the said report be, and is hereby set aside, and that the said defendant do pay to the plaintiff twenty pounds, as well in full satisfaction and discharge of all the tithes of the small underwood in question, as of all costs and charges payable to the plaintiff, without prejudice to, or including any part of the defendant's tithes of the said Great Beech Wood therein.

EDWARD WARD.

1694.

UMFREVILLE

v.

CAMPION.

The lops and tops of timber trees are privileged by law from the payment of tithes as well as the bodies.

1694.

M. 6 W. 3. B. R.

*Hicks v. Woodeson.* [4 Mod. 324. Comb. 403.]Carth. 392. 12 Mod. 111. Skin. 560. 2 Salk. 655. 1 Ld. Raym. 137.  
Holt, 671. 2 Gw. 550.

A hundred or county cannot prescribe in *non decimando* for a thing which is in its nature *de jure* titheable; but of things which in their nature are not *de jure* titheable, a hundred or county may so prescribe, because they are discharged in such case, unless there be a custom to the contrary, and they do but insist on their ancient right, and that custom has not prevailed against it.

Tithes for agistment of barren cattle is due of common right, because the grass which is eaten is *de jure* titheable, and must have paid tithe if cut at perfection. Two shillings in the pound is the usual tithe of common right, (though there are divers customary manners of tithing for them) therefore a hundred cannot prescribe in *non decimando* for them.

Wood is not titheable of common right, being part of the freehold, but it is titheable by custom only, for though trees are renewing yearly, yet they yield no annual profit.

Somersetshire, } **NICHOLAS HICKS**, who sues as well for the Lord the  
to wit. } King and Lady the Queen as for himself in this behalf,  
complains of Samuel Woodeson, clerk, rector of the parish church of Huntspill, in the county of Somerset aforesaid, in the custody of the marshal of the Marshalsea of the Lord the King and Lady the Queen, being before the King and Queen themselves, of a plea wherefore he sued in the court-christian against the royal prohibition to him before directed and delivered to the contrary thereof, for that (to wit) That whereas the parish of Huntspill, in the county aforesaid, is an ancient parish, and whereas the said Nicholas, for the space of five years now last past, and more, hath been, and as yet is, an inhabitant within the parish aforesaid, and for the whole time aforesaid hath had and occupied forty acres of land, meadow and pasture, with the appurtenances, being parcel of the manor of Huntspill, in the said county of Somerset, within the parish aforesaid, and the bounds, limits, and titheable places of the same parish. And also whereas there are had, and from time whereof the memory of man is not to the contrary there have been had, within the same parish, and the bounds, limits, and titheable places of the said parish, these customs and *modus* of tithing, of and concerning the tithes of lambs falling, brought forth, and forthcoming within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the tithes of milch cows and heifers kept and depastured within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the tithes of calves falling, brought forth, and forthcoming within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the tithes of colts falling, brought forth, and forthcoming within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the tithes of hay growing, renewing, and forthcoming within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the tithes of gardens and orchards, being within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; and of and concerning the payment of the offerings of all the men and their wives inhabiting within the parish aforesaid, and the bounds, limits, and titheable places of the same parish; that is to say, that every occupier of any lands or tenements within the said parish, and the bounds, limits, and titheable places of the same parish, who hath in any year kept any milch cow or heifer, or any milch cows or heifers within the parish aforesaid, and the bounds, limits, and titheable places thereof, hath paid, and for all the time aforesaid hath been used and accustomed to pay, to the rector of the parish church of Huntspill aforesaid, or to his farmer, or deputy of the rectory for the time being, for every such milch cow three-pence, of lawful money of England, and for every such milch heifer one-penny and a halfpenny, of like lawful money, in every such year, and no more, for all the tithes of milk of the same cows and heifers in the same year; and that every such occupier as aforesaid, who in any year hath had any lamb or any lambs, under the number of seven lambs, brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, hath paid, and for all the time abovesaid, hath been used and accustomed to pay, to the rector of the parish church of Huntspill aforesaid, or to his farmer or deputy of that rectory for the time being, in the same year, one halfpenny, of the like lawful money, for every such lamb so under the number of seven lambs brought forth and forthcoming, in full satisfaction, payment, and content of all tithes of those lambs; but if the same occupier in any such year have had within the parish aforesaid, and the bounds, limits, and titheable places thereof, any lambs to the full number of seven lambs brought forth and forthcoming, then the

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same occupier hath rendered and delivered, and for all the time abovesaid hath been used and accustomed to render and deliver to the rector of the parish church of Huntspill aforesaid, or to his farmer or deputy of that rectory for the time being, one lamb of the same seven lambs in such year, in full satisfaction, payment, and content, and in the name and place of the tithes of the same seven lambs; and for the number of seventeen lambs, two lambs; and for every calf one halfpenny, if less than seven calves, and if above seven, then one calf, and two calves for seventeen calves; and one penny for every colt; and two-pence for every acre of hay; and two-pence for every garden and orchard; and for every man of the age of sixteen years two-pence, and for a wife two-pence, for oblations. And also whereas the hundred of Huntspill and Puriton, within the aforesaid county of Somerset, is, and from time whereof the memory of man is not to the contrary, hath been, an ancient hundred, within which said hundred the said parish of Huntspill is, and from time whereof the memory of man is not to the contrary, hath been. And whereas within the same hundred of Huntspill and Puriton there is, and for all the time abovesaid, there hath been, a certain ancient custom for all the time abovesaid, used, and approved, that all the inhabitants within the hundred aforesaid, occupying any lands, meadow or pasture, within the hundred aforesaid, have been free, exempt, and discharged, and from time to time, for all the time abovesaid, ought to be free, exempt, and discharged, of and from the payment of any tithes of or for the depasturing of any cattle not employed to plough or pail, by them depastured in any lands, meadow or pasture, being within the hundred of Huntspill and Puriton aforesaid, to wit, at the hundred aforesaid. And whereas the said Nicholas, for the space of seven years next before the exhibiting the bill of the said Nicholas in the court here, hath been, and as yet is, an inhabitant within the hundred aforesaid, and within the said parish of Huntspill, and for all the same time of seven years aforesaid did possess and occupy divers lands, meadow and pasture, within the hundred and parish aforesaid, and hath depastured upon the same lands, meadow and pastures, and not elsewhere, within the same time, divers cattle not employed to plough or pail, that is to say, cows, heifers, and colts; nevertheless the said Samuel, well knowing the premises, but contriving and maliciously intending unjustly to aggrieve and oppress him the said Nicholas, against the due form of law, and against the form and effect of the said *modus* of tithing, and the custom aforesaid, and unjustly to violate the customs and prescriptions of those *modus* of tithing, and also to disherit the said Lord the now King, and Lady the now Queen, and their crown, and to draw the consance of a plea which belongs and appertains to the said Lord the King and Lady the Queen, their royal crown and dignity, to another trial, hath drawn him the said Nicholas into plea, before the venerable man Richard Hely, doctor of laws, surrogate of the venerable man Edwin Sandys, clerk, archdeacon of the archdeaconry of Wells, lawfully constituted surrogate, or the lawful deputy of the said archdeaconry, or some other competent judge in this behalf, of and for the subtraction and non-payment of the tithes of lambs fallen, brought forth, and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, in the years of our Lord 1689, 1690, &c. and also in the months of March, April, May, and June, in the year of our Lord 1693, now current, or in every one or some of the same months and years; and of and for the subtraction and non-payment of the tithes of calves within the parish aforesaid, and the bounds, limits, and titheable places thereof (so for colts, cows, heifers, hay, gardens, and orchards, *mutatis mutandis*); and of and for the subtraction and non-payment of offerings of all the men and their wives inhabiting within the said parish, and the bounds, limits, and titheable places thereof, in the years and months abovesaid, or in every one or some of them, by craftily and subtly libelling in the same court-christian, against the said Nicholas Hicks, in and by a certain libel and a certain schedule to the same libel subscribed or annexed, against him the said Nicholas Hicks in the said court-christian exhibited under the form following, that is to say, "First of all, that the said

"Master Samuel Woodeson, in the years of our Lord 1689, 1690, &c. to

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"wit,

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" wit, in the months past in the same respectively concurring, and also in the  
 " months of March, April, &c. in the year of our Lord 1693 now current, or  
 " in every one or some of the said months and years, hath been and was  
 " rector of the parish church of Huntspill aforesaid, and of all and singular  
 " the tithes, ecclesiastical rights, and emoluments, to the same rectory belong-  
 " ing and appertaining, and the said rectory, with all its rights, members, and  
 " appurtenances, rightly, lawfully, &c. canonically hath got and obtained,  
 " and the same so obtained, with all its rights and appurtenances, hath pos-  
 " sessed and had, as he hath at this present time (except as within written),  
 " and for the true rector and lawful possessor of the same hath been for the  
 " time aforesaid, and also at present is commonly called, held, esteemed,  
 " named, and reputed, openly, publicly, and notoriously; he propoundeth  
 " nevertheless, &c. And he propoundeth jointly and severally of every item,  
 " which as well of common right of this renowned kingdom of England, as  
 " from ancient and laudable and lawful prescriptive custom, from time and  
 " through time, the beginning whereof the memory of man is not to the con-  
 " trary, hitherto hath been inviolably and unshakenly used and observed, and  
 " against gainsayers hath often obtained in judgment, or at least once the right  
 " of perceiving, receiving, and having, all and singular the tithes, as well greater  
 " as lesser, mixed and minute, whatsoever, and the rest of the rights and emolu-  
 " ments of the church whatsoever in the schedule to these presents annexed,  
 " contained, and specified, within the parish of Huntspill aforesaid, and the  
 " bounds, limits, and titheable places of the same, wheresoever, whensoever,  
 " howsoever, and as often as forthcoming, growing, renewing, and happening,  
 " to any rector there whatsoever, for the time being, or his farmers, and to the said  
 " Master Samuel Woodeson, clerk, the present rector there, hath belonged  
 " and appertained, doth belong and appertain, ought to belong and appertain,  
 " and does and shall appertain and belong, and propounds as above. Also,  
 " that for ten, twenty, thirty, forty, fifty, and sixty years last past, more or  
 " less, and also from time and through time, the beginning whereof the me-  
 " mory of man is not to the contrary, the rector of the said rectory of the  
 " parish church of Huntspill aforesaid, for their respective times successively  
 " being, and the said Master Samuel Woodeson, clerk, the present rector  
 " there, or his predecessors, and all and every of his predecessors in successive  
 " times in the same being, in the same have been, as they ought to have been,  
 " in the quiet and peaceable possession, or as of right to perceive and have all  
 " and singular the tithes aforesaid, and have received and had them by them-  
 " selves, or their predecessors, and of and upon the same have freely and fully  
 " disposed, and so it hath been and ought to be, and so the said Master Samuel  
 " Woodeson, clerk, the rector aforesaid, hath perceived, received, and had  
 " for the whole and all the time of his incumbency in the same, in right, and  
 " in the name of his rectory, until and unto the time of the years within written;  
 " and he propounds as above. Also the said Nicholas Hicks, in the years and  
 " months abovesaid, or in one or some of them, all and singular the titheable  
 " things, fruits, rights, and emoluments, in the present schedule annexed, con-  
 " tained, and specified within the parish of Huntspill aforesaid, and the bounds,  
 " limits, and titheable places thereof, forthcoming, growing, renewing, and  
 " happening, as in the same schedule is declared, and they are drawn out  
 " (which said schedule the party propounding will have to be accounted as if  
 " here inserted and read, as far as it may be expedient for him, and not other-  
 " wise, or in any other manner), has had, holden, possessed, received, and to  
 " his own proper use converted and applied; and the party proponent pro-  
 " pounded of every other number of things respectively titheable, and of the  
 " tithes in the schedule to these presents as above set forth, annexed respectively  
 " contained and specified, more or less, and also such and such number, quality,  
 " and quantity, as by lawful proofs or confession of the party in the event of  
 " this suit more fully shall come to be proved; and he propounds as above.  
 " Also, that the true value or estimate of every titheable thing and things  
 " respectively titheable in the schedule aforesaid to these presents as before in  
 " set forth, annexed, contained, and specified, as of the tithes or tenth part  
 " thereof,

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" thereof, to the sums or respective values in the same schedule mentioned, in the months and years abovesaid, or in one or some of them, in the common estimation of men manifestly did extend, and do extend; and the party propound propounds of every other sum or value of the things respectively titheable, and of the tithes, more or less, and also of such and so much money or value, quality, and quantity, as by lawful proofs in the event of this suit more fully shall come to be proved; and he propounds as above. Also, that the said Nicholas Hicks to pay, give, and deliver to the before-named Samuel Woodson, the rector aforesaid, or to his lawful deputy in this behalf, all and singular the tithes aforesaid, so as before set forth, accustomed to be paid, and especially the tithes and ecclesiastical rights and emoluments aforesaid, in the schedule to these presents (so as before is set forth) annexed, mentioned, and specified, or otherwise, to compound duly with the said rector for the same, or with his lawful deputy, has oftentimes, at least once, been properly and lawfully requested and importuned, who being so requested and importuned, did not take care to do the premises, or any of them, nor at present does take any care, but has withholden and refuses to pay, but at least (more properly) withholdens and defers at present, to the great peril of his soul, and no small prejudice and grievance of the said Master Samuel Woodson, the rector aforesaid; and he propounds as above. Also, that the said Nicholas Hicks has been, and is, an inhabitant of the said parish of Huntspill, manifestly under and subject to the diocese and jurisdiction of Bath and Wells; and he propounds as above. Also, that all and singular the premises were and are true, notorious, public, manifest, and in like manner famous, and the public voice and fame have laboured of and concerning the same, as at present they labour; whereupon, having given the assurance required by law in this behalf, the party of the said Master Samuel Woodson, the rector aforesaid, prays right and justice, and his complement thereof to be done and administered to him with effect, &c." In which said schedule annexed to the said libel as aforesaid, are contained the words following (that is to say): " First of all, that in the years and months aforesaid, all, some or one of them, upon the tenements, estate, and lands, which he the said Nicholas Hicks had held, possessed, and enjoyed, in the said parish of Huntspill, and titheable places thereof, there was kept feeding and depasturing twenty ewe sheep, and of them there was yearly fallen twenty lambs, each lamb worth three shillings, and the tithe after that rate. Also, that the said Nicholas Hicks, in the months and years aforesaid, all, some or one of them, within the said parish of Huntspill, and titheable places thereof, had and kept feeding and depasturing yearly four cows and four heifers, and for the milk of each cow he is to pay three-pence, and of every heifer three half-pence, according to the custom of the said parish. Also, that the said Nicholas Hicks of the said cows and heifers above-mentioned had fallen yearly six calves, which he bred up for the pail, for each he is to pay one half-penny, according to the custom of the said parish. Also, that the said Nicholas Hicks, the months and years aforesaid, all, some, or one of them, within the parish of Huntspill, and titheable places thereof, had held and possessed twenty acres of meadow, which he mowed, or caused to be mowed, yearly, for each acre of which there is yearly due, and he ought to pay to the rector of Huntspill aforesaid, for and in lieu of tithe-hay, two-pence, according to the custom of the said parish. Also, that the said Nicholas Hicks, the months and years aforesaid, all, some, or one of them, within the said parish of Huntspill aforesaid, had and possessed one garden and two orchards yearly, for which there is yearly due, and he ought to pay to the rector of Huntspill aforesaid, three-pence, according to the custom of the said parish, to wit, one penny for his garden and each orchard. Also, that the said Nicholas Hicks, the months and years aforesaid, all, some, or one of them, within the parish of Huntspill, and titheable places thereof, had and kept feeding and depasturing the colts above one year old, which he sold away before they were used to the plough, the feeding and depasturing of each colt, the months and years aforesaid, being monthly worth four shillings,

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" and the tithe after that rate, and also had and kept feeding and depasturing,
 " the months and years aforesaid, all, some, or one of them, in the said parish,
 " ten cows, ten heifers, ten steers, and ten oxen, from the time he bought
 " them to the time he sold them off, they were never employed to the plough
 " or pail, the herbage and depasturing of each of the said cows, heifers, steers,
 " and oxen, being monthly worth four shillings, and the tithes after that rate.
 " Also, that the said Nicholas Hicks, the months and years aforesaid, all, some
 " or one of them, in the said parish of Huntspill, and titheable places thereof,
 " had and kept four mares, and of them had fallen and received four colts
 " yearly, for the fall of each he is and ought to pay to the rector of Huntspill
 " aforesaid, one penny, according to the custom of the said parish. Also that
 " the said Nicholas Hicks has, the months aforesaid, all, some or one of them,
 " dwelt in the said parish of Huntspill, and he and his wife have received, or
 " at least ought to have received, the holy sacrament of the Lord's Supper, at
 " their own parish church, for whose offerings he is yearly to pay to the rector
 " at Easter, or thereabouts, four-pence yearly; to wit, two-pence for each.
 " Also, that the said Nicholas Hicks, the months and years aforesaid, all, some
 " or one of them, within the said parish and titheable places thereof, had kept
 " and bred up forty head of cattle, which he sold before they came to the
 " plough or pail, the herbage and depasturing of each of the same being
 " monthly worth forty shillings, and the tithe after that rate. Also, that the
 " said Nicholas Hicks, the months and years aforesaid, all, some or one of
 " them, within the said parish of Huntspill, and titheable places thereof, had
 " and kept six cows, six heifers, six steers, and six oxen, after they had been
 " turned off from plough and pail, the feeding and depasturing whereof, until
 " they were fat, and looked on as such, and then sold off, from the grass and
 " herbage and depasturing of the said cows, heifers, steers, and oxen, being
 " monthly worth five shillings, and the tithe after that rate. Also, that the
 " said Nicholas Hicks, the months and years aforesaid, all, some, or one of
 " them, had and kept feeding and depasturing eight cows and heifers, and of
 " them had fallen and received eight calves yearly, each calf at seven weeks old
 " (which is the customary time for the tithe-calf), being worth ten shillings,
 " and the tithes after that rate, as by a copy of the libel and schedule aforesaid,
 " brought here into court and read, among other things more fully appears."

And him the said Nicholas Hicks, in the said court-christian, before the said
 spiritual judge, by occasion of the premises, has unjustly bound to appear and
 answer to the said Samuel Woodeson, of and upon the premises: and although
 he the said Nicholas Hicks, in every year of the years aforesaid wherein he the
 said Nicholas had any lambs, calves, or colts, any milch cows or heifers, any
 hay, any gardens or orchards, within the parish aforesaid, and the bounds, limits,
 and titheable places thereof, being, growing, renewing, or forthcoming, or has
 dwelled within the parish aforesaid, has been always ready and offered, and yet
 is still ready to pay to the said Samuel the said several sums of money for the
 tithes of lambs, calves, colts, milch cows and heifers, hay, gardens, and or-
 chards, and for the oblations aforesaid, according to the form and effect of the
 several *modus* of tithing aforesaid: and although he the said Nicholas all and
 singular the premises aforesaid has pleaded and alleged in his discharge of pay-
 ment of the tithes by the said Samuel demanded in the said court-christian,
 before the said spiritual judge, and has often offered to prove the same by
 unavoidable testimony, yet the said spiritual judge has absolutely refused to
 admit or receive that plea, allegation, and proof: and the said Richard Hely
 with all his power endeavours and daily contrives to condemn the said Nicholas
 by the definitive sentence of the said court-christian, of and upon the premises
 in the libel and schedule aforesaid contained, and to compel him to pay the
 tithes aforesaid, in form aforesaid demanded, in contempt of the said lord the
 now King, and lady the now queen, their crown and dignity, and to the great
 damage, prejudice, and manifest impoverishing of him the said Nicholas Hicks,
 and against the due form of law and prescription and customs and *modus* of
 tithing aforesaid: and although the said Nicholas Hicks, on the last day of
 August, in the fifth year of the reign of the said Lord William and Lady Mary,

now King and Queen of England, &c. at Huntspill aforesaid, in the county aforesaid, the writ of the said Lord the King and Lady the Queen, of prohibition to the contrary, to him the said Samuel Woodeson delivered: nevertheless the said Samuel Woodeson has not ceased to prosecute the said plea against the said Nicholas, but has further prosecuted that plea in the said court-christian (notwithstanding the said writ of prohibition), in contempt of the said now Lord the King and Lady the Queen, and contrary to the prohibition aforesaid: whereupon the said Nicholas, who sues as well for the said Lord the King and Lady the Queen in this behalf, as for himself, &c. says, that he is injured, and has damage to the value of two hundred pounds; and thereupon, as well for the Lord the King and Lady the Queen as for himself, he brings suit, &c.

And now at this day, to wit, Friday next after the morrow of the Holy Trinity, in this same term, until which day the said Samuel Woodeson had leave to impart to the bill aforesaid, and then to answer, &c. before the Lord the King and Lady the Queen at Westminster, come as well the said Nicholas, who sues as well, &c. by his attorney aforesaid, as the said Samuel Woodeson by Giles Clark his attorney; and the said Samuel defends the force and injury when, &c. and all contempt, and whatsoever, &c. and says, that he has not prosecuted the plea aforesaid against the said Nicholas in the court-christian after the prohibition of the said Lord the King and Lady the Queen to him thereupon delivered, as the said Nicholas, who sues as well, &c. above supposes; and of this he puts himself upon the country, and the said Nicholas, who sues as well, &c. thereof, likewise; but for having a writ of the Lord the King and Lady the Queen of consultation as to the tithes of lands, for which the said Samuel has drawn into the plea the said Nicholas in the court-christian aforesaid, before the said spiritual judge, he the said Samuel says, that the said Nicholas, in the months and years in the declaration aforesaid specified, had, kept, and depastured, upon his lands and tenements within the parish of Huntspill aforesaid, twenty ewe sheep, and of them had twenty lambs yearly, every one of them of the value of three shillings, for the tithes of which said lambs to the same Samuel, as rector of the parish church aforesaid, due and payable, he the said Samuel drew into plea him the said Nicholas in the court-christian aforesaid, before the said spiritual judge, before the prosecuting of the said writ of prohibition, as it was lawful for him to do; without this, that within the parish of Huntspill aforesaid, and the bounds, limits, and titheable places of that parish, there is had, and from time whereof the memory of man is not to the contrary, there has been had such a custom and *modus* of tithing of and concerning the tithes of lambs there falling, brought forth and forthcoming, to wit, that every occupier of any lands or tenements within the said parish, and the bounds, limits, and titheable places of the same parish, who in any year has had any lamb or lambs under the number of seven lambs brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, and has paid, and for all the time abovesaid has been used and accustomed to pay, to the rector of the parish church of Huntspill aforesaid, or to his farmers or deputy of that rectory for the time being, in the same year, one half-penny, of the like lawful money of England, for every such lamb so under the number of seven lambs brought forth and forthcoming, in full satisfaction, payment, and content, of all tithes of those lambs; but if the same occupier in any such year has had within the parish aforesaid, and the bounds, limits, and titheable places thereof, any lambs to the full number of seven lambs brought forth and forthcoming, then the same occupier has rendered and delivered, and for all the time abovesaid has been used and accustomed to render and deliver to the rector of the parish church of Huntspill aforesaid, or to his farmer or deputy of that rectory for the time being, one lamb of the same seven lambs in such year, in full satisfaction, payment, and content, and in the name and place of the tithes of the same seven lambs: and if the same occupier in any year has had any lambs to the full number of seventeen lambs brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, then the same occupier has rendered and delivered,

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delivered, and for all the time abovesaid has been used and accustomed to render and deliver to the rector of the parish church of Huntspill aforesaid, or his farmers or deputy of the said rectory for the time being, two lambs of the same seventeen lambs in every such year, for the tithes of the same seventeen lambs, as the said Nicholas above thereof complains; and this he is ready to verify: wherefore he prays judgment, and a writ of the said Lord the King and Lady the Queen, of consultation, as to the tithes of lambs aforesaid, to be granted to him in this behalf, &c. And for having a consultation as to the tithes of calves aforesaid, for which the said Samuel has drawn into plea the said Nicholas in the court-christian aforesaid, before the said spiritual judge, he the said Samuel says, that the said Nicholas, in the months and years aforesaid, had kept and depastured upon his land and tenements within the parish aforesaid, sixteen cows and heifers, and of them had fourteen calves yearly fallen, brought forth and forthcoming, each of the same calves of the value of ten shillings, for the tithes of which said calves to the same Samuel, as rector of the parish church aforesaid, due and payable, he the said Samuel drew into plea him the said Nicholas in the court-christian aforesaid, before the said spiritual judge, before the prosecuting of the said writ of prohibition, as it was lawful for him to do; without this, that within the parish of Huntspill aforesaid, and the bounds, limits, and titheable places thereof, there is had, and from time whereof the memory of man is not to the contrary, there has been had a custom that every occupier of any lands or tenements within the parish aforesaid, and the bounds, limits, and titheable places of the same parish, who had any calf or any calves under the number of seven calves in any year brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, and has paid, and for all the time aforesaid has used and been accustomed to pay to the rector of the parish church of Huntspill aforesaid, or his farmers or deputy of that rectory for the time being, in every such year, one half-penny, of the like lawful money, for each of the said calves, in full satisfaction, payment, and content, of all the tithes of those calves; but if the same occupier, (as before in the traverse as to lambs). And for having a consultation as to tithes for depasturing of colts, cows, steers, heifers, and oxen, not employed to plough or pail, and also other unfruitful cattle within the parish aforesaid depastured, for which he the said Samuel has drawn into plea the said Nicholas in the court-christian aforesaid, before the said spiritual judge, he the said Samuel says, that the said Nicholas in every year of the years aforesaid, had kept and depastured upon his lands and tenements aforesaid, within the parish aforesaid, colts, cows, heifers, and oxen, not employed to the plough or pail, and other unfruitful cattle in the declaration aforesaid mentioned, for the tithes of depasturing of which said cattle to him the said Samuel, as rector of the parish church aforesaid, due and payable, he the said Samuel drew into plea him the said Nicholas in the court-christian aforesaid, before the said spiritual judge, before the prosecuting of the said writ of prohibition, as before is set forth, as it was lawful for him to do; without this, that within the said hundred of Huntspill and Puriton there is, and for all the time abovesaid there has been an ancient custom for all the time abovesaid used and approved, that all the inhabitants within the hundred aforesaid occupying any lands, meadow or pasture, within the hundred aforesaid, have been free, exempt, and from time to time, for all the time abovesaid, ought to be free, exempt, and discharged, of and from the payment of any tithes of or for the depasturing of any cattle not employed to plough or pail, by them depastured in any lands, meadow or pasture, being within the hundred of Huntspill and Puriton aforesaid, as the said Nicholas above complains; and this he is ready to verify: wherefore he prays judgment, and the writ of the said Lord the King and Lady the Queen, of consultation, as to the tithes for the depasturing of cattle not employed to plough or pail, and of other unfruitful cattle, for which the said Samuel has drawn into plea him the said Nicholas in the court-christian aforesaid, as before is set forth in this behalf, to be granted to him, &c. And for having the writ of the said Lord the King and Lady the Queen, of consultation as to the offerings aforesaid, the tithes of milk cows and heifers

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few aforesaid, the tithes of hay aforesaid, the tithes of gardens and orchards aforesaid, and the said tithes of the said four colts in the parish aforesaid yearly fallen, for which he the said Samuel has drawn into plea him the said Nicholas in the court-christian aforesaid; the said Samuel prays judgment of the declaration aforesaid, because he says that the said declaration, and the matter in the same contained, are not sufficient in law to compel him the said Samuel to answer to that declaration as to the same oblations and tithes; to which the said Samuel has no necessity, nor is bound by the law of the land, in any manner to answer; and this he is ready to verify: wherefore, for want of a sufficient declaration in this behalf, he the said Samuel prays judgment of the declaration aforesaid, and that the said declaration as to the said oblations and tithes, may be quashed, and that the writ of the said Lord the King and Lady the Queen may be thereupon granted to him, &c. And the said Nicholas says, that by any thing by the said Samuel above in pleading alleged, he the said Samuel ought not to have the writ of the said Lord the King and Lady the Queen, of consultation; because as to the said plea of the said Samuel in manner and form above pleaded, as to the tithes of lambs, for which the said Samuel has drawn into plea him the said Nicholas in the court-christian aforesaid, before the said spiritual judge, he the said Nicholas as before says, that within the parish of Huntspill aforesaid, and the bounds, limits, and titheable places of that parish, there is had, and from time whereof the memory of man is not to the contrary, there has been had such a custom and *modus* of tithing, of and concerning the tithes of lambs there falling, brought forth and forthcoming, to wit, that every occupier of any lands or tenements within the said parish, and the bounds, limits, and titheable places of the same parish, who in any year has had any lamb or lambs under the number of seven lambs, brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, has paid, and for all the time abovesaid has been used and accustomed to pay to the rector of the parish church of Huntspill aforesaid, or to his farmers or deputy of that rectory for the time being, in the same year, one half-penny, of the like lawful money of England, for every such lamb so under the number of seven lambs brought forth and forthcoming, in full satisfaction, payment, and content, of all tithes of those lambs: but if the same occupier in any such year has had within the parish aforesaid, and the bounds, limits, and titheable places thereof, any lambs to the full number of seven lambs brought forth and forthcoming, then the same occupier has rendered and delivered, and for all the time abovesaid has been used and accustomed to render and deliver to the rector of the parish church of Huntspill aforesaid, or to his farmer or deputy of that rectory for the time being, one lamb of the same seven lambs in such year, in full satisfaction, payment, and content, and in the name and place of the tithes of the same seven lambs; and if the same occupier in any one year has had any lambs to the full number of seventeen lambs brought forth and forthcoming within the said parish, and the bounds, limits, and titheable places thereof, then the same occupier has rendered and delivered, and for all the time abovesaid has been used and accustomed to render and deliver to the rector of the parish church of Huntspill aforesaid, or his farmers or deputy of the said rectory for the time being, two lambs of the same seventeen lambs, as the said Nicholas above thereof complains: and this he prays may be inquired of by the country, and the said Samuel likewise, &c.

The like replications and issues joined upon the other traverses, as to the *modus* for calves, and as to the custom alleged in *non decimando* in the hundred of Huntspill. And a joinder in demurrer as to the rest.

PROPOSITION. The plaintiff suggested, that the parish of Huntspill is an ancient parish, of which he was an inhabitant, and used lands there; that in the said parish there is a custom to pay several small sums to the parson in lieu of small tithes, which sums are particularly set forth; that this parish was within the hundred of Huntspill; and that there is a custom also for every inhabitant and occupier of lands within the said hundred to be discharged of tithes for the pasture of barren and unprofitable cattle. The defendant traversed the customs; and issue being thereupon joined, it was found for the plaintiff.

And now it was moved in arrest of judgment,

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First, That a custom alleged in *non decimando* in a whole hundred is void in law. Secondly, Admitting it to be good, yet it was not well pleaded here, because the plaintiff had not shewn that there was a sufficient maintenance for the parson besides those tithes.

First, It was argued that this custom was against common right, because there was never yet any precedent of a custom to discharge a layman in *non decimando*. It is agreed, that as to ecclesiastical persons, such a custom may be good, but not as to a layman, because he was not capable, at the common law, to have tithes, and therefore could not sue for them in the spiritual court, but now he is enabled by the statute of 32 H. 8. c. 7. And as tithes in general are due of common right, so this particular tithe of agistment of barren cattle is due the rather, because those which are for the cart are discharged by custom; it is the whole profits of the land out of which some things must be paid to the parson. A layman is allowed to prescribe in *modo decimandi*, but not to be exempted from all tithes in general, because some must be paid and are due of common right, though the quantity be ascertained by custom and usage. If therefore tithes are due of common right, such a prescription either in a hundred or a county will not be good, because, if it should be allowed, every person in that hundred or county might prescribe; and nothing would be left for the parson. It is true, my Lord Rolle affirms the contrary, (1) but he denies it again in the same line (2); which shews that book to be of little authority in this case. It is likewise said in the same book, (3) that a prohibition was granted in a case of the same nature with this, which was thus, viz. a man prescribed to a custom within two hundreds of Middlesex and Surry, that if a common baker dwelling in either of these hundreds should erect a mill there to grind corn for his trade, and sell it to customers in or near those hundreds for their sustenance, such a baker should pay no tithes for the corn. But the reason upon which that case was adjudged does not suit with this; for the parson there had more and greater tithes out of the lands of the inhabitants, and of them who were sustained in those hundreds, than he could have by the manual occupation of a miller. In Michaelmas Term in the eleventh year of Charles the First, and in the same book, (4) it is mentioned that a prohibition was granted upon a surmise that tithes ought not to be paid for pheasants' eggs, or young pheasants hatched in woods inclosed in the Chiltern of Buckinghamshire; but that was because they were *fera natura*. Such a custom as is here alleged could never have a reasonable commencement, because of common right tithes ought to be paid out of all land; (5) and though before the Council of Lateran no person could claim them, because there were no parishes, (6) yet still they were due to the church, though it was in the power of the donor to give them to what spiritual person he thought fit. (7) It is in *favorem ecclesie* that the law will not allow a prescription in *non decimando* to prevail against her. It is true, a prescription strengthens all other titles, but is of no force when pleaded in discharge of tithes, (8) because the law presumes that a layman cannot be absolutely discharged without the consent of the parson, the patron, and the ordinary; and then likewise the grant of such discharge or exemption must appear. This was the opinion of DODDERIDGE, Justice, (9) grounded upon the authority of Lindwood, and of the author of the Doctor and Student. (10) The whole country may be discharged of tithes, but such discharge ought to have a reasonable commencement, which must be shewed. Now it would be very strange that the law should reject a prescription to be discharged of tithes in a particular place, and yet to allow a custom in a whole hundred in *non decimando*. One single instance may be given where such a custom has been allowed; it is in my Lord Rolle's Abridgment, (11) and it was

(1) 1 Roll. Abr. 653. pl. 9.

(2) 1 Roll. Abr. 654. pl.

(3) *Kidder v. Edwards*, 1 Roll. Abr. 654.

pl. 20. 3 Com. Dig. "Dimes" (E. 4.)

(4) 1 Roll. Abr. 636.

(5) *Fridle v. Napier*, 11 Co. ant^d, 205.

(6) Hob. 296.

(7) Jones, 373. Moor, 219.

(8) *Bury v. Evans*, Bunb. 345. post.

(9) 2 Bulst. 285.

(10) St. Germaine.

(11) 1 Roll. Abr. 654, pl. 12. Litt. Rep.

152. 2 Inst. 655.

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for the milk of ewes; and probably the reason might be, that such milk is of little value to the parson, and does not much contribute to his maintenance, for which tithes were originally ordained; but it is but one single case, which does not make a law. The case of *Russel v. Backhurst*, (1) which seems to give some colour to such a custom, is a controverted case; it was thus: The parson libelled for tithe-wood, and the defendant prayed a prohibition by reason of a prescription in *non decimando* for wood growing in the Weald of Kent: it is true; the prescription there was denied, and no prohibition granted (2): this was in Michaelmas Term in the twelfth year of James the First; and yet but two years afterwards there was a trial at bar in this court upon a prohibition, where such a prescription was suggested to be discharged of tithes of the underwood growing in the Weald of Sussex; and it was found for the plaintiff; and the court held the prescription good. (3) But admitting such a prescription in *non decimando* for underwood in a weald be good, yet it will not affect this case, because in ancient times there were many controversies about such tithes; for at the common law tithes were not to be paid for trees, because cutting them down is not an increase of their growth as in corn, but a total destruction; it is an uncertain profit, and not arising yearly for the maintenance of the parson; neither are those tithes due of common right, but by custom and usage; and therefore in those days, and in those places where tithe-wood was due only by custom, the parishioners procured wood or other lands for the parson and his successors in satisfaction of all tithe-wood in the same parish. (4) Several petitions have been made to the parliament concerning the right to such tithes, until the statute of *silva cædua* (5) was made, by which all those controversies were ended; it being enacted, "that tithes shall not be paid for wood of twenty years growth or more," which implies it shall be paid for all under that age. It is true, it was the opinion of my Lord Coke, (6) that such a prescription in a county, not only for wood, but for any other tithe, is good; but that can be no reason why it should be allowed in a hundred, because the court cannot judicially take notice what a hundred is, or what it comprehends; (7) it is a liberty in its commencement; it is to have a jurisdiction over a hundred vills, or so many parishes; and therefore it has been held, that a leet cannot be parcel of a hundred, because they are both liberties, and one liberty cannot be parcel of another. But it does not appear by the pleading, that there is more than one parish in this hundred; if so, such a custom in a parish can never be made good. (8) Besides, there is no consequence to say that there is such a custom in a county, therefore it may be in a hundred, because there can be no inference from one to the other; and even in that case it will be very difficult to find a reason how a county at first came to be exempted from payment of tithes. My Lord Rolle uses the words "a province" and "county" as synonymous: now "a province" being only a circuit within the jurisdiction of an archbishop, (9) probably there might be an agreement between the clergy and the laity that such a place, &c. should be exempted from the payment of tithes; but there could be no such agreement in a hundred, because that was divided from the county, and became a particular district and the inheritance of several persons, but the bailiwicks thereof were re-united to the counties by the statute of 4 Edw. 3. c. 15. and 14 Edw. 3. c. 9. It is agreed on all sides, that a single parish cannot have such a custom; (10) and this is a strong reason why a hundred cannot, because it consists and is made up of several parishes; and it is as good a reason that a hundred cannot have such a custom because a parish cannot, as it is to say a county may, and therefore a hundred may have it.

Secondly, But admitting a hundred to be capable of such a custom, yet it cannot be so large as this, because there must be a sufficient maintenance left for the parson, which does not appear in this case; and so are all the books

(1) 2 Bulst. 285. See also 1 Roll. Abr. 653, pl. 52. 654. pl. 5. 2 Roll. Rep. 122. Palmer, 37. *Russel v. Patridge*, *antè*, 236. 3 Inst. 645. 653.

(2) 1 Roll. Abr. 653. pl. 10.

(3) Palm. 37. 3 Roll. Rep. 122. *antè*, 236.

(4) 13 Co. 13.

(5) 45 Edw. 3. c. 3. *post*. vol. iii. p. 9.

(6) 2 Inst. 645.

(7) Year Book, 8 Hen. 7. 1 b.

(8) 1 Roll. Abr. 653. pl. 47. 2 Inst. 645. March, 25. pl. 59.

(9) Co. Litt. 94. 1 Bl. Com. 111.

(10) 1 Roll. Abr. 653. 2 Inst. 645.

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where such prescriptions have been allowed, which are very few, but never to have such effect as this, viz. to take away the maintenance of the parson; and therefore the plaintiff in the prohibition ought to have shewn that there was sufficient for him besides, because it is a discharge against common right and no other reason can support it, but to shew that the parson has *superiores decimas* besides the tithes alleged to be exempted; and this was the only reason of the judgment in the case of *Kidder v. Edwards*. (1)

E contra. If there may be a custom (as it is admitted) to be discharged in a whole county of tithe-milk, and of tithe-corn ground at such a mill or mills in a hundred, there may be also a custom to be discharged of the tithes of fat cattle, and if the parson has lived without such tithes time out of mind, he may live so still. It is granted on the other side, and an authority was produced of a custom to be discharged of tithes out of two hundreds, and there can be no reason, if that be law, why such a custom may not be good in one hundred. It has been objected, that a layman cannot prescribe in *non decimando*, but no good reason can be given for it. (2) It cannot be because of any disability in his person; for as to this matter there is no difference between a layman and a clerk; it must therefore be in *favorem ecclesie*, and introduced by ecclesiastical persons who were formerly judges here, as part of the canon law, who had in those days such a power over the laity, that they would not suffer such a prescription to be tried by them, neither would they suffer them to sue for tithes in their courts. This is the reason why it is generally said in our books that a layman cannot prescribe in *non decimando*; but though he cannot prescribe, &c. yet there may be a custom to exempt him from tithes, and such a custom is of as good authority as a prescription; for if it be established by long usage and by the common consent of our ancestors, it passes into a law of that place, and is of equal force with a prescription. Such is the custom of gavelkind, (3) and borough English, (4) which is the law of England, and as ancient as the common law in the places where these customs prevail. It is true, where a custom of a public nature is alleged in a particular vill or place, it must be shewn that it is an ancient vill; as where a man claimed lands on the south side of a vill, setting forth that they were time out of mind devisable, and so derived a title to himself by a feoffment from the last devisee, this was held void, because, it being a custom against common law, he ought to have set forth that the vill was an ancient vill; but if he had alleged such a custom in a borough, which *ex vi termini* imports a place of antiquity, it had been good. (5) Now in this case it is alleged, that the parish of Huntspill is an ancient parish, and then the custom is set forth, which is agreeable to the authority before-mentioned. And if the custom be not contrary to reason and justice, the judges never inquire into the commencement of it. No man can say, that this custom is unreasonable, because it goes only in discharge of a single duty: now all the books which condemn prescriptions in *non decimando*, either in a county or in a parish, are where they are made generally of all tithes, but they are seldom denied for a particular thing, as in this case. And therefore a custom to pass in a ferry-boat toll-free has been adjudged good (6), though it is far more unreasonable than this, because it is only a discharge to the person claiming it, and may be a charge to another. So there are many things which are not titheable of common right, as fish taken in the sea, rabbits and pigeons spent in the house, &c. and yet by custom tithes of those things have been paid to the parson; (7) if therefore it be a reasonable custom for the clergy to charge the laity with tithes of such things which of common right ought not to be chargeable, it is as reasonable that a layman may discharge himself by a custom in a place where none have been usually paid. Such a custom (as has been observed) is not good in a parish; not because it is inconsistent with the law; the reason is, a single person or parish

(1) 1 Roll. Abr. 654.

(5) Co. Lit. 109. Brady, 2.

(2) 1 Roll. Abr. 653. pl. 5. Cro. Jac. 44.

(6) 2 Mod. 291.

Moor, 445. Hob. 297. Bemb. 325. 345.

(7) 1 Roll. Abr. 642. 646. Cro. Car.

(3) Year Book, 40 Ass. pl. 27.

264.

(4) Year Book, 21 Edw. 4. pl. 52.

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is not capable of such a custom.(1) Besides, the law requires that the parishioners should shew what recompense the parson has in lieu of his tithes, by which it may appear that the custom had a reasonable commencement; but no such thing is required of a whole county, because it cannot with any shadow of reason be pretended, that all the inhabitants could or can conspire to defraud their respective parsons. But there are books which allow a custom or usage to be good in places of as large extent,(2) which customs will not bind when alleged in a vill; as in a *cessavit per bicennium*, the lord shewed the custom of the place to be, that where the tenant did not pay his services in two years, he might enter and hold the lands till he was satisfied of the arrears; this was held to be void, because the usage was alleged in a particular vill only, and not shewn that it was customary so to do in the vills round about. But a custom in an hundred in Kent, that if any one be charged to have gotten children in adultery, and cannot acquit himself by law, that then he shall forfeit all his goods to the King, was held a good custom.(3) So a custom in an hundred, that if a waif or estray be eloiigned, and it is pretended that it came to the possession of any dwelling within the hundred, the lord may distrain till he make restitution.(4) So a custom that an infant of the age of fifteen years may make a feoffment, and sell his lands;(5) all these are against common law; but being used in a hundred or county, are thereby become the laws of the places where they obtain. But to come nearer to the case, it will not be denied that a custom alleged in a parish, for all underwood to be discharged of tithes which is used in that parish for fencing corn, is good,(6) but then you must shew that the tithe of that corn is paid to the rector; but it may be alleged in a county, weald, or country, without any consideration at all. And therefore Brook in his Abridgment, referring to the author of Doctor and Student, says,(7) that a man cannot prescribe in a vill to be discharged of tithes, because it is too particular; but such a prescription is good in a whole county or hundred, because it is the custom of the place.(8) It has been objected, that a custom in *non decimando* may be good in a county, but not in a hundred, because of the uncertainty of its extent: sure that is a reason of very little force, for the limits of a county are altogether as uncertain as those of a hundred; but a hundred is a known precinct, and not barely a liberty,(9) as has been said, though there may be many liberties therein; for when granted to a subject it is a liberty,(10) but when it remains part of the county it is otherwise; and therefore in an avowry a man may prescribe by a *que estate* to have a leet in a hundred;(11) but if a *quo warranto* be brought against the hundred, he must then set forth his title. Besides, if the words "province" and "county" are synonymous, a county and hundred are so too; and that in the meaning of the law, as may plainly appear; for all issues are to be tried by jurors of the county,(12) that is, by jurors of the hundred; for it was a good challenge at the common law if there were no hundredors of the jury.(13) In the statute of Winton(14) these words are used promiscuously; it appoints, "that inquests of felonies and robberies shall be taken in towns, hundreds, franchises, and counties, so that the offender may be attained; and if the county will not answer for him, then it shall be answerable for the robbery done, so that the whole hundred where the robbery is committed shall be liable." Such a custom in a hundred has never yet been condemned, for it never came in judgment but in the case for tithe-wood, and there it was held to be a good custom, even in a whole weald; and what reason can be given why it should not be good in a hundred as well as in a weald, which is as ancient as the other, especially when it cannot be denied but such discharge might begin by composi-

(1) Dr. and St. 167. 13 Co. 13.

(2) Year Book, M. 43 E. 3, pl. 30. 33 E. 3, pl. 80.

(3) 1 Roll. Abr. 568.

(4) Year Book, T. 44 E. 3, pl. 14. 21 E. 4, pl. 24.

(5) See Rob. on Gav. 195; and Mr. Vallant's Edit. Dyer, 301. a. pl. 41 notis.

(6) *Croucher v. Collins*, 1 Saund. 141. ante, 469.

(7) Bro. Abr. title "Dismes," pl. 14.

(8) March, 25. 1 Roll. Rep. 22.

(9) 2 Roll. Abr. 78.

(10) 1 Vent. 409.

(11) 1 Leon. 217, 218.

(12) 2 Hen. 4. c. 6.

(13) 11 Hen. 4. c. 2.

(14) 13 Ed. 1. c. 2.

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tion? It is objected, that tithe-wood is not due of common right, as all other tithes are, and therefore a custom in *non decimando* for wood in a hundred may be good. But tithe-wood is due of common right; (1) if not, to what purpose was the statute *de silva cædua* made? It was to ascertain what wood should pay tithes, and what should be exempted; and why did the nobility and commons prefer several petitions to the King, after the making that statute, that it might be explained what was meant by *silva cædua*, (2) if no tithes were due for wood, which is an admission that tithes had been paid for it before that act? Agreeable to this is the common way of demanding tithes for wood at this time; for the libel is always general, which shews that the party has a right to demand; for if he had not, then he must allege a custom, and yet prohibitions are never granted upon such general libels. Suggestions are also made always in the affirmative, but if they were due by custom, and not of right, then they ought to be in the negative, viz. to deny that there is any such custom.

Second point. Then as to the objection, that it does not appear that the person has a sufficient maintenance left, the pleading seems to be otherwise; for there are several *modus*es set forth for tithes yearly arising in the parish, which may give him a convenient maintenance every year; and if he has a sufficient provision by any one *modus*, it is not material by whom he receives it.

Curia. It will be difficult to shew a *non decimando* for any tithes besides those of wood; for all the cases which incline to such a custom, are put generally, viz. that a county or a hundred may thus prescribe, but they do not mention what tithes are in question. Now if tithes of wood had been due of common right, to what purpose was that canon made by Archbishop Stratford, in the seventeenth year of Edward the Third, that tithes of *silva cædua* shall be paid? against which canon there was a petition made to the parliament in that very year, (3) reciting the ancient usage to be, that tithes should not be paid for wood; and the petition was answered, that a prohibition should be granted against the canon where tithes of wood have not been accustomed to be paid. It is true, the ecclesiastical courts do hold, that tithes are due of common right for every thing, nay, even for stones or gravel digged out of pits, but the common law is otherwise, for tithes of common right are due only for such things which arise by annual profits: now though trees are renewed yearly, yet they yield no annual profit, and therefore tithes are not paid for them. (4) Therefore where tithes are paid for things which do not arise by such means, they must be due by custom. But such a custom in *non decimando* cannot be good.

And therefore a consultation was granted. [4 *Mod.* 336.]

THE person sued for tithe-herbage in the spiritual court, the defendant prescribed in *non decimando* for the lands by the custom within the hundred of Huntspill and Barton in Somerset, and thereupon a prohibition was moved for and granted, and upon declaration and plea the custom was tried in the county, and a verdict for the plaintiff in prohibition that there was such a custom; and upon return of the *postea* it was moved in arrest of judgment that it was a void custom, and it was argued several times, and at last the whole court held it a void custom, and consultation was granted. Note. The court agreed in the case of wood, but said that was because no tithes were due thereof at common law, but in all other cases it is a void custom, because in *non decimando*. Note. In a suit for wood they do not claim them by custom, but as due of common right. [Dodd's MS.]

In prohibition, upon a suggestion, that the hundred of Hunsbyton in the county of Somerset is an ancient hundred, that there has been a custom time out of mind, that the inhabitants of that hundred have been discharged of the tithes of barren cattle, issue was taken upon the custom and verdict for the plaintiff, but judgment was staid.

1. Tithe is due for agistment of barren cattle of common right, and at the

(1) 3 Com. Dig. "Dismes" (H. 3.)

(3) Dr. and St. 164. 169. Godolph. 467.

(2) 1 Roll. Abr. 638, 639. 2 Inst. 643.

(4) 2 Inst. 647. 5 Bac. Abr. 54.

common law it is 2s. per pound; but the custom governs it as to the sum. (1) Vide Fitz. Nat. Br. 53. G.

2. It was urged, that a county, and by the same reason a hundred may prescribe to be quit of tithes of wood, or any other tithes, as appears by Dr. and Stud. 166. 2 Inst. 645. Roll. 653 and 654. 12. 13. but HOLY, Ch. J. said, true it is, a hundred is as capable of such a custom as a county, wild, or country; and whereas it was said for the defendant, that the hundred of H. contains no more than the parish of H. and if it cannot be discharged as a parish, it is not capable of such a discharge as a hundred: HOLY said, if it were so, the plaintiff should have shewn it in his replication: a hundred, when it is granted out to a subject exempt from the county, with a hundred-court, then it is a liberty, else it is not, but the sheriff is to execute writs there; if he direct a warrant *Ballivo Hundredi*, it is his execution, unless he says *cui executio brevis pertinet*. Co. 1 Inst. 121. says a *Que Estate* is a good prescription to a hundred for the title to a leet, that is in debt for an amercement; but in a *quo warranto*, must set forth the title to a leet; several hundreds have no courts-baron; abbots, &c. had hundreds; when dissolved, the king might either lay them open to the county or continue the franchise; it is said in the Mirror, that hundreds are divided into vills and parishes, and if it were otherwise here, as an extraordinary case, it should come on the other side, if it were material: but here I think the custom is ill to be discharged of tithe-herbage, which is due of common right, though it be generally put in Dr. & Stud. 166. that a county may prescribe to be discharged of any tithe, yet I find no instance of it in any other case than tithe-wood (except one in Roll. 654. which I am not satisfied with). Now tithe-wood does not seem to be due of common right, because it does not renew annually, but the church had got possession of it, and the statute *de silva cadua*, 45 E. 3. c. 3. is but in affirmance of the common law, and, where they have obtained it, it is to be paid as a customary tithe, and yet in the case of wood the parson need not lay a custom in his libel; but if the country be discharged by custom, it must come on the other side (*à contrà* 13 Co. 13.) The case of *Ridden and Edwards*, Roll. 654. cannot be right, it is against the statute of *Articuli Cleri*. The case of a tithe-wood is somewhat like the case of tithe of mills; the church claimed tithes for all mills; and by the statute of *Articuli Cleri*, cap. 5. *de molendino de novo erecto*, a prohibition lies not, but yet of an old mill a man may prescribe generally in *non decimando*.

A consultation was granted, and the court directed, that it should be specially entered, because it appears the custom is void and against law. [*Comberbach.*]

IN attachment *sur prohibition*, the plaintiff declared of a custom in such a hundred, to pay no tithe for agistment of cattle barren: issue was taken upon the custom, and found for the plaintiff, but judgment was arrested with this entry, *Et quia apparet curiæ Domini Regis hic quod consuetudo præd. nullius vigoris in lege existit, ideo fiat consultatio, &c. Et per Cur'*,

1. Tithe of agistment is due of common right, because the grass, &c. which is eaten, is *de jure* titheable, and must have paid tithe if cut at perfection: and the court took this difference, viz.

That a hundred or a county cannot prescribe in a *non decimando*, for a thing that is in its nature *de jure* titheable; for, as no one single person, or his estate can; no more, by the same reason, can the hundred, which consists but of many single persons estates. Vide March, 26. 1 Ro. Ab. 653.

But of things which in their nature are not titheable *de jure*, a hundred or county may prescribe in a *non decimando*, because they are discharged in such case without a custom to the contrary, and they do but insist on their ancient right, and that custom hath not prevailed against it: *Ergo* the case of wood, 1 Ro. Ab. 654. Lit. Rep. 152, 153. and the hearth-penny, which is but a

(1) EYRE, J. said, that tithes for barren cattle are due by custom, and by the same reason they may be discharged of tithes by custom; but HOLY, Ch. J. said, that tithes for

barren cattle are due *de communi jure*, and 2s. per pound is the usual tithe of common right; but that there are divers customary manners of tithing for them. (*Skinner. Holt.*)

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modus for it, they allowed to be good law; because wood is not in its nature titheable, nor within the reason of titheable things, which come not to perfection every year. [2 Salt. 655.]

H. 6 W. 3. Scacc. *Morgan v. Holt.* [1 Wood, 336.]

Radnorshire, 11th and 18th February, 1694.

A *modus* of 12d. for a milch cow, and 6d. for every barren cow in lieu of all tithes arising from or by reason of such cows, sent to be tried on an issue.

THE scope of the bill was to have a discovery of what corn, grain, and other titheable matters, the defendant had within the parish of Lanbaderne Vawr, in the county of Radnor.

The defendants said that they had paid all tithes due from them to the plaintiff, except the tithe of cows, for which there was and had been a custom to pay twelve-pence yearly for every milch, and six-pence yearly for every barren cow, in lieu of all tithes arising from or by reason of the said cows, which they are ready to pay according to the said custom.

The plaintiff's counsel insisted, that eighteen cheeses were of right due and accustomed to be paid yearly by every inhabitant within the said parish, that kept a cow or cows within the said parish, to the rector, his farmer, or tenants in lieu of the tithe of all cow or cows.

The court ordered a trial at law on the following issue, "Whether a *modus* of twelve-pence for every milch, and six-pence for every barren cow, is, and for time out of mind has been accustomed to be paid yearly by every inhabitant of the parish of Lanbaderne Vawr to the rector of the said parish, his tenants, or farmers of the tithes for the time being, in lieu of all tithes arising from or by reason of the said cows, or not?"

In pursuance of which order, a trial was had upon the aforesaid issue, and a verdict therein passed for the plaintiff.

The cause coming on to be heard upon the *postea*,

It is ordered and decreed, upon reading the said order and *postea*, that the defendants shall likewise respectively account with, satisfy, and pay to the plaintiff the value of eighteen cheeses from each of them due for the years aforesaid.

WARD, C. B.
LECHMERE, B.
TURTON, B.
POWIS, B.

H. 6 W. 3. Scacc.

Goodall v. Perkins. [1 Wood, 338.] 2 Gw. 543.

Berkshire, 4th February, 1694.

Alder poles are not timber, therefore titheable. Tithes are due of underwood made into faggots when not consumed in a house of husbandry in the parish.

THE rector of Padworth, in the county of Berks, charged that the defendant, for several years past, had occupied and possessed twenty acres of coppice wood and five hundred poles of hedge-rows, and had cut and carried away about eighty loads of the wood growing there; the tithes whereof were worth eight pounds, which the defendant refused to pay.

The defendant confessed that he had been for several years past owner and occupier of a coppice wood called Brickcroft, and certain lands called Wallingford Lands, and of some hedge-rows within the said parish; that in the years 1687 and 1688 he cut and carried away from the said coppice alder poles; and he set forth the quantities and values for several years following; that he had cut several hundred of faggots from the same coppice, which he used for firewood in his own house; and he insisted that he was not obliged to pay any tithes, either for the alder poles or for the faggots, for that the alder poles were all above twenty years growth, and of that age and quality had been, and were usually reckoned and esteemed as timber, and measured by timber measure; and the said faggots were not titheable, in regard they were part thereof burnt, and

the rest intended to be burnt in his own dwelling-house, and that for wood burnt in the houses of the owners tithes were not due.

The court declared their opinion that alder poles were not timber, but were titheable to the plaintiff.

And in regard it appeared to the court, that the defendant had not any house of husbandry within the said parish of Padworth, but that the said underwood and hedge rows, made into faggots, were carried to the defendant's house, being out of the said parish, and there burnt, the court did also declare, that tithes were due to the plaintiff for the same.

It is therefore ordered and decreed, that the defendant shall account with and satisfy the plaintiff for the value of tithes of all the said alder poles and underwood by him felled and cut within the said parish of Padworth demanded by the bill.

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PERKINS.

H. 6 W. 3. C. B. *Stopp v. Peacock*. [3 Lev. 386.]

A PROHIBITION was prayed and at last granted, on suggestion of a *modus* to pay for all the tenants and occupiers of the lands (so much) in discharge of tithes. On the first motion this prescription in occupiers was doubted by the court. But at last seeing it goes only in discharge, and not in claiming an interest, the prohibition was granted on consideration of *Cooper* and *Andrews's* case, (1) *Hob.* and *ibid.* 188. *Shelton* against *Montague*, (2) and 1 Cro. *Baker* against *Brereman*.

A custom to pay a *modus* for all tenants and occupiers of lands in discharge of tithes was held good.

(1) *Ant.*, 240.

(2) *Ant.*, 248.

E. 7 W. 3. Cam. Scacc.

Wilbraham v. Saunders and others. [Dodd's MS. No. 70. p. 99. No. 71. p. 156. Rayn. 76.] 2 Gw. 544. [1 Wood, 328.]

1695.

IN this case A. had a farm adjoining to a farm called B. in another parish, the fences of B. were down, the cattle of A. went into the said farm of B. by defect of the fences, and ate there for four months; and resolved that the parson should not have tithe of the herbage, for they were as trespassers, and a trespasser, or he whose beasts stray through defect of fences, shall not pay tithes. *LECHMERE* cited the parson of *Bangor's* case, that tithes shall not be paid for cattle which go by reason of vicinage. But *POWELL* *contra*, and that in the principal case, A. was but a disseisor, and should pay tithes; for it was not an accidental trespass, but a continued act; but to me (Dodd) it seemed clearly to the contrary. [*Dodd's MS.*]

No agistment tithe is due for cattle trespassing, or straying from defect in fences; or for cattle going by reason of vicinage.

A's farm adjoins to B.'s in the parish of C.; the fences of B. being down, A.'s cattle escape there, and eat there in the parish of C. for four months.

Resolved, that the parson of C. should not have tithe herbage, for they were as trespassers; and *LECHMERE* cited the parson of *Bangor's* case, that tithes shall not be paid for cattle which common *pur cause de vicinage*. But *POWELL*, *contra*; in the present case, A. is a disseisor, and shall pay tithes; for it is not an accidental trespass, but a continued act; but it seemed clearly to the contrary to Mr. Dodd, the reporter. [*Rayner*.]

E. 7 W. 3. Scacc. *Swaine v. Pern*.

Cambridgeshire, 29th April, 1695.

THE plaintiffs, as parishioners and inhabitants of the parish of Leverington, in the isle of Ely, for and on behalf as well of themselves as of the rest of the parish, filed their bill against the defendant and others, stating, that within the said parish there are the following customs of tithing, *viz.* for all grounds

A custom to pay the tenth bushel of raped seed ready dressed for tithe, the parson allowing one

penny for dressing, established; and tithes of coleseed, mustard seed, and turnip seed, decreed to be paid in the same manner. Tithes in kind shall be paid of madder, being a new improvement.

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grounds mown between Sea Dike and Cattle Dike, two-pence an acre ; Elaine Field, one penny halfpenny ; and betwixt High Fenn Dike and Cattle Dike, one penny : a foal, one penny ; a milch cow, two-pence ; a heckforth, that has had but one calf, one penny : calves in kind to be delivered at the will of the owner, after they are three weeks old, and at such time of the year as the owner can best spare them, not hindering his breed, and if the parson delay fetching, he is to pay for keeping : lambs in kind to be delivered on the first of May, and if under seven to pay for every lamb a halfpenny, and if seven and under ten, to pay a lamb, allowing, for every lamb wanting of ten, an halfpenny, and so likewise of calves ; but if any person has under seven calves, and sell any of them to the butcher, he is to pay the tenth part of the money : pigs to be delivered at the will of the owner after they are nine days old, and if the parson delay fetching, he is to pay for keeping ; geese in kind to be delivered before Midsummer, and if any one have under seven pigs or geese, to pay one halfpenny for every one : and if seven and under ten to pay one, and to be allowed what is wanting of ten, one halfpenny a-piece at Easter : that every householder, being a married man, is to pay, in lieu of all other things whatsoever paid in other places and not customable here in the name of an offering, four-pence ; and for every son and daughter, or other servant not taking wages, one halfpenny ; and for every servant taking wages, two-pence, if they receive the communion ; bees, for every stock smothered or driven, whereof profit is taken, two-pence : that the parson, or his farmer, or deputy, shall prepare on the Thursday before Easter, a drinking or maundy for the parishioners presently after evening prayer, at the parsonage house, where they are to have bread, cakes, beer, almonds, raisins, figs, stewed prunes, and such like ; that the parson shall find a bull and a boar for the service of the township, and, if not, he is to be abridged of calves and pigs, unless he make allowance as it costs the party : wool, the tenth stone presently after the sheep is clipt, and if any sell their sheep out of the township after Candlemas-day before they are clipt, they are to pay for each sheep one penny : corn if bound, the tenth sheaf ; if loose, the tenth shock : hemp and flemble the tenth sheaf, when it is pulled, weathered and thrashed ; rapeseed the tenth bushel ready dressed, the parson allowing one penny for dressing : wood the tenth tree, when felled, except it be of twenty years growth : flax the tenth pottle when watered and bleached : that any stranger occupying or feeding any ground, is to pay acreage after the custom of the field, as the inhabitants pay for the mown ground, the fall at the parson's election : that if any person sow half a pound of onion seed, or above, the parson is to have the tenth bed, and if less, nothing : reed ground, for every year it is looked, cropped, or mown, one penny an acre ; eggs at Easter, for every hen or duck, two eggs ; for every cock or drake, three. The bill stated, that the said customs of tithing had been constantly used, as by the several reckoning books of former parsons, and other evidence, appeared ; that about the year 1621 divers differences about the said customs happened, and by the mediation of the judge of the isle of Ely and several justices, they were accommodated and reduced into writing and signed, by which the above customs appeared ; that about 1681 the defendant Pern became rector, and received the said rates and payments, until the year 1686, when he endeavoured to overthrow the same, and brought several vexatious suits in the bishop's court, and in this court, but which were accommodated ; that the defendant Pern and the parishioners, about the nineteenth of April, 1688, came to a further agreement of tithing over and besides the former customs, viz. that the inhabitants were to pay for every acre of fed ground in the parish of Thockonholt (not included) for herbage one penny an acre, or the fall, at the parson's election ; grounds sown over with clover or such like for feeding, to be accounted as feeding land, and not otherwise ; and that if the parson neglected the fall in such year he was not to have the penny an acre, neither in the old grounds or in the new ; that the said agreement was reduced into writing ; that shortly after, the defendant, intending to avoid as well the customs as the agreement, demanded tithes in kind, and brought his bill in this court for that purpose against Swaine and others, which in Michaelmas Term 1691, came to a hearing, and the bill was dismissed with costs, and

the said customs and agreement, after several evidences being read to prove the same, were allowed and approved of; that Pern petitioned for a re-hearing, declaring that he did not intend to set aside the customs or agreement, but to have some matters explained; which re-hearing was granted, and the cause was re-heard in Hilary Term following, when the court ordered the plaintiff Swaine to account and pay for some sheep according to the *modus*; to pay for clover as feeding ground; and to consider the fall mentioned in the additional agreement to be of lambs, wool, and calves, and to account for the same accordingly; that the plaintiff Swaine complied with the said decree, and paid him his due for 1691, and has his receipt; yet he, notwithstanding, again attempted, in the year following, to break through the customs, &c. and to get tithes in kind, and sued the above plaintiffs in the bishop's court, and obtained a judgment for the treble value of tithes in kind. Therefore for relief the plaintiffs prayed the aid and assistance of this court.

The defendant Pern by his answer, said, that in 1692 he was inducted into the said parish of Leverington; that he had in his possession a parchment writing, but that it is lost, or in the plaintiff's hands, but that it is not of sufficient force to establish those rates to be customs so as to debar him from claiming tithes in kind of milk and hay, and that there are several other rates not set forth in the parchment. He denied that the customs had been secretly sued for; but he admitted that the court dismissed his bill in 1691, and that it was re-heard, and that he brought his action, &c. as in the bill is stated, and obtained judgment, not by surprise, but on a demurrer; and said that the plaintiffs had brought a writ of error against the judgment.

The defendant Putter put in his answer, and said he believed the facts, &c. as the other defendant did.

The plaintiff replied to the defendant Pern's answer; and he rejoined; and divers witnesses were examined on both sides.

Upon opening the bill and answers, and upon hearing what could be alleged on both sides, and on long debate thereon, and reading the proofs and exhibits taken in the cause, and also the afore-mentioned cause, and the instrument and parchment writing, dated the twenty-ninth of April, 1691, entitled a prescription of the accustomed payments of tithes to the parson of the said parish, or to his farmer, or deputy, which have been continued time out of memory of man, and now renewed, consented unto, and agreed upon by the parson and parishioners of the said town, dated as aforesaid,

It is hereby ordered, adjudged, and decreed, that the said ancient prescription and *modus*, mentioned in the parchment writing, dated the 29th of April, 1621, aforesaid, and the additional agreement, dated the 19th of April, 1688, do and shall stand ratified and confirmed, and be for ever established by the authority and decree of this court, with these alterations and explanations following: that the *modus* of two-pence, three halfpence, and one penny an acre, mentioned in the said parchment writing for all mown grounds, is for and in lieu of all hay growing and cut within the said places; that the two-pence to be paid for every milch cow, and one penny for every heifer, is for and in lieu of milk and all profits arising by such cow and heifer, except her calf kept within the said parish; that tithe lamb shall be paid in kind, as well those that fall after as before the first of May, respect being always had to the number of lambs, according and pursuant to the said prescription, *modus*, or parchment writing, to be delivered as therein mentioned, save those that fall after May-day, to be kept by the owner until a month old, and if longer, to be paid for keeping; that the four-pence to be paid every Easter by every householder or married man, is in lieu of all things whatsoever paid in other places, and not customable in Leverington, and shall be hereafter paid and received as an offering only; that all other persons, inhabiting within the said parish, of the age of sixteen and upwards, shall pay two-pence every Easter as an offering, whether they receive the sacrament or not; that the maundy or drinking, heretofore kept and provided by the minister of the said parish for the parishioners on the Thursday before Easter, shall hereafter be had, kept, and provided for them upon the Thursday

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Thursday after Easter, at which time the parishioners are to reckon and account with the parson, for the time being, for their several *modus*es and dues for the preceding year, and then to have receipts for what they so pay, if they require the same; that the tithes of coleseed, mustard seed, and turnip seed, upon lands tilled, ploughed, and sown, or ordered to that purpose, shall be paid in the same manner and proportion as rapeseed is by the ancient prescription mode, or parchment writing, said to be payable; that madder, being a new improvement, shall be paid in kind; that for every mill for the grinding of corn within the said parish, such *modus* or payment shall be paid as is and has been heretofore paid for the same; that due notice shall be given to the minister to take his tithes before any corn and grain be carried off the premises; that the weathering or thrashing of hemp and fumble shall be construed, deemed, and taken to be for and in lieu of the seed; that the tithe of wood shall be paid by the tenth tree if felled of twenty years growth or under, which twenty years, if never felled before, is to be reckoned from the first planting, but if felled before, from the last felling thereof; that the word *fall* mentioned in the additional agreement, dated 1688, shall be meant and intended the profits of wool, lambs, and calves, which the incumbent may take as above, abating the penny an acre for acreage of lands depastured and fed, whether with profitable or unprofitable cattle; but if the one penny an acre exceed the fall, or such profits, the incumbent may take the one penny an acre, and quit the fall or profits, viz. he may take which he will, but not both; that clover shall be paid for by the parishioners to the parson as feeding ground, and not otherwise, or in any other manner; that marriages, churchings, and mortuaries, shall be paid for as hitherto has been used and accustomed: with which alterations and explanations the said prescription or ancient *modus* specified in the writing, dated in 1621, and the said additional agreement, dated in 1688, are hereby ordered, adjudged, and decreed, to be for ever hereafter observed, kept, and performed by all parties interested and concerned therein, according to the tenor and true meaning thereof.

And it is also ordered, that the defendant Pern do and shall acquit and discharge the plaintiffs from the aforesaid mentioned judgments obtained against them by default, in regard it appears, that according to the ancient *modus* and customary tithing, nothing is due from them to the defendant; and for that purpose he shall forthwith execute warrants of attorney to the plaintiff to acknowledge satisfaction upon record of the judgments obtained; and that the said defendants shall also deliver up to the plaintiff Swaine the bond given by him to the defendant Putter to be cancelled, and that the sums of forty-four pounds and forty pounds brought into court by the plaintiffs, be forthwith paid to them, or to those whom they shall appoint.

N. LECHMERE.
JOHN TURTON.
JOHN POWELL.

Tr. 7 W. 3. Cam. Scacc.

Ansell v. Adman. [Dodd's MS. 157.] Rayn. 76. 1 Wood, 332.

No tithe of an
ancient mill.

UPON English bill it was resolved in the exchequer chamber, that of an ancient mill, tithes shall not be paid, for the statute, *Artic. super Claretis* implies this. *Nota*, the bill dismissed. 1 (Dodd) was of counsel with the complainant. *Quare*, see 2 Inst. 621. 1 Ro. 656. 2 Ro. Rep. 84. Cro. Jac. 523.

Tr.

Tr. 7 W. 3. Scacc.

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Estopp and others v. Portman; and Portman v. Moreton and others.

[1 Wood, 946.]

Worcestershire, 22d June, 1695.

THE original bill stated, that the plaintiffs were severally seised and possessed of messuages, lands, and hereditaments, lying in the parish of Leigh, in the county of Worcester, whereupon were fruit-trees of all sorts growing; that in the said parish there was a custom that the parishioners and occupiers of lands, who had any fruit-trees upon the lands they enjoyed in the said parish, should yearly pay two-pence, as a *modus*, in lieu and satisfaction of the tithe of all fruit growing upon the lands in their respective possessions, which payment is called Leighton-money; that the tithes of the village of Brainsford, being part of the said parish, were paid to the lord of the manor; that the said *modus* of two-pence had been accepted by the rector in satisfaction for tithe fruit; that tithe fruit had never been paid in kind in the said parish, or any satisfaction made for the same, other than by the said *modus* called Leighton money; and that the defendant denies the existence of any such a *modus*. The bill therefore prayed, that the defendant might answer whether he had not received the said *modus*, and why he refused the same; and that the plaintiffs might examine their witnesses *in perpetuam rei memoriam*.

Moduses of a smoke penny, in lieu of all wood burnt, and of 2d. called Leighton money in lieu of tithes of all fruit, held good.

The defendant insisted, that he ought to have tithe fruit in kind, and denied the existence of the *modus*, as stated in the bill, or of any other *modus*, or sum of money in lieu of tithes in kind; that Leighton money is only in lieu of the tithes of fuel and gardens, and, as such, had been received by the former rectors, and by the defendant, and not otherwise; that the planting of a very large number of the apple trees growing within the parish had been within the memory of man, and therefore there could be no such *modus*; and although no tithe fruit had been paid in kind to the rectors, he denied that there was any *modus* in lieu thereof, or that he or his predecessors did ever receive two-pence, or any other sum of money, or other thing, in lieu of fruit; and therefore he refused to accept, and hoped he should not be compelled to accept of the same.

The defendant, by his cross bill, also stated, that he was entitled to the great tithes of Brockman, a vill in the said parish, and to all manner of tithe of fruit, flax, hemp, hops, wood, bees, cows, calves, lambs, wool, fuel, and garden stuff, which two last tithes are called Leighton money, and all small tithes within the rectory (except in the township of Brainsford); that the defendants Moreton and Nott refused to pay the tithe of fruit, flax, and hemp in kind, and withheld the same, with other tithes, on a pretence that there was a *modus* for the same.

The plaintiffs to the original bill, Moreton and Nott, by their answer insisted upon the several *moduses*, viz. the said two-pence, called Leighton money, in lieu of tithe fruit; one penny, called the smoke penny, in lieu of all tithe wood; one penny, called garden penny, in lieu of things growing in the garden; one penny for each cow, in lieu of tithe milk; four shillings for a calf; and where there are not seven, or more, one halfpenny for a calf reared, eighteen-pence for a calf sold; two shillings for a tithe lamb, and where there are not seven or more, a halfpenny for each lamb; and for a sheep sold unshorn between Candlemas and the time of shearing, one penny.

The defendant Nott said, that two-pence was due for the fall of a colt; and insisted upon a *modus* of four-pence for the tithe of a pigeon-house.

The defendants said that they had paid all their tithes and dues, save the *modus* of two-pence in lieu of tithe fruit, which they tendered to the plaintiff, who refused the same, and also except what the defendant Moreton by his answer confessed was due from him to the plaintiff, viz. for the tithe of flax, one shilling; for hemp, six-pence; for a calf reared, one halfpenny; and for a sheep sold unshorn between Candlemas and the time of shearing, one penny; which he offered, by his answer, to pay.

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The plaintiffs and defendants replied and rejoined in both causes, and witnesses were examined; and upon opening the pleadings, and hearing counsel on both sides, and reading the proofs taken on both sides in these causes, and hearing what was alleged by counsel for all parties, it appeared to the court, that there was within the said parish a *modus* of a smoke penny, payable in lieu of tithe for all wood burnt, and that there was no wood sold by the defendants: it also appeared that there were such other *moduses* and customs in the said parish as the defendants have by their answers insisted upon: and it also appeared, that the said Moreton and Nott had duly paid the said Portman all their small tithes and dues, except the tithe of fruit, for which they insisted that a *modus* was payable as aforesaid; and that they had tendered the same, which the court thought proper for a trial at law; and also, except the said tithes confessed by the defendant Moreton in his answer as aforesaid.

It was thereupon ordered by the court, that the cross bill of the said Portman be, and is hereby dismissed as to all other matters and things therein contained, except as to the tithe of fruit.

And as to what is confessed by the defendant Moreton's answer to be due to Portman, the defendant Moreton is hereby ordered to pay, according to his offer in his answer, the said Portman having made no proof of any more tithe due to him from the said Moreton than is confessed by his answer as aforesaid.

And as to the *modus* of two-pence, called Leighton money, insisted on by the plaintiffs in the original cause to be payable in lieu of tithe fruit, it is ordered by the court, that it be referred to a trial at law, the issue to be, "Whether there is, and time out of mind has been, a custom within the said parish of Leigh, that the respective occupiers of lands within the said parish have paid two-pence yearly, called Leighton money, to the rector of the said parish for the time being, in discharge of all tithe fruit growing upon the lands of such respective occupiers, or not?"

And it is further ordered, that the Lord Viscount Hereford, a defendant to the cross bill, be, and is hereby dismissed.

These causes came on upon the equity reserved, when it was insisted upon by the counsel for the plaintiffs Estopp and others, that at the trial an exception was taken, that the issue, as it was directed by the order, and drawn up, was against the plaintiffs Estopp and others, as it included all the tithes of the village of Brainsford, and the titheable places thereof, being within the said parish of Leigh, which were payable to the Lord Viscount Hereford, (or his tenants) who was lord of the manor of Leigh, and not to the rector, by reason whereof the plaintiffs were forced to become nonsuited: whereupon, and on hearing counsel, and what could be alleged on both sides, the issue was ordered to be amended, and a new trial had upon this issue, "Whether there is, and time out of mind has been, a custom within the said parish of Leigh (except within the village or hamlet of Brainsford, and the titheable places thereof,) that the respective occupiers of lands, titheable to the rector within the said parish, have, time out of mind, paid, and used to pay, two-pence yearly, called Leighton money, to the rector of the said parish for the time being, in discharge of all tithe fruit growing upon the lands of the said respective occupiers titheable to the said rectory, or not?" The nonsuit upon the former trial not to be given in evidence; and the consideration of the defendant Portman's costs for the said nonsuit to be reserved until the further hearing upon the equity reserved, the court declaring that the plaintiff shall not have costs for the same.

A new trial was accordingly had; and upon hearing the causes on the eleventh of July, 1696, upon the equity reserved, it was insisted by the plaintiff's counsel, that they had obtained a verdict against the defendant Portman; upon full evidence; whereupon, and upon hearing what was insisted upon by the defendant's counsel, and upon reading the record and *postea* of the said trial, whereby it appeared, that the jury had found the custom as stated in the issue;

It is ordered and decreed by the court, that the defendant Portman and his successors,

successors, rectors of the parish of Leigh for the time being, do receive from the respective occupiers of lands titheable to the said rector of the same parish, the yearly sum of two-pence, called Leighton money, in lieu and satisfaction of all tithe fruit growing upon the lands of the said respective occupiers; that the said custom or *modus* of two-pence yearly, called Leighton money, payable in lieu of tithe fruit, be established, ratified, and confirmed; that the cross bill do stand absolutely dismissed as to tithe fruit; and, by consent of all parties, that the defendant Portman shall pay to the plaintiffs forty pounds for the costs of these causes.

EDW. WARD.
N. LECHMERE.
LITTLETON POWIS.

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Tr. 7 W. 3. Scacc.

Bevan v. Williams. [1 Wood, 350.] 2 Gw. 549. *Griffiths v. Williams.*
Glamorganshire, 20th June, 1695.

THE lessees of H. Bowers, vicar of Cadoxton, in the county of Glamorgan, claim tithes in kind.

The defendant said, that he had accounted with the plaintiffs, as farmers of the said vicarage, and paid them all their demands for all manner of tithes and duties due to the vicar, except for the tithes of six calves, which he had in the year 1691, and which, by the custom of the said parish, was three-pence, viz. a halfpenny for each calf; which sum he had tendered to the plaintiffs; and denied that any more was due; that he occupied three tenements which were heretofore held by three persons, and that by the custom of the parish, the calf is titheable where it falls, and not where it is weaned, and also the lambs; that tithes of cheese, and the profits of cows, are due to the parson, and not to the vicar; and that he had ten milch cows, for which he paid tithes to the impropriators, to whom the same belong.

The plaintiffs replied; the defendants rejoined; and witnesses were examined on both sides; and upon reading the depositions of several witnesses, it appeared to the court, that the defendant had duly paid all his small tithes to the plaintiff, except for the said six calves, and that the tithes of them were only the said customary payment of a halfpenny for each calf, which the defendant had tendered to the plaintiffs before the filing of their bill; and this being the only matter the plaintiff's counsel insisted upon, it was thought so minute and frivolous, that the court declared the bill to be vexatious; and ordered, that the bill be dismissed with good costs for the unjust vexation.

EDW. WARD.
JOHN TURTON.
JOHN POWELL.

Where the defendant had only six calves, the tithe whereof was only a halfpenny for each calf, which he had tendered, the court declared the bill to be vexatious, and ordered good costs for the unjust vexation.

Tr. 7 W. 3. Scacc. *Rodd and others v. Bishopp.* [1 Wood, 351.]

Devonshire, 22d June, 1695.

THE bill stated, that the plaintiffs had been, and then were seized of and interested in divers lands and tenements within the parish of Stoake Cannon, in the county of Devon; that within the parish and vicarage there were, and, from the time whereof the memory of man is not to the contrary, had been, several manners of tithing, viz. for the tithes of milk and other dues (except for the calves) of every cow within the said vicarage yearly, four-pence; for every calf yearly, four-pence; for every heifer, steer, and every barren bullock, yearly, two-pence; for the tithes of every garden, and the herbs, fruit, and the garden stuff therein growing yearly, one penny; and for the tithes of wood cut and felled within the said parish, by every owner of such wood, one penny yearly; that the defendant for twenty years past, had been vicar there, and during all that time had accepted the said customs; that the plaintiff's witnesses being dead, old, and infirm, the defendant demanded

Moduses of 4d. for every cow for tithe of milk and other dues, except the calf, and 4d. for every calf, held good.

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tithes in kind, and endeavoured to destroy the customs. The bill therefore prayed, that the plaintiff might have a discovery of the customs aforesaid, and that the manner of tithing within the said vicarage might be established by the decree of this court.

The defendant admitted a *modus* of one penny payable for the tithes of every garden, and the pot-herbs and roots growing therein, and used in the houses only; and also two-pence to be payable yearly for every heifer, vewer, and barren cow, within the said vicarage or curacy endowed; and all other the customs as in the bill stated to be payable in lieu of the titheable matters in the bill set forth; and stated that twenty years since he became vicar or curate of the said parish by gift of the dean and chapter of Exeter.

It is ordered, adjudged, and decreed by the court, upon hearing counsel on both sides, and reading depositions for the plaintiffs, that the said *moduses* of one penny and two-pence, as admitted by the defendant's answer, and the said several other and respective customs and manner of tithing due and payable for the several and respective titheable matters, as in the bill mentioned, are good, and shall be, and are hereby ratified and confirmed.

WARD, C. B.
TURTON, B.
POWELL, B.

Tr. 7 W. 3. B. R. *Swales v. Lowther*. [5 Mod. 96.](1)

If cattle be depastured in a parish where they do not plough, they shall pay tithes there, although they plough in another parish.

A MAN had a house and a great farm of arable land in the parish of Kippax, where he dwelt, and he had five acres of ploughed land, and forty acres of pasture, in the parish of Swillington, upon which pasture he fed his cattle which were employed in husbandry in the parish of Kippax. The parson of Swillington libelled for tithes, for the agistment of cattle there. The defendant thereupon suggests, that by the custom of England no tithes ought to be paid for agistment of cattle kept for plough or pail.

And now a motion was made for a prohibition, because the plaintiff cannot libel for the agistment of cattle but for such as are fed in the same parish, and not elsewhere; and the pasturage, of cattle used for husbandry in the same parish is not titheable, because the parson has tithes for them in another kind.

On the other side it was said, that the parson is to have a profit where the parishioner has any benefit, and that he is an inhabitant wherever he has land.

But the court would not grant a prohibition upon the first motion, but gave the defendant leave to amend his suggestion, by adding, that he had arable land in Swillington, and exercised husbandry there, which was amended.

Afterwards in Michaelmas term it was moved again, and the court were of opinion, that if the cattle depastured were not for ploughing the land in the same parish where they are fed, he shall pay tithes, though they plough in another parish; and if he had more cattle than he employed for the plough in the same parish, he ought to pay tithes for them. But the court ordered the defendant to make affidavit to ascertain the fact.

(1) Vide *Scoles v. Lowther*, post, 621.

M. 7 W. 3. C. B. *Bastard v. Hancock*. [Carth. 361.]

After great debate, the court of Common Pleas unanimously resolved that the action for not setting out tithes on 2 E. 6. was founded on a tort, and not upon a contract, for not guilty is a good plea to it, and therefore one may be found guilty and the other acquitted, as in other actions upon torts.

DEBT upon the 2 Edw. 6. in which the plaintiff declared for 72*l*. the treble value, setting forth, that he was the lawful proprietor of the tithes arising within the parish of Lanlivery, in Cornwall; and that the defendants were occupiers of thirty-five acres of land within that parish, and that they had sown so many acres thereof with corn and grain, and had carried it away without setting out the tithes.

Upon *nil debet* pleaded, the cause was tried at Launceston assizes, before Holt,

HOLT, Ch. J. and the jury found that the defendant Hancock *debet* 18l. but *quoad* the other defendants *nil debent*.

And now it was moved in arrest of judgment, for that this verdict had abated the action of the plaintiff, because it is an action of debt grounded on a contract which is entire; and here the plaintiff has founded his action upon a contract made with three persons, and the jury find it *quoad* one of them alone.

So that the plaintiff was mistaken in his action, for he ought to have brought it against Hancock only, and not against the two other defendants, and this was compared to the common cases in actions upon general contracts and promises.

But after great debate, the court of C. B. in Michaelmas term, 7 W. 3. unanimously resolved, that this action was founded on a tort, and not upon a contract, for *non culpabilis* is a good plea to it, and therefore one may be found guilty and the other acquitted, as in other actions upon torts.

The plaintiff had judgment.

H. 7 W. 3. Scacc.

Stephens v. Martin and others. [1 Wood, 357. Bunb. 169. Dodd's MS. 162.] 1 Rayn. 82. 2 Gw. 549.

Cambridgeshire, 20th February, 1696.

THE bill stated that the plaintiff was and had been ever since the year 1693, vicar of Lynton, in the county of Cambridge, and was thereby entitled to the tithes of carrot-roots, turnips sowed and hoed, parsnips, apples, pears, plums, calves, sheep, lambs, wool, milk, and to all other small tithes whatsoever; that the defendants, in the year 1694, were severally inhabitants, owners, and occupiers of several parcels of lands and grounds which were ploughed, sowed, and hoed with peas, turnips, carrot-roots, and other garden stuff, the tithe whereof did of right belong to the said vicar.

The defendants denied that he, as vicar, ought to enjoy the tithes of carrot-roots, turnips, or peas, or any other tithes, save what are expressed in the endowment; and said that the master and scholars of Pembroke Hall, in Cambridge, were the proprietors of the rectory impropriate of Lynton; that in 1473, some controversies arising between the master and scholars of the said college and one T. Green, then vicar of the said vicarage, touching the mansion-house and some tithes then supposed to belong to the said vicarage, they, by the assent of the then bishop, for quieting and appeasing those differences, and declaring and settling the rights of the vicar for the future, did mutually execute certain indentures, dated the eighteenth of June, 1473, as is therein mentioned; that no carrot roots, turnips, or garden peas, till within sixty years last past, were ever sowed or hoed in any of the closes or common field lands within the said parish; that one Mayo was the first man that sowed the same; which being found very profitable in husbandry, the example was followed by others in the said parish; that the proprietors, or their farmers, of the said rectory, did collect and receive tithes thereof, or some composition for the same; that for several years last past, and in the said year 1694, there had been, in the closes and common fields within the said parish, many acres sowed and hoed with carrots, garden or hasting peas, and turnips; which lands always before that time, have, or ought to have paid tithes to the rector or farmers of the said rectory, and make up a considerable part of the titheable lands of the said parish. The defendants further set forth their quantities of tithes, and the several things for which they had paid tithes; and insisted that they used to pay the farmer of the rectory of Lynton after the rate of ten shillings for every acre sown with peas and turnips in the same year; six shillings an acre for what was sown with peas only; four shillings for turnips; and four shillings for carrots; which rates they believed were sometimes more than the worth of the tithes; and said that they had not paid the same as yet, but that they were willing to pay them to whom the court should adjudge the same of right to be due and payable.

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The plaintiff replied, the defendants rejoined, and witnesses were examined on both sides; and upon reading the composition between the master and scholars and the said Green, dated the eighteenth of June, 1473, before-mentioned, and also a confirmation thereof by the then Bishop of Ely as ordinary; and likewise several proofs taken in the cause, and upon mature and deliberate debate of the whole,

The court is of opinion, and does declare, that the tithes of garden or hasting peas, whether set or sown, which are managed with the hoe, do belong to the vicar, and not to the impropriator; and that the tithes of carrot-roots and turnips do also belong to the vicar there, and not to the impropriator or his farmer; wherefore

It is ordered and decreed, that the defendants shall pay to the plaintiff, vicar of Lynton aforesaid, the tithes of all such garden or hasting peas that have been by them, or by their order, set or sown, and managed by the hoe as aforesaid, in the said parish and the titheable places thereof; and that the defendants do severally account for the tithes of such peas; and also for the tithes of turnips and carrot roots, and all other titheable matters and things due to the plaintiff from the said defendants for 1694, according to their answer and the proofs taken in the cause; which said account is hereby directed to be taken by the deputy remembrancer, who is to report the same; and the said defendants shall pay moderate costs throughout; the costs to be taxed by the said deputy.

EDW. WARD.

NICH. LECHMERE.

LITTLETON POWIS.

Determined, that tithes of peas and beans are never paid to the vicar, but always to the impropriator, without an endowment or usage to the contrary: and this decree was affirmed upon an appeal to the House of Lords. [*Bamberg.*]

Resolved, that the vicar shall have the tithes of turnips and of hasting or grea peas growing in the field, and managed with a hoe. Note, the land was field land and ploughed, but it was proved that until within thirty years the vicar had them, and that then the quantity increased, and the impropriator took them. Decree affirmed in the House of Lords. [*Dodd.*]

H. 7 W. 3. Scacc.

Hawkins v. Chittle. [*Dodd's MS. 162.*] 1 Rayn. 77. 1 Wood, 356.

Non-payment of tithes of the glebe by a lessee, will induce the court to presume that it was discharged upon the endowment.

THE lessee leased his glebe, the lessee sowed it with corn, the impropriator brought a bill for his tithes, and upon debate the court resolved: 1. That *prima facie* the lessee of the vicar should pay tithes, for the vicar himself is privileged in respect of his person. *Quare*, (by *Dodd*) for an ecclesiastical person may prescribe in *non decimando* for himself and his tenants. Bishop of *Winchester's* case. (1) 2. That if the glebe had been before leased and the lessee had not paid tithes, it was evidence that the land by the endowment was discharged, and this was the case in question, and the bill dismissed. See *Saunders v. Ryall*, Cro. Eliz. 479. 579. Hob. 188. (2) and a case cited by Ch. B. WARD of *Greenwood v. Grainger*, 1684, where it was resolved that the court would presume an endowment upon non-payment. See *Degge*, 200.

(1) *Antè*, 119.(2) *Antè*, 570.

E. 8 W. 3. Scacc. & Dom. Proc.

Edwyn Sandys v. Eastmond. [*Show. P. C. 192.*] 1 Rayn. 78.
1 Wood, 364. 2 Gw. 538.

Agistment tithe is to be paid for oxen and unprofitable cattle,

THE case was no more than this; the parish of Yeovilton, consisting much in pasture land, and the plaintiff having been rector thereof for twenty years last past, and upwards, and being entitled to the great and small tithes and

and all other dues, within the said rectory, exhibited his bill in this court against the defendant Joseph Eastmond, in his own right, and as executor of Henry his father, and against the other defendant, Samuel Noyle, for agistment tithes, for depasturing and fattening their oxen, and other unprofitable cattle, within the said rectory, from the year 1677, to the time of exhibiting his bill, which was in Michaelmas Term, 1692.

The defendant Joseph Eastmond, by his answer, admitted, that he had assets sufficient to answer the plaintiff's demands; and both of them admitted, that they and the testator had fattened and depastured divers oxen yearly upon their lands in the said parish, but said, that some of them were first used to the plough, and afterwards fattened, when turned off from the plough.

The Court of Exchequer thereupon, viz. May 26, 1696, decreed tithe-herbage to be paid for the defendant's and the testator's oxen and unprofitable cattle, not used for the plough, and also for their oxen and unprofitable cattle, used for the plough, for and during the time they were grazed and fattened in the parish for sale, after they were turned off, from the plough; which decree was affirmed upon the following appeal to the House of Lords.

It was insisted on, in favour of this appeal, that the decree was unjust; and then were quoted some texts of scripture about muzzling the ox, &c. and also it was urged, that that part of the decree concerning oxen once used to the plough, was erroneous; and there were cited all the cases in the books for exemption of plough cattle from tithe-herbage, and that this was double tithing; and it was insisted on, that the reason of the thing was against it in this case, because the agistment of these cattle was necessary to sustain that labour, which promoted the gain of which tithe was paid; that this privilege extended to all such oxen, as ever had been used to the plough; that the exemption continued after they were forborne to be used at the plough; for there was the same reason to continue the exemption afterwards, as there could be to allow it during the interval, when they did not draw the plough; and these and other reasons urged, it was prayed, that the decree for tithe, as to such cattle as ever had been used with the plough, should be reversed.

On the other side, it was urged, that the decree is agreeable to the law, and supported by many resolutions in the Court of Exchequer, that there was a reason for tithe in this case; because these cattle, though formerly used to the plough, ceased now to belong to it, and consequently tithes became due; that there is a difference in the nature of the thing; for when the cattle feed in order to labour, the parson has a tenth of the benefit produced thereby; but when they are fattened only for sale, it is otherwise.

That this was a settled and allowed difference in the Exchequer, that while the oxen are working, no tithe shall be paid for their feeding, because there are tithes of other things, arising by the labour of such cattle; but when they do no work, and are turned off to be fattened, and are grazed, there tithes shall be paid for the herbage which they eat, they being no way beneficial to the parson, in any other tithes; and many cases in the Exchequer were cited to warrant this distinction; and it was said, that none could be alleged to the contrary; wherefore it was prayed, that the decree might be affirmed, and it was affirmed.

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&
EASTMOND.

for the time they
are grazed and
fattened for sale,
after they are
turned off from
the plough.

H. 8 W. 3. Scacc. *Browne v. Chaplin*. [Dodd's MS. 162.]

TITHE bill, resolved that a *modus* of 20 shillings *per annum* for the small tithe of land worth £26 *per annum* was good, for the *modus* may be better than the tithe in kind, and the value of small tithes uncertain; the cases of *Dodderidge* and *Startup*, (1) and *Edge* and *Oglander*, were cited. But the case of *Vicaridge* and *Goodier*, of *Heathorp* in *Oxon*, was also cited, where £30 for all the small tithes was adjudged too great a *modus*.

(4) *Ante*, 566.

A *modus* of 20s. *per ann.* for the small tithes of land worth £26 *per ann.* is good. £30 in lieu of all small tithes was held too great.

H. 8 W. 3. Scacc.

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Wilkinson v. Newson. } [Dodd's MS. 163.]
Bobbot v. Seager.

Quere, Whether it shall be intended that a monastery came to the crown by 27 H. 8. where the value is not proved. Dodd thought the coming after the 4th Feb. 27 H. 8. the criterion of exemption, that ministers' accounts are good evidence of value, and that there may be discharge of tithes in part.

THE first for the tithes of Langthorpe in York of the possessions of the priory of Newburgh, and the second for the tithes of Michael Creech in Somerset, part of the possessions of the priory of Montacute, the court inclined, 1. That notwithstanding a surrender produced of them to the crown 30 H. 8. it shall be intended that they came by 27 H. 8. if the value be not proved. 2. That a minister's accounts of annual and casual profits should not be evidence of the value. 3. That these religious houses seldom or never had partial discharges, for in the case of *Bobbot*, they always paid great tithes, but never small. Note. As to the first, it appeared to me, that the law is clearly to the contrary, for the statute 27 H. 8. gives only those under £200 *per annum*, and then came the statute 31 H. 8. which did not give the greater abbies only, but the words of the act are rather in confirmation of what had been given to the crown, and though exemption is extended to all lands which from and after the 4th of Feb. 27 H. 8. came to the crown, and the surrender in 30 H. 8. is an evidence that they came to the crown after the 27 H. 8. especially with the usage of non-payment.

As to the second, that a minister's account is good evidence of the value, for many of the surveys are lost. 3. As well as they may be discharged of the whole, it appears to me clear, that they may be discharged partially, or for some part, for their discharges were infinite, and non-payment is the best evidence in such cases, but *WARD*, Ch. B. held the contrary as to this point, although not absolutely.

E. 8 W. 3. Scacc. *Harding v. Golding.* [1 Wood, 365.]

Wiltshire, 8th May, 1696.

Tithes are due of apples fallen as well as other apples.

THE bill stated, that William Hicks, rector and incumbent of Broughton Gifford, in the county of Wilts, did lease and demise to the plaintiff the great and small tithes arising therein; and that he had been legal farmer of the said tithes, and so entitled to the same, from the twenty-fifth of March, 1693, to the time of filing the bill.

The defendant put in his answer; the plaintiffs replied; the defendant rejoined; and witnesses were examined; and upon hearing counsel, and reading the proofs,

It is ordered, that the defendant shall account with and pay to the plaintiff the value of his tithe fruit for the two years demanded by the bill, and the tithe of all fallen apples as well as other apples, and the value of the tithe-hay of the half acre of land, and of the cock of tithe-hay taken away by the defendant, and eightpence a calf, according to the custom of the said parish, for the tithe of every calf which he had fallen within the said parish during the said time, and the value of the tithe-lambs which had fallen within the said parish, and the tithe-wool of the sheep which he shored therein, and had not paid to the plaintiffs, and for the value of the tithes of the other things titheable demanded by the said bill; and it is referred to the deputy-remembrancer to take the said account, and report the same.

Tr. 8 W. 3. C. B. *Shapcott v. Mugford.* [1 Ld. Raym. 187.]

Case for against the person for not carrying away tithes in a convenient time

CASE: The plaintiff declares, that he was possessed of divers closes in B. which he sowed with corn, and when it was ripe he reaped it, and made it into sheaves, and duly severed the tithes thereof from the other nine parts; that the defendant was proprietor of the tithes; that the plaintiff required the de-

defendant to take away the tithes off his land, but that the defendant did not take them away in convenient time, but suffered them to continue there upon the land from the fourth of June, 6 Will. 3. until the suing of this action; *per quod per totum tempus predictum* the grass did not grow where the corn lay, and the plaintiff lost the benefit of the residue of the grass in that close, because he could not depasture his cattle, for fear of doing damage to the corn. Not guilty pleaded. Verdict for the plaintiff and entire damages given. Serjeant Gould moved in arrest of judgment, that the action will not lie, because, the plaintiff might have prevented any injury which this corn could do him. For as soon as the tithes are duly severed, the property of them is vested in the parson; then if upon notice he do not carry them away, they may be distrained as damage feasant, or trespass will lie against him. As where an executor does not remove the goods of the testator in convenient time after his death, the owner of the house, where they are, may have trespass against him. 2 Cro. 204. *Stodden v. Harrey*. Then when the law has prescribed a remedy, the party must be content with it, and shall not have any other. And therefore in this court in a case between *Thornton* and *Austen*, *intr.* Hil. 4 & 5 Will. & Mar. C. B. Rot. 1051. the plaintiff brought case against the defendant, and declared that he was possessed of a close, and the defendant dug pits in it, &c. *per quod*, &c. and after verdict for the plaintiff it was adjudged, that the action will not lie; because the cause of action was properly trespass, for which the party might have an action of trespass, but could not turn it into an action upon the case. But the court answered, that doubtless in the principal case the action would lie, and so they said it had often been adjudged. See 1 Roll. Ab. 109. pl. 36, 37. And though it should be admitted, that the plaintiff might have had trespass against the defendant for not taking away the corn in convenient time, yet this was no argument, because in many cases the law allows a double remedy. But they held, as this case was, the plaintiff could not have trespass, but only case. For he could not have trespass *quare vi et armis* he did not take away his corn, which is but a *non feasant*. But they agreed, that the case of *Thornton v. Austen* was good law, for the plaintiff turned that, which was properly trespass, into an action upon the case, only with the design to evade the statute of 22 & 23 Car. 2. and to get full costs, though the damages were under forty shillings. And that judgment of the case of *Thornton v. Austen* the judges of the King's Bench approved. [Note for this same reason this term between *Hills* and *Clerk* the plaintiff brought case against the defendant *quare amputavit et spoliavit* his corn, by which he lost it; after verdict for the plaintiff upon the general issue pleaded judgment was arrested.]

Then Gould took another exception, that the plaintiff has laid two several damages in his *per quod*, and entire damages are given, then if the action does not lie for the one part, the whole shall be arrested; but (by him) the action does not lie for the loss of the benefit of the grass because he could not depasture his cattle, &c. for he might have put in his cattle without danger; for if the defendant did not take away his tithes in convenient time after notice, the plaintiff might put in his cattle; and though they eat the corn, yet it would be *damnum absque injuria*. Then to suffer the plaintiff to bring an action upon a supposal that he could not put in his cattle when he might; is to suffer him to maintain an action for his own negligence, which the law will not permit. Against this, Birch, Serjeant, for the plaintiff answered, that the plaintiff could not have put in his cattle, no more than if lessee for years at the end of his term leave corn upon the land, the lessor might put in his cattle to eat it, which he cannot justify. For where a right is once vested in a party, he who destroys it shall be a trespassor. And he cited Mich. 22 Car. 2. B. R. Rot. 249. *Lutcomb v. Porter*, the case in *terminis* with the present case; and after verdict, judgment there was given for the plaintiff. And it was adjudged *per curiam* in this principal case, that the plaintiff could not put in his cattle, and eat the corn; for if that should be allowed it would subvert the foundation of this action for the other part, which has often been adjudged maintainable. Besides that it is unreasonable, that the plaintiff himself should be judge, what

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after they are set out, and not trespass, which does not lie for a non-feasance. The parishioner cannot put in his cattle and eat the corn tithes, if the person do not carry them away.

is

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is convenient time. And to permit him, if the corn be not removed at the day, to put in his cattle, and eat all the corn, would be a much a greater loss to the parson, than that which the plaintiff has sustained by the continuance of the corn upon the land. But it is much more reasonable to permit the plaintiff to bring an action against the parson, and so the court to be judge of the reasonableness of the time, and that the recompense be proportionable to the loss sustained. And therefore judgment was given for the plaintiff.

Tr. 8 W. 3. Scacc.

Medley v. Talmy. [Dodd's MS. 168.] 2 Gw. 559. Rayn. 81.

Though one cannot prescribe in *non decimando*, yet, against a lay impropiator, the court will presume, no tithes having ever been paid, that they were granted to the terre-tenant, and look upon them as tithe free.

BILL by the lessee of the provost, &c. of Eaton, of the impropriate tithes of Leominster, in the county of Sussex, for the tithe of corn and hay. The defendant insists that his lands, by some lawful means, are discharged; and that in 1652 he bought the lands, and all tithes thereon.

Upon the hearing, the court declared, that though the tenant could not prescribe in *non decimando*, yet that against a lay impropiator, they would presume tithes granted to the terre-tenant, no tithes having ever been paid, but the land (as sworn) looked upon as tithe-free; and though the occupier could not shew the grant; and although the defendant had insisted that the lands were free or discharged from tithes, yet the court would intend the freedom or discharge to be upon the non-payment, that the tithes were formerly granted away.

Quere. See the cases of Sir John Hoskins, Dean and Chapter of Litchfield, Dr. Hickeringshills, and several others, which *semble contrâ*. But in this case the bill was dismissed by the Chief Baron and Powis.

BILL for tithes generally. The defendant states, that, in 1652 his father purchased the lands whereof the tithes are claimed, and by the purchase-deed they are mentioned to be tithe-free, and are conveyed as such; that defendant is owner and occupier of the said lands, which contain eighty acres, and are of only 30*l.* a-year value; that all the said lands are and will appear to be free, and by lawful means discharged from the payment of tithes of corn and grain, and other predial tithes, or any customary rate in lieu thereof; that the ancient deeds relating to the said estate are lost or mislaid, so that he cannot particularly set forth by what ways or means the said lands are exempt or discharged from tithes; he discovers quantities and values. Upon long debate of the matter, the court did not think fit to decree for the plaintiff without a trial at law, but proposed that he should bring his action on the statute (1); which the plaintiff declining, the bill was, by his consent, dismissed without prejudice and without costs.

(1) *Qu.* Whether an ejectment should not rather have been directed?

M. 8 W. 3. Cam. Scacc.

Portman and Forty-two others, Parishioners of Staple Fitzpaine, in Somerset, v. Snow. [Dodd's MS. 172.]

Where distinct *modus*es are claimed, there must be distinct suits by the several parties.

UPON hearing, it appeared that the bill was brought for establishing *modus*es in the parish, but each party claimed a distinct *modus* for his farm, and not any general *modus* throughout the parish; and the court dismissed the bill without prejudice, because it is not possible to try forty-two several *modus*es, for the infinite vexation and multiplicity of them; besides they were in their nature forty-two several suits or causes.

M. 8 W. 3. C. B. *Scoles v. Lowther*. (1) [1 Ld. Raym. 129.]

1695.

LOWTHER is parson of the parish of Swillington, and Mr. Scoles lives in Kippax, the next adjoining parish, and occupies a large parcel of arable land there, and has forty acres of meadow and pasture in Swillington, and four acres of arable land. Lowther libelled in the spiritual court of York against Scoles for tithes of the cattle depastured in Swillington. Scoles, upon a suggestion that barren cattle, kept for ploughing the land, and cattle for the pail for the use of the house, ought not by law to pay tithes, and that these cattle, for the tithes whereof Lowther now libels, are such, moves for a prohibition. And it was granted to him *nisi*, &c. And now Serjeant Pemberton, upon affidavit, that Scoles carried the milk of his cattle to his house in Kippax, and used it there, and that he made use of the dry cattle for ploughing his land in Kippax, moved that the rule might be discharged. And it was resolved by the whole court, that the defendant Lowther should have tithes of the milk. For though *Wright*, serjt. objected, that if a man have arable land without a house, he is entitled to be discharged of the tithes of the milk, which maintains the servants, who plough the land, as well as if he had had a house, in which the milk were spent; yet the court answered, 1st, That the law was otherwise, for it is of the same nature with wood which is burnt in the house, which is exempt from the payment of tithes, only so long as it is burnt in the house. So the law is in the case of milk, which is only discharged of tithes because it is used in the house. And *per curiam*, of common right tithe-milk is payable at the parsonage or vicarage house. 2d. As to the tithes for the agistment of the barren cattle, the court said, that if in this case there had not been any arable land in Swillington, it is without doubt that the parson ought to have had tithes. For the reason why cattle of the plough are excused from the payment of tithes is, because they are employed for the improvement of the arable land in the same parish, by which the parson has better tithes of the arable land; but here that reason fails, for the parson of Swillington has no tithes of the land in Kippax. In the same manner where a man has wood in one parish, and arable land in another; if he make use of this wood in making fences for his arable land, yet he shall pay tithes to the parson where the wood grows. But it had been otherwise if it had been the same parish. The same law where the wood grows in one parish, and is spent in the owner's house in another parish. Now then the question here will be, whether the ploughing of these four acres of land in Swillington will excuse these cattle from the payment of tithes? And *per curiam*, it will excuse only those cattle which only plough that land of the four acres, and not those which plough any land in Kippax. For the parson ought to have something in lieu of the loss of those tithes, which can only be of the four acres in Swillington. Then **POWELL**, J. took exception to the suggestion, where the plaintiff suggests, that this barren cattle plough the land, &c. but does not say, *per quod* the parson had *uberiores decimas* in another place. And (by him) *uberiores decimæ* does not signify only, that the parson will have better tithes out of the arable land than he would have had if the cattle had not ploughed it; but it signifies that he will have so much more tithes (than otherwise he would have had) as will fully recompense the loss of the tithes of the cattle; or it will (as he expressed it) overweigh that loss. But as to this signification of *uberiores decimæ*, **TREBY**, Ch. J. doubted much. But in the principal case a prohibition was granted *quoad* these cattle, which only ploughed the land in Swillington. And as to the rest, Lowther had liberty to proceed below.

(1) See the case of *Swailes v. Lowther*, 5 Mod. 96, antè, 614, which appears to be the same.

H. 8 W. 3. B. R.

Gale v. Ewer. [Com. 22.] 12 Mod. 117. 4 Gw. 1579.

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A PROHIBITION was moved for to the consistory court of London, where Ewer, the rector of Ingatestone, libelled for refusing to set out tithes, or if they were set out, such setting out or severance was, in the absence of, without

Milk is only discharged of tithes when used in the house, and that house must be in the parish in which it is produced.

Of common right tithe milk is payable at the parsonage or vicarage house.

Barren cattle used for the plough will only be exempt when used on arable land within the parish in which the exemption is claimed.

Wood which is burnt in the house is only exempt from tithes so long as it is burnt in the parish in which it grows.

Where a man has wood in one parish, and arable land in another, if he make use of the wood in fencing the arable land, yet he shall pay tithes to the parson where the wood grows; but if it had been in the same parish, it would been otherwise.

POWELL said, that *uberiores decimæ* do not only mean better tithes, but so much more as will fully recompense the loss of the tithes of that by means of which *uberiores decimæ* are produced. But of this **TREBY**, Ch. J. doubted much.

The clause of 2 E. 6. which gives double value for carry-

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ing away corn, &c. before tithes set out, gives the spiritual court conusance for refusing to set out tithes.

By the common law it is not necessary to give notice of setting out tithes.

HOLT, Ch. J. thought the turning of cattle to the tithe, made it a fraudulent severance, and that a suit might be maintained for it in the spiritual court.

without giving notice to the rector, and also that the plaintiff after severance without notice to the rector, took the nine parts, and turned his cattle into the meadows where the tithes were, who destroyed and consumed the tithes: and upon a suggestion that by the statute 2 E. 6. c. 13. all the king's subjects ought justly to set out their tithes, &c. and that the plaintiff had separated them from the other nine parts; and whereas the exposition of all statutes belongs to the temporal judges; and whereas tithes divided from the nine parts are lay chattels, and a suit for trespass, &c. is merely temporal, &c. this motion was made.

And first it was urged that the spiritual court ought not to proceed for refusing to set out tithes, but for the subtraction of them only: for by the statute 2 E. 6. c. 13. it is enacted that, that if any person do subtract or withdraw any manner of tithes, &c. the party so subtracting or withdrawing the same may or shall be convicted or sued in the king's ecclesiastical court, &c. And the clause which gives the suit in the spiritual court for the double value says, if any person carry away his corn before the tithe thereof set forth, &c. so that the suit in the spiritual court ought to be for the subtraction only, and not for refusing to set the tithe out: the clause which provides, that all the king's subjects shall duly set out their tithes, gives the penalty of treble value, but the remedy is by action of debt in the temporal courts. This clause for the setting out of tithes is introductory of a new law, as appears by 2 Inst. 649. and by consequence the exposition thereof appertains to the temporal courts, which ought to judge whether the tithes were duly and without fraud severed and divided; for the manner of tithing ought not to be governed by the canon or civil law.

A prohibition was granted Trin. 1 W. & M. upon a suggestion that tithes were set out, 2 Vent. 48. But in the present case the court did not incline to do so; for the clause which gives double value for carrying away corn, &c. before tithes set out, gives the spiritual court conusance for refusing to set out tithes. 2 Roll. Abr. 299. l. 15.

2dly, It was urged that the spiritual court ought not to proceed for the setting out of tithes without notice given to the rector; for although the ecclesiastical law requires notice to the parson when the tithes are severed, yet the common law requires no such thing; as HURTON says it has been adjudged. *Noy*, 19. The statute 2 Ed. 6. c. 13. says only, it shall be lawful for every party to whom any of the said tithes ought to be paid, &c. to view and see the said tithes to be justly and truly set forth, and the same quietly to take and carry away, &c. and although it be that as to the taking and carrying, this statute is declaratory, yet as to the view, it is introductory of a new law; as it appears 2 Inst. 650. And the penning of this act is, that it shall be lawful to view, &c. which shews the intent of the legislature was not, that the parishioners should give notice thereof; and that no notice is necessary has been oftentimes adjudged; thus 13 Car. 1. between *Chase* and *Ware*, in this court, and afterwards affirmed in error. *Style*, 342. 1 Rol. Abr. 643. l. 30. So also Trin. 1 W. & M. 2 Vent. 46.

And of the same opinion was the court in the present case; and a prohibition was granted as to the suit for not giving notice of setting out the tithe. It was urged on the other side, that this matter ought to have been pleaded in the spiritual court. But HOLT, Ch. J. answered to that, there was no necessity that it should be so pleaded; forasmuch as it appears upon the face of the libel, that the suit was for setting out tithes without giving notice; it would have been otherwise if the suit had been for refusing to set out tithes. The plea, that the tithes were severed, is no good cause for a prohibition, unless they refuse that plea for want of notice given of the severance. But HOLT, Ch. J. thought the turning of cattle to the tithe made it a fraudulent severance, and that a suit might be maintained for it in the spiritual court.

H. 8 W. 3. Scacc. *Fifield v. Squire and his Wife.* [1 Wood, 375.] 1697.

Nottinghamshire, 11th February, 1696.

THE bill stated, that for twenty years past the plaintiff was instituted and inducted into the vicarage of East Drayton *cum membris*, in the county of Nottingham, whereof Askham was a member, and had duly performed the cure of both places, and by reason thereof was legally entitled to all tithes of flax linseed, rape seed, hops, milk, fruit, roots, pasturage tithes, and all other small tithes, oblations, obventions, offerings, dues, duties, and customary payments, arising within the said parish of Askham, and the titheable places thereof; that W. Sandys, late of Askham, deceased, and the defendant Margaret, his daughter and executrix, and the defendant Squire and his wife, since their intermarriage, were occupiers of several lands and grounds within the liberties of Askham for thirteen years past, and had several titheable matters therein, the tithes of which ought to have been paid to the plaintiff.

A witness ordered to attend in the Exchequer, to explain his deposition to an interrogatory, and sworn and examined.

The defendants confessed the plaintiff to be lawful vicar of East Drayton *cum membris*, as in the bill was stated, and said, that the said W. Sandys, in his life-time, was an inhabitant and occupier of a messuage and lands in Askham, and that the same, for the time whereof the memory of man is not to the contrary, had been part of the possession and demesnes of the Archbishop of York, and that he, his lessees, and tenants, and their undertenants and farmers, had always held and enjoyed the premises, freed and discharged from the payment of all manner of tithes to the vicar of Drayton or Askham.

An issue was directed to try, "Whether the demesne lands of the archbishop of York, lying in Askham, be discharged from the payment of all small tithes to the vicar of Drayton *cum Askham* or not?"

An order of the ninth of February instant was made, that one R. Stanniland, a witness examined on behalf of the plaintiff, should attend, at the hearing on this cause, to explain his depositions to the ninth interrogatory concerning the value of tithe of the hops; who, being now sworn in court, deposes that the tithe of the hops were worth between three or four pounds a-year for seven years.

In pursuance of the above order a trial was had, and a verdict found for the defendants, viz. that the lands in the defendant's possession were exempt from payment of tithes, and every thing in lieu thereof, to the vicar of Drayton *cum Askham*.

The court accordingly, on the 6th of May, 1696, ordered and adjudged, that the said bill be dismissed.

EDW. WARD.
NICH. LECHMERE.
LIT. POWIS.
JOHN BLENCOWE.

H. 8 W. 3. Scacc.

Eachard v. Brown and others. [Dodd's MS. No. 71. p. 183.(15)]

THE plaintiff was vicar of — in Sussex, and brought his bill for small tithes, and amongst others demands tithes for turnips, against A. & B. and upon the proof it appeared that A. had ten roods of turnips, which he plucked

Tithes shall be paid for turnips when severed and eaten by cattle and hogs, but none shall be paid when not severed.

(1) In the report of this case in No. 70, p. 105, before alluded to, (p. 578.) it will be seen that it varies from that given above in the most material point, viz. that tithes should be paid for the turnips not severed. Besides the internal evidence afforded by the case itself, of the superiority of No. 71, it may be added, that No. 70 is in English, and No. 71 in the original language of the reporter: the words of the latter are "*& q. B. payera null tithes p. son turnepps quia not severed.*"

The report of the case in No. 70 is as follow:—"Bill by vicar of —, in Sussex, for small tithes int. al. for turnips, against A. and B., on the proof it appeared A. had ten roods of turnips which he plucked up and carried into another field (I suppose in same parish) and there fed his cattle and hogs on them; B. had ten roods growing and did not sever them, and decreed that B. should pay tithes for the turnips because not severed. *Quere*, and see *Daniel v. Tuffnall*, ante, 578.

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RICHARD
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OTHERS.

up and carried into another field, and there fed his cattle and hogs upon them, and B. had ten roods of turnips growing and did not sever them, and decreed that A. should pay tithes for the turnips severed, and that B. should pay no tithes for his turnips, because not severed. Note, 24 Feb. 1697.

Tr. 9 W. 3. Cam. Scacc.

Harris v. Adge. [Dodd's MS. No. 71. p. 185. No. 70.] Rayn. 84.
2 Gw. 560.

Between *John Harris*, Clerk, Rector of *Easton Gray*, in *Wiltshire*, plaintiff;
and *Joseph Adge*.

Where tithes has been paid, the court will be inclined to presume the reading of the articles.

THE plaintiff in a tithe bill set out that he was presented, instituted, and inducted in 1683, and ever since continued lawful rector, and that the defendant had occupied twenty acres ever since, &c. Upon hearing the cause, it appeared that the plaintiff had ever since officiated, and all persons had paid their tithes except the defendant, who had paid for two years and then forbore under pretence the defendant did not read the articles, &c. the defendant in 1697 got a new presentation, and had induction, and now brought his bill without taking any notice of his new title, and resolved,

1. That having done the work he ought to have the wages, in such a case, and that the court will presume very much for him and his having read the articles in such a suit, although he had not proved it, but on the contrary there was proof that he had confessed that he had not read the articles.

2. At least that his new title would entitle him to all arrears notwithstanding he had not mentioned his title in his bill, for it appears to the court, here is the parson entitled one way or another. Decreed to account.

THE court presumed, that the plaintiff had read the articles, where tithes had been paid; though this was the defendant's defence.

Tr. 9 W. 3. B. R.

Godfrey v. Matthews. [Comb. 427.]

Spiritual court cannot try a *modus* because the prescription differs; but if the question be whether the *modus* has been paid or not, they may try.

IN this case HOLR said, the ecclesiastical court cannot try a *modus*, though the original suit be for a *modus*, because the prescription differs; but if the question be payment or non-payment, then they may proceed.

Tr. 9 W. 3. C. B.

Norton v. Brigs. [1 Raym. 242.] 2 Lutw. 1043.(1) *Morton v. B.*
2 Gw. 561.

A payment for cows having calves in lieu of tithes for all cows and calves, and herbage and pasture of lands, is void, for a *modus* for one species can be no ground for a *modus de non decimando* as to another. A custom to pay certain sums for five cows having

A PROHIBITION was granted to suit for tithes of cows, calves, herbage, and pasture, upon suggestion of a custom, that every parishioner from time whereof, &c. had used to pay for every cow having a calf one penny, for every cow not having a calf one penny half-penny, as far as five cows, and for five

(1) The *modus* is thus laid in the pleadings in Lutw.: "And whereas also, in the parish aforesaid, there is, and from time whereof the memory of man is not to the contrary, has been a custom or *modus decimandi*, viz. that every tenant of lands within the parish aforesaid who has held and occupied any pasture lands within the parish aforesaid, and the bounds, limits and titheable places thereof, has paid, and for time whereof, &c. has been used to pay to the vicar of the vicarage aforesaid for

the time being, three halfpence for every cow having a calf up to the number of five cows, and for five cows having calves 2s. 4d., for six cows having calves 2s. 8d., and for every cow not having a calf 1d. in full satisfaction of all and singular the tithes of cows, calves, herbage, and pasture whatever of the tenants of lands within the parish aforesaid, and for every milch cow 1d. in full satisfaction and payment of all and singular tithes of milk."

COWS,

cows, one shilling and three-pence, and for six cows two shillings and sixpence, and for ten cows two shillings and eight-pence, in *plena satisfactione omnium decimarum vaccarum et vitulorum, et herbagii, et pasturæ*. The plaintiff declared in attachment upon this prohibition, and upon traverse of the custom a verdict was found for the plaintiff in the prohibition. Upon which *Lutwiche*, Serj. moved in arrest of judgment in Easter term last past, 1. That this custom was void, for it is laid to be a discharge of tithes of all cows, which is not; for nothing is laid for the tithe of the seventh, eighth, and ninth cows, and payment for the sixth cannot be payment for the seventh, &c. 2. This cannot be a discharge of the tithes of herbage, and agistment, for tithes of one thing cannot be a discharge of tithes of another, and tithes are payable of both; then since the custom is laid entire it is void in the whole. 3 Cr. 446. 475. And of this opinion was the whole court; and therefore judgment was arrested and a consultation granted, unless cause should be shewn this Trinity term. At which time Serjeant *Levinz* moved, that the prohibition should stand, because it appears here that there is a custom, and then the spiritual court has no jurisdiction to proceed; and therefore variance in case of a *modus* will not hurt, but the prohibition shall stand, because it appears, that the spiritual court has not jurisdiction; and when they have not jurisdiction the Common Pleas cannot allow them to proceed. *Sed non allocatur*. For *per curiam* the question is here, whether a *modus* be good or void. If the *modus* be void the spiritual court has jurisdiction; and the *modus* is void for the reasons given before. Then *Levinz* moved, that though the custom was void for part, yet it was good for one, two, three, four, and five cows, and therefore he prayed that the consultation should be granted only for that part which is void, and that the prohibition should stand for the residue. And by this he said, that a man might have a *modus* for five cows, and then for the residue he shall pay tithes in specie. And the court agreed the case put by him, but said, that in the principal case, the custom was entire for all cows, and therefore if it was ill in part it was ill in the whole; and a consultation was granted as to all. In this case, *TREBY*, Ch. J. said, that tithes are not payable for aftermath *de jure*, and therefore it is but form to lay a custom to be discharged of tithes of aftermath in consideration of making the former mowing into hay, for tithes are payable only of things *semel in anno renovantibus*. See *contrà* 1 Roll. Abr. 640. pl. 11. Parson of *Stanfield's* case.

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calves, six cows having calves, and ten cows having calves, in satisfaction for all cows having calves, is void; for there is no payment for any number between six and ten, nor when the number exceeds ten. *TREBY*, Ch. J. said that tithes are not payable of aftermath *de jure*, and therefore it is but form to lay a custom to be discharged of tithes of aftermath in consideration of making the former mow into hay, for tithes are payable only of things *semel in anno renovantibus*.

M. 9 W. 3. Scacc. *Anon.* [1 Freem. 334.] 2 Gw. 562.

IN a cause, where a parson preferred a bill for tithes, these points were held by the judges:

1. Where the parson had tithe-hops, no tithes should be paid for the poles which were used in the hop-yard. And a question arose, whether the parson should have tithes of the bark of the poles, the bark being sold; and by *LECHMERE* he should. But the chief baron and the others *è contrà*, for the poles being privileged, the bark shall be so too.

2. That for fuel spent in fire to dry the hops, tithes should be paid; because the parson had no benefit by that, the tithes being paid before they were dried.

3. That tithes ought to be paid as soon as the tenth part can be well severed from the nine, if there be no custom to the contrary; and so it is for corn and hay, as soon as it is made into shocks or cocks.

That for wood employed to hedge or fence corn, where the parson had tithe-corn, no tithe shall be paid; and it was said to be a general rule, that no tithes shall be paid for any thing *per quod decimæ fiunt uberiores*.

5. Whether tithes shall be paid for fuel spent in the house, where there is no custom, they said they should not determine, it being no point in this case; and

tithes of any thing whereby the tithes are increased. 5. *Quære*, Whether tithe shall be paid of fuel consumed in the house. 6. Wood land converted into tillage is not barren within 2 Ed. 6. but only such land as before produced no benefit to the owner. 7. No tithe is due for involuntary rakings, not fraudulent. 8. The parson cannot justify coming to set out tithes without the consent of the owner.

1697.

and there being opinions both ways, 1 Cro. 113. was cited at the bar, that such fuel shall not be discharged without a custom.

6. That land where wood grew, and was stocked up and converted into tillage, is not such barren land as ought to be exempted from payment of tithe; but only such is intended barren land, which, before the ploughing, produced no profit to the owner.

7. That for rakings of corn no tithe was payable, if they were involuntary; but if there were any fraud in leaving more than was necessary, that tithe should be paid.

8. That the parson could not justify his coming to set out tithes without the consent of the owner, because by the statute of Edw. 6. the owner is to set out his tithes, and if he do not, he is liable to the penalty of the statute.

Tr. 9 W. 3. Scacc. *Peirson v. Hoskerton*. [1 Wood, 380.]

Lincolnshire, 21st June, 1697.

An issue directed to try whether there was a custom to set out tithe lambs on Lammas-day. In a question between the farmer of an impropriator and a parishioner, for tithes, any impropriator returned upon the jury was ordered by the court to be a just cause of challenge.

THE plaintiff, as farmer of the impropriate rectory of Holbeach, in the county of Lincoln, claimed the tithes of wool and lamb arising therein; and stated, that the lambs yeaned and brought forth in the said parish were not, according to the usual course of husbandry there, fit to be weaned and taken from their dams before the first day of August yearly, or near about that time; that the defendant, since the twenty-ninth of March, 1691, occupied and enjoyed meadow and pasture ground, and kept sheep thereupon, from which he had yearly lambs, and from which he clipped and shored wool, for which he ought to have paid tithes to the plaintiff at the usual time of tithing thereof.

The defendant said, that for many years before the plaintiff was farmer, the parishioners generally compounded for their tithes, and therefore the customary and ancient way of tithing of lambs had been greatly neglected and altered; that the ancient customary time of setting out and delivering tithe lambs there was on or about May-day, and they were usually paid at clipping-day, which is generally about Midsummer-day.

The plaintiff replied, and thereby abridged the demands of his bill, and only proceeded for the tithes of the defendant's lambs in the year 1695, which he insisted ought, by the custom of the said parish, to be set out and paid at Lammas-day, and not at shearing-day, or any other time before Lammas-day; and discharged the defendant of all other demands in the bill.

The defendant rejoined, and said, that tithe lambs were not, by custom of the said parish, to be set out at Lammas-day, but at clipping time.

Upon reading several depositions on both sides, and on debate,

An issue was directed to try, "Whether there be a custom within the parish of Holbeach that tithe lambs ought to be set out and paid at Lammas-day, and not before?" to be tried by a special jury; and if any impropriator be returned upon the said jury, it is to be allowed a just cause of challenge.

On the said trial, a verdict was, upon full and long evidence, given for the defendant, "That there is not, nor time out of mind has been, a custom within the parish of Holbeach, that tithe lambs arising, renewing, and hap-pening within the said parish, should be set forth and paid for upon the first day of August, called Lammas-day, and not before the same day."

The court accordingly ordered and decreed the defendant to pay to the plaintiff fourteen shillings, for the value of the two lambs in question, according to the defendant's tender in his answer; but as to all the other demands, and the custom alleged and mentioned in the said bill, it is further ordered, that the said bill shall be dismissed with costs, to be taxed by the deputy-remembrancer of this court.

EDW. WARD.
N. LECHMERE.
LITTLETON POWIS.
J. BLENCOWE.

H. 9 W. 3, Scacc.

Layfield v. Enticknap. [Dodd's MS. No. 70. p. 104. No. 71. p. 182.]
2 Gw. 560. Rayn. 83. 3 Burn Ecc. L. 412.

1697.

THREE-PENCE a lamb, adjudged a void *modus*, being too rank; the court refused to direct an issue to try the *modus*, because void.

The court held the *modus* could not be, for that a lamb was not then worth two shillings and six-pence in that country.

The plaintiff, as rector of Chiddingfold, in Surry, brought his bill against the defendant for tithe lambs; the defendant insists that there was a *modus* for all lambs sold before St. Mark's-day of three-pence a lamb, and tithe lamb in kind for the rest; and upon re-hearing, the court were of opinion that three-pence was too great a sum, and therefore could not be a *modus*, for anciently a lamb could not be worth two shillings and six-pence, and then the three-pence is at least tithe in kind, and decreed tithe in kind; which to me (*Dodd*) seemed hard. *Nota*, the custom was not very clearly proved: but the court would not direct an issue, for they said it was a void *modus*. Also the Chief Baron said, that it was odd to have tithe in kind after St. Mark's-day, and a *modus* for lambs sold before. But it seems to me, (*Dodd*) that there is clear reason for it; and also that the *modus* is good. (1)

Modus of three-pence for a lamb too rank, and no issue directed, because a void *modus*; but *Dodd* thought it good.

(1) It will appear from a memorandum, p. 169. that the opinion of the reporter was entitled to some weight at that time.

"Mich. T. 8 W. 1696. Saturday, the 7th
"Nov. I received a message from the Lord-
"Keeper to attend him next morning, which
"I did. He very honourably proposed to

"make me a Baron of the Exchequer, or a
"Judge of the Common Pleas, upon the pre-
"sent vacancy, by the death of J. Powell,
"with many kind expressions. I was sur-
"prised at the thing; but, upon consideration,
"excused myself, and durst not accept it."

M. 9 W. 3. Scacc. *Poole and Draper v. Osborne.* [Dodd's MS. 180.]

ATITHE bill, wherein the plaintiff sues both defendants for all tithes, Draper answers, and insists upon a *non decimando* for tithe herbage in the hundred. Osborne answers by herself, and says she had no unprofitable cattle, but if she had, yet there is a *non decimando* in the hundred; and says she had a plot of meadow, which was compounded with the plaintiff for six shillings; the plaintiff replies, and takes out a commission, and both the defendants join in the interrogatories and examinations, that not titheable in the hundred, &c. The court condemned Draper in tithe herbage, and Osborne in eight shillings for hay only, and ninety pounds costs taxed; and Osborne only served. I moved the court to separate the costs, for they were several causes, and different duties decreed; and though Osborne had insisted that no tithe herbage was due by the custom, &c. yet that she had no herbage; but the court, upon debate, would not separate the costs, though I (*Dodd*) cited them *Lister v. Cape and Salmon*, where it was so done, 25th Nov. 4 W. & M. in this court, but the court notwithstanding would not do it. *Quere.*

Where two defendants put in several answers but joined in interrogatories and examinations, the court would not separate the costs, though they were several causes and different duties decreed. *Quere.*

H. 9 W. 3. B. R.

The King v. Sanchee and Tipper. [1 Ld. Raym. 323.]
Holt, 657. 12 Mod. 165.

SANCHEE and others, quakers, were cited into the ecclesiastical court, to answer there, upon their solemn affirmation, &c. concerning tithes withheld by them from the parson of the parish; and for not answering, the commissary, according to the statute of 27 Hen. 8. cap. 20. certifies their contumacy

1. The remedy in the spiritual court against contumacious quakers under 27 H. 8. c. 20.

is not taken away by 7 & 8 W. 3. c. 34. which gives a remedy in the temporal courts. 2. Where a statute gives a remedy in the temporal court for what was before suable in the spiritual court, its jurisdiction is not taken away, unless the statute alter the offence, and make it of higher degree. 3. A pension payable out of a personage (even in) lay hands may be sued for in the spiritual court, though a writ of annuity lies also for it at common law.

1697.
THE KING
v.
SANCHEE AND
TIPPER.

tumacy to two justices of peace, by whose warrant they were seised, and committed to prison; and being brought by *habeas corpus* into the King's bench, Mr. Robert Eyre moved, that they might be discharged. Because the new act concerning the affirmation of quakers gives the parson a remedy to recover such tithes by distress, by virtue of a warrant of a justice of peace; then where a statute gives remedy, the jurisdiction of the spiritual court is taken away, unless it be saved by the same statute. 5 Co. 73. b. Jones, 320. And he cited several statutes, where the jurisdiction of the spiritual court was saved, as 23 Eliz. cap. 1. 1 Eliz. cap. 2. In the same manner in the statute against usury, 3 Inst. 152. 2 Inst. 657. And from thence he inferred, that it was the opinion of those parliaments, that the spiritual jurisdiction would have been taken away by these acts, if it had not been saved by them. But *per curiam* this last act seems to be only an accumulative remedy, and not to repeal the act of Hen. 8. And in many cases the common law and ecclesiastical courts have concurrent jurisdiction; as if a pension be payable out of a parsonage by prescription, the remedy for this is either in the spiritual court, or annuity lies for it at common law; though Coke says the contrary in his second institute in his comment upon the statute *de circumspecte agatis*. But where the nature of the offence is altered by a statute, and a new penalty inflicted, then, after the party has been tried at common law and condemned, the ecclesiastical court should not proceed against him. As if a man be convict at common law for having two wives, or has been adjudged the reputed father of a bastard son, &c. But then NORTHEY took exception to the return, because it is said, that Sanchee, &c. were imprisoned for contempt in a suit for detention of tithes, or other ecclesiastical duties; and it ought to appear, from which the suit was, specially. For though the statute that gives this remedy is in general words, yet in the return the cause of imprisonment ought to be certainly expressed, to the end that it may appear to the court, that it was an ecclesiastical duty, for which they were imprisoned. And of this opinion was the whole court; and therefore the quakers were discharged out of custody.

H. 9 W. 3. Cam. Scacc.

Edge v. Oglander. [Dodd's MS. 129.] 2 Gw. 536. Bunb. 301.
1 Wood, 288. Ray. 71.

A *modus* of 8*l.* for a farm of 80*l.* held good, for a *modus* may be better than the *tithe*.

RESOLVED, that 8*l.* was a legal *modus* for a farm at Pancras, in Sussex; the farm was about 80*l.* *per annum*, the *tithe* about 16*l.* *per annum*, but sometimes not so much. Note, the *modus* was decreed by consent of the parson, seeing the opinion of the court. But LECHMERE said it was too big; the other Barons said, the *modus* may be better than the *tithe*, and yet good.

Tr. 10 W. 3. B. R.

Gardner v. Rooth. [2 Salk. 548. 12 Mod. 196.] 7 Mod. 137.
12 Mod. 207. *Pool v. Gardner.*

1698.

Where it appears upon the face of the libel that the spiritual court has not consanance, prohibition will be granted after sentence. A suggestion of a *modus* must be proved within six months.

WHERE it appears in the libel, or by the proceedings in the cause, that the consanance of the case does not belong to the spiritual court, a prohibition may be moved for and granted after sentence; and this holds in all cases, but where one is sued out of his diocese; for there if he do not take advantage of it before sentence, he shall not have a prohibition after sentence; the reason is, because the cause belongs to the spiritual court; and though it does not belong to that spiritual court, it belongs to some other, and not to the King's temporal court.—[Salkeld.]

A PROHIBITION was granted in a suit of tithes, on a suggestion of a *modus*; and consultation was prayed, because they had not proved their suggestion.

And *per curiam*, Supposing the plaintiff had declared in a prohibition, and the defendant had pleaded thereunto, yet the suggestion, by force of the stat. must be proved within six months. But then the suggestion is entered on the roll,

roll, and for that the roll must be brought into court, that it may be seen whether there be a proof thereon or no. After which, it appearing no proof had been made, a consultation was awarded.—[*Modern Rep.*]

1698.
GARDNER
v.
ROOTH.

M. 10 W. 3. B. R.

Hill v. Vaux. [1 *Ld. Raym.* 358.] *Holt.* 672. 2 *Salk.* 656. *Carth.* 461.

MOTION was made, that the King's bench would grant a prohibition to the spiritual court, where the defendant Vaux libelled against the plaintiff for tithes of milk. And it was grounded upon a suggestion of a custom, that every inhabitant in the parish, who kept cows there, had used time whereof, &c. to set out the whole meal of milk upon the ninth day of May at night, and upon the tenth day of May in the morning, *et super quemlibet unum diem tunc proxime sequentem*, until one lamb yeaned the next year following should be heard to bleat there; and the milk set out in such manner the vicar for the time being had used to send a servant to bring to him; and that was in satisfaction of all tithes of milk. And a rule was made that a prohibition should be granted, *nisi causa*, &c. Upon which *Wright*, King's serjeant, at the day appointed, argued, that the rule ought to be discharged; because unreasonable customs are void. *Hob.* 175. *Topsall v. Ferrers*, 329. *Barker v. Cocker*. (1) Then this custom is unreasonable, because it forces the parson to send for the milk where it is milked; and then, if it be a great parish, he must keep more servants than his vicarage will sustain. And in *Raym.* 277. *Dodd v. Ingleton*, (2) it is held, that tithe milk ought to be brought to the parson's house. And of this opinion was *ROBEY, J.* But *HOLT, Ch. J. contra.* For (by him) if a parishioner set forth a custom, to pay the tithes to the parson at his house, though he prescribes to pay them in kind; this will be a good custom. And for that, he cited the opinion of *POPHAM, Ch. J.* 3 *Cro.* 609. *Austin v. Lucas*, (3) where he says, that a prescription to pay to the parson the tenth quart of milk at the parson's house, would be a good *modus*. And *per HOLT*, the resolution in *Raym.* 277. is an equitable resolution, founded upon the usage of the neighbouring parishes. (4) See *Palm.* 341. 381. *Wiseman v. Denham*. (5)

2. *Wright*, King's serjeant, argued that this custom is a plain prescription in *non decimando* for a great part of the year. For the prescription is in truth to pay less in the compass of the whole year than a tenth part. And then no custom is good to pay the same thing in kind, unless it be to be paid in a more beneficial manner than that which the law prescribes. 3 *Cro.* 609. 2 *Cro.* 47. 1 *Mod.* 229. *Moor v. Field*. 1 *Anders.* 199. (6) But where there is some alteration in the payment of that which the law appoints for the advantage of the parson, though the advantage be small, yet the custom shall be good. *Hob.* 250.

But against this *Coniers*, King's counsel, argued, that the custom was good: for (by him) the usual time for ceasing from this payment in this parish is the middle of March; for being in Lincolnshire, there are no lambs yeaned before that time. Then for the days in which the parson is deprived of the tithe which the law gives him, he receives very great recompense, in receiving the whole meal of milk every ninth day, when the cows give more milk than they do in March and April. And he cited the case of *Lee v. Collins*, 1 *Roll. Abr.* 648. C. 3. where it is said, that it is a good *modus* for tithes of eggs, to pay

A custom to set out the whole meal of milk on the 9th day of May, at night, and on the 10th day of May, in the morning, and so upon every ninth day till a lamb yeaned in the parish in the next year following be heard to bleat, (such milk to be sent for by the vicar) in satisfaction of all tithes of milk, is void; for during the part of the year in which the *modus* is payable it gives the parson no more than a tenth, which he ought to have through the whole year; and a man cannot prescribe to pay less of the same thing, but ought to prescribe to pay some other thing in lieu of it, or to pay it in some other manner than the law prescribes, so that the parson has a benefit by it. *HOLT, Ch. J.* said, that a parishioner is not obliged to deliver his tithe milk either at the vicarage-house or the church-porch, but only to set them out; and therefore if this had been the *modus* it would have been good, and that the case of *Dod v. Ingleton* was a mere equitable decree, guided by the custom of the neighbouring

(1) *Anté*, p. 321.

(2) *Anté*, p. 516.

(3) *Anté*, p. 142.

(4) In the debate of this case, a question arose, whether it had been a good *modus* if it had been alleged that the delivery had been at the vicarage-house, which depended on this question, whether the parishioner of common right is obliged to deliver his milk tithes, either at the vicarage-house or church-porch, as was adjudged in the equity side of the *Ex-*

chequer, in the case of *Dod v. Ingleton*.—[*Raym.* 277.]—(*Anté*, p. 516.)

And *HOLT, Ch. J.* said, that a parishioner is not obliged so to do of common right, but only to set them out; and that therefore if this had been in the *modus*, it would have made it a good one; and that the case of *Dod v. Ingleton* was a mere equitable decree, guided by the custom of the neighbouring parishes.—[*Holt, Modern Rep.*]

(5) *Anté*, p. 328.

(6) *Anté*, p. 511.

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in Lent thirty eggs for all tithes of eggs. *Sed non allocatur.* For (*per totam curiam*) the custom is ill, and it is a plain *non decimando*. For suppose a lamb bleats there at the end of December, or at the beginning of January, the parson shall lose tithes for four months and more. Then a man cannot prescribe to pay less of the same thing, but ought to prescribe to pay some other thing in lieu of it, or to pay it in some other manner than the law prescribes. And *per Holt*, Ch. J. this does not resemble the case of the thirty eggs in Lent: for there the custom binds the parishioner to the payment of so many at that time, and whether he has hens or not, he is obliged to it; so that he may be obliged to buy eggs to pay the parson; and that makes it a good custom. But if the custom was that he should pay thirty eggs of his own hens, the custom would be ill. (2) The rule for the prohibition was discharged.

(2) The case of thirty eggs, in lieu of all eggs, was cited, 1 Ro. Ab. 648. 651. *Et per curiam*. A *modus* to pay one thing for another, or a part of the same thing in another manner, may be good; but a prescription to pay part of the very thing that is tithe, can never be a good *modus*, unless payable in some

other manner, so that the parson has a benefit by it. 3 Cro. 609. 2 Cro. 47. 1 And. 799. Mod. 229. Hob. 250. Raym. 277. 3 Bulstr. 326. As to the case of the thirty eggs, he is bound to pay that, whether he has hens or no, and he must pay it at a certain time. — [Salkeld.]

M. 10 W. 3. B. R. *Pool v. Gardner*. [Carth. 463.]

A *modus* suggested must be proved within six months, or a consultation shall go. Where a consultation had been granted for default of proving a *modus* suggested, in proper time and not upon the merits, a second prohibition was granted after sentence, upon payment of double costs, according to the stat.

A PROHIBITION was granted, *Anno* 9 Will. 3. to stay a suit in the consistory court, at Wells, for tithe hay and seed of clover-grass, upon a suggestion of a *modus* to pay 4d. per acre for all upland meadows, which *modus* was pleaded below, and depositions taken there.

And in Trinity term, *Anno* 10 Will. 3. this court was moved for a consultation, because the plaintiff in the prohibition had not proved this *modus* within six months; and thereupon a consultation was awarded, and then the spiritual court proceeded to sentence against Pool.

And now it was moved for a new prohibition, because the consultation was awarded for default of proving the *modus* in time, and not upon the merits of the cause, so not within the statute of Edw. 3. by which it is enacted, that no prohibition shall be allowed after consultation duly granted, so that the matter in the libel is not charged.

And the court was of this opinion; whereupon a prohibition was granted upon payment of double costs, according to the statute, though it was strongly opposed, because after sentence.

M. 10 W. 3. C. B.

Machin v. Moulton. [1 Ld. Raym. 452. 534.] 2 Salk. 549. 3 Salk. 90. 5 Mod. 451. 12 Mod. 252.

If a person live in the diocese of York and there subtract tithes for land, and afterwards remove and inhabit in another diocese, yet he may be libelled against in the spiritual court of York.

MR. BRIDGES moved for the discharge of a rule, by which a prohibition was granted *nisi*, &c. to the consistory court of the Archbishop of York; where Molton, rector of the church of South Collingham, in Nottinghamshire, preferred a libel against Machin, for subtraction of tithes. And the motion for the prohibition was grounded upon a suggestion that Machin lived within the diocese of Lincoln, and therefore ought not to be cited out of the diocese where he lived, by 23 Hen. 8. cap. 9. And the cause that Mr. Bridges shewed to the court to discharge the rule was, because Machin had lands within the diocese of York, viz. in the parish of South Collingham, in Nottingham; for tithes of corn growing upon which lands Molton libelled in the consistory court of York; and when the citation was served, Machin was there, though he lived generally within the diocese of Lincoln. And he cited Dr. Blackmore's case. Hardr. 421. where it is said by the court, that if a man be cited within the diocese, though he is not an inhabitant there, but only comes there upon the account of trade or other notice, that this is not within the statute of 23 Hen. 8. cap. 9. But Serjeant Jenner, for the prohibition, cited 1 Roll. Rep. 328. *Moor v. Cockain* and *Saunderson*, where it is admitted, that if an executor, living in the diocese of A. be sued and cited in the diocese of B.

where the will was proved, a prohibition shall be granted. But *per* HOLT, Ch. J. if A. live in the diocese of B. and occupy lands in the diocese of C. if A. subtract tithes in C. he may be cited and sued there; and it is not within the statute of Hen. 8. For when A. occupies land in C. that makes him an inhabitant there, and out of the intent of the statute. And if a man have goods in the diocese of A. only, and he make his will, and constitute B. who lives in the diocese of C. his executor, and die; B. proves the will in the court of the bishop of A. B. may be cited in the diocese of A. for a legacy devised by this will, because the residence of the executor does not give consanguinity, but the probate of the will. To which ROKEBY, J. agreed. *Jenner*, serjt. The case in 1 Roll. Rep. 328. is *contra*. HOLT, Ch. J. Then it has been over-ruled several times since. And though that statute was made to prevent vexation, yet there are several exceptions.—*Adjournatur*.

And afterwards, at another day, Mr. *Bridges*, against the prohibition argued, that if a prohibition should be granted, there would be a failure of justice, because Molton cannot maintain a suit in the court of the bishop of Lincoln, for the subtraction of these tithes. And Mr. *Broderick* of the same side said, that the statute of 32 Hen. 8. cap. 7. which says, that persons withdrawing tithes shall be convened before the ordinary of the place where they were withdrawn, will amount to a repeal of 23 Hen. 8. cap. 9. if it had been within the intent of the said act, which he said was never intended. But *Jenner*, serjt. cited 13 Co. 6. *Potter v. Rochester*. Palm. 488. Hob. 185. *Jones v. Jones*. 1 Roll. Rep. 328. And as to suits upon wills, they might transmit them to the diocese where the party lives. [See Godb. 191. *Frances v. Powell*.] And that civilians had told him, that they can sue a man in the spiritual court of the diocese where he resides, for tithes which he ought to pay for lands in another diocese. But to that *Broderick* said, that a suit for tithes was local. And for that he cited, 1 Keb. 481. *Rogers v. Harding*. But *per* HOLT, Ch. J. the statute 32 Hen. 8. cap. 7. did not intend to repeal any part of 23 Hen. 8. cap. 9. But the question is here, whether there is any remedy in Lincolnshire for this subtraction of tithes within the diocese of York? The civil law courts may transmit any cause into another civil law court, and so they do every day for causes arising in the admiralty of France. But here the question is, whether the jurisdiction arose from the cause, or from the person? If a will be proved in the prerogative court of Canterbury, a suit upon it for a legacy, &c. must be in the Arches, which is the provincial court, though the party lives in another diocese. See the saving of the statute 23 Hen. cap. 9. for that. *Adjournatur*. And afterwards a prohibition was granted, to the end that the parties should declare upon it; so that the question might come more judicially before the court.

THE plaintiff declared in attachment upon the prohibition, &c. And Mr. *Broderick* argued for the defendant, that the words of the 23 Hen. 8. cap. 9. are general, viz. that a man shall not be cited out of the diocese or peculiar where he shall be dwelling; but that restraint ought to be limited to such cases only, where the jurisdiction, within which the party dwells, hath consanguinity of the cause for which the party is cited out of the diocese; for if it were otherwise, the subtraction of tithes in this case would be dispunishable. A diocese is a jurisdiction, and not the description of a place, as terminated by metes and bounds. And therefore in this case the party cannot be said to be cited out of his diocese, because no remedy could be had against him there; and therefore as to that he is not within the diocese. This notion appears by the cases in 1 Roll. Rep. 328. Cro. Car. 27. 13 Co. 4. So if a peculiar is in two dioceses; and a man who dwells in one of the dioceses in the peculiar, is cited to the court of the peculiar held in the other diocese, that is not a citing out of the diocese, because it is within the peculiar. 1 Roll. Rep. 329. Therefore since in this case the tithes arose within the diocese of York, he is not cited out of the jurisdiction, nor consequently out of the diocese. For by the statute of 32 Hen. 8. cap. 7. the subtraction of tithes is made local; for

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by the words of the act the party offending shall and may be cited before the ecclesiastical judge of the place, where such wrong shall be done. In *Winch. Entr. 570.* there is a suggestion for a prohibition, for proceeding before the archbishop, where the cause was transmitted by letters of request; because by the statute 5 & 6 Edw. 6. cap. 4. proceedings against brawlers in churches and churchyards are limited to be before the ordinary of the place where the offence shall be done. The case in 1 Keb. 481. is a case in point. And in the case of 2 Roll. Rep. 448. the tithes are laid to have arisen within the peculiar. There is a case in 3 Mod. 211. where it is held, that a taxation in another diocese is local, and will subject a man to be cited there, (it is said by inference) much more will tithes subject a man, for they will make a man an inhabitant to many purposes. *Jenner, serjt. & contra*, for the plaintiff. The words of the act are express for the prohibition, and suit for tithes is mentioned in the preamble. And there is an opinion in point, 2 Brownl. 28. confirming the generality of the words of the act; and there is no authority against it. There is also a case of a legacy in 2 Brownl. 12. and for words, 191. [But of personal things there is no doubt.] It is a rule in the canon law, that *forum sequitur reum*. And the cases in 1 Roll. Rep. 328. and 1 Cro. 97. are strong cases for the plaintiff.

The court awarded a consultation, because by the statute of 32 Hen. 8. cap. 7. sect. 2. the suit for withholding of tithes in express words is appointed to be before the ordinary of the place where the wrong was done. But if it had been in another place, it had been within the 23 Hen. 8. cap. 9. and the prohibition should have continued.

M. 10 W. 3. B. R.

Hart v. Hall. [12 Mod. 243.] 1 Ld. Raym. 441. Holt, 673.

In a suggestion for a prohibition to stay a suit for tithes of an old mill the party ought to prescribe in *non decimando*, and make an affidavit of the fact.

MOTION for a prohibition to stay a suit for tithes of an old mill, viz. every tenth toll-dish, on suggestion that it was an old mill.

But by *HOLT*, Ch. J. the plaintiff ought in his suggestion to prescribe in *non decimando*, and also to bring an affidavit of the fact; and so it was adjudged in Lord Chief Justice Hale's time, in the like case; for he said, that of common right tithes were due out of a mill; yet before the statute of *Articuli Cleri* some mills did pay, and some did not, and upon that it was enacted, "that *de molendino de novo erect. non jacet prohibitio*;" and for such as paid before this statute, they shall still pay. And he said tithes were either predial or personal, for the corn paid tithe before; and it was necessary to prescribe in a *non decimando* in an old mill; and he quoted the case of *Hughes v. Hertford.* (1)

(1) And so it was done upon debate, in the time of *HALE*, Ch. J. between *Hughes v. The Lord Viscount Hereford.* See *Winch Ent.*

552. pl. 1. *Brown v. Nicholson.*—[*Lord Raymond.*]

M. 10 W. 3. B. R. *Anon.* [12 Mod. 235.]

Tithe is due of rakings of corn never gathered into sheaves; but if it had been so gathered and

H*OLT*, Ch. J. One may libel in the spiritual court for tithe of rakings of corn, if it never was gathered into sheaves; but *secus* after the corn has been gathered into sheaves, and there was no fraud in the gathering; and a prohibition would lie.

M. 10 W. 3. Scacc.

Gee v. Peach. [1 Wood, 386. Dodd's MS. 186.] 2 Gw. 563. 1 Ray. 87.

Kent, 15th November, 1698.

A custom to pay 10s. an acre for tithe of hops is void.

THE plaintiff, as farmer of the rectory and parsonage of Orpington, in the county of Kent, stated, that the defendant had, for five years last past, been occupier of a great farm, consisting of arable land, hop grounds, wood, and

and underwoods, which he had ploughed and sown with grain of all sorts, and planted with hops, and from which he had felled divers acres of underwood, alder trees, and ash trees, under twenty years growth, and had barked and flawed great quantities of bark from the said trees, and had paid no tithes for the same.

The defendant said, that the tithes of hops or wood belonged to the vicar; that he had several times peeled, barked, and flawed several alder trees for hop poles, but that the bark was of small profit; that as to hops, there was a *modus* to pay ten shillings an acre in lieu of the tithes thereof; that tithes of the topplings of the timber trees were not due, nor for the stackwood used in his family; that he had grubbed several quantities of woodland which he had sown with corn, and also several roods of barren ground which yielded no profit, and had sown the same with peas; and that no tithes ought to be paid for such lands by the statute 2 & 3 Edw. 6. c. 13. s. 5. for seven years.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides.

The court declared, that the custom of paying ten shillings an acre for the tithe of hops is a void custom and not warranted by law; and therefore decreed, that the defendant ought to account for the same, according to the value of the tenth part of the said hops, when the same were pulled from the bine or stem, at which time the tenth part is severable from the nine parts, and the tithes by law payable. That the reason assigned for the non-payment of tithes of corn sowed upon grubbed ground, is no good discharge, but that tithes in kind, or some composition, ought to be paid to the plaintiff for the same. That tithes ought to be paid for the hop-poles growing upon the premises, which he used in polling his hops. That the tithes of the bark of the alder-poles and hurdle-rods and of woad or woald, as offered by the answer, are to be paid in kind, and delivered by the defendant upon the plaintiff sending for them.

It is ordered by the court, that the said defendant shall and do forthwith pay to the said plaintiff the sum of ten pounds in full of his tithes of hops, hurdle-rods, bark of alder trees, cords of wood and peas, and in full discharge of the sum of eleven pounds, seven shillings, and three-pence, reported due.

EDW. WARD.

LITTLETON POWIS.

NICH. LECHMERE.

HEN. HATSELL.

MR. Gwillim observes, that it does not appear that the tithes of the hop-poles themselves were demanded.

26th Jan. 10 W. 3.

DECREED an account for tithes in Mich. Term preceding, and upon debate now to settle the order, resolved that tithe-hops shall not be paid by the pole, nor by the hill, but by the bushel or weight when picked, for by the court, then alone are they severable. Note. Upon debate, if this be of common right, where there is no usage in the manner of setting out. *Quære*. Whether a *modus* may be for hops, or if a *modus* of setting out may be, and *semble* that there cannot, and so afterwards resolved in the case of *Conald v. Spratling*. Note. A *modus* in the case before was insisted upon of ten shillings an acre, and the court held it was not good for hops, because they are a new plantation. 1 Ro. 648. MS. notes.—[*Dodd*.]

Tithe of hops shall be paid by the bushel or weight when picked. *Quære*, whether this be of common right.

E. 11 W. 3. Scacc.

Folchier, Vicar of Lakenham, v. *Ward*. [Rayn. 87.]

1700.

IN Trinity Term, 9 W. 3. the plaintiff brought his suit in the court of Exchequer, to compel the defendant, tenant of the demesne lands, to pay tithes; and the case, upon the depositions, appeared to be this:

Tithe of hay is a great and not a vicarial tithe.

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VOLCHER

V.

WARD.

In the time of William II. the cathedral church of Norwich is supposed to be built; and the bishop's see removed from Thetford thither.

In the time of Henry I. Herbert, bishop of Norwich, grants to the prior and convent of Norwich * "*Ferias quas Rex Willielmus fratribus donavit, in hebdomada Pentecostis, &c. Lakenham, cum omnibus rebus quæ ad eandem pertinent vallam, præter terram Osberti archidiaconi Ameringhale, medietatem silvæ de Thorp, &c.*" But this seems rather a confirmation of the grant of Henry I.

A. D. 1121, Edward, bishop of Norwich, confirms to them† "*Omnia quæ predecessores mei dederunt, et similiter quicquid Herbert de Ross habuit in Lakenham, &c.*"

A. D. 1646, William, bishop of Norwich, confirms to them‡ "*Omnia quæ Herbertus episcopus Norwicensis, aut Everardus episcopus Norwicensis, donavit, et quicquid Herbert de Ross habuit in Lakenham.*"

A. D. 1200, John de Grey, bishop of Norwich, grants to the prior and convent of Norwich§ "*Ecclesiam Lakenham, cum omnibus, ad eandem pertinentibus, &c. administrari per capellanos suos, salvo nobis, et successoribus nostris, jure pontificali et parochiali.*"

16 H. 3. A. D. 1232, an *insperimus*, and confirmation of the grants of King William II. and Henry I. wherein they grant|| "*manerium de Lakenham, Ameringhale, medietatem silvæ de Thorp, &c.*"

A. D. 1273, confirmation by Pope Gregory to the monks of Norwich of a grant of the church of Lakenham; and by the valuation of ecclesiastical benefices, 20 Ed. 1. and 26 Hen. 8. it appears, that the cure was served by the monks, who received an annual pension by charter 30 Hen. 8. the King¶ "*Cenobium de priore conventu ecclesiæ cathedralis, Sancta Trinitatis Norwici transposuit et mutavit in decan. et capitulum ecclesiæ cathedralis sanctæ Trinitatis Norwici;*" and incorporates the dean and chapter, and grants them all the possessions of the priory. See 3 Co. 73.

The dean and chapter having by this grant the manor of Lakenham, and likewise the church of Lakenham, as being part of the possession of the prior and convent, by lease 2 Jan. 33 H. 8. A. D. 1541, demised to Robert Flint the site of the manor of Lakenham, and all the lands belonging, except the mills and woods, for years, and covenanted, that the lessee shall have the tithes of his cattle going on the said demesnes: and that the dean and chapter will discharge him of all tenths, &c.

1 March, 1 Ed. 6. by indenture, the dean and chapter, in consideration that Robert Flint had been at a great charge in building and repairing the houses, demised to him Lakenham woods; and it is declared, that whereas he held the manor of Lakenham, (that is to say, the site of the manor and demesne lands by the lease 33 Hen. 8.) which is said had been always freed from the payment of tithes predial and personal in the hand of the farmers; the meaning was, that he should hold the said manor of Lakenham discharged of all manner of such tithes; and by the same indenture, the dean and chapter demised to him the tithes of hay and corn growing on the said demesnes for ninety years.

3 June, 1 Ed. 6. the dean and chapter surrendered their possession to the King, who by letters-patent, 9 Nov. 6 Ed. 6. grant to the dean and chapter, *** "*Omnia illa maneria nostra de Hindlenoston, &c. viginti maneria in com. Norf.*"

ac

* "Those holidays which King William allowed to the brotherhood, in Whitsun week, &c. Lakenham with all things belonging to the same vale, besides Ameringhale, the land of archdeacon Osbert, and a moiety or half part of the wood of Thorp," &c.

† "All that my predecessors gave, and likewise whatever Herbert of Ross had in Lakenham," &c.

‡ "All that Herbert or Everard, respectively bishops of Norwich, gave, and whatever Herbert of Ross had in Lakenham."

§ "The church of Lakenham, with all appertaining to the same, &c. to be served by

their own chaplains, saving to us, and our successors, all pontifical and parochial rights."

|| "The manor of Lakenham, Ameringhale, a moiety of the wood of Thorp," &c.

¶ "Translated and changed the monastery of the priory, &c. from a convent of the cathedral church of Saint Trinity, Norwich, into the dean and chapter of the cathedral church of Saint Trinity, Norwich."

** "All those our manors of Hindlenoston, &c. twenty manors in the county of Norfolk; and also all those our rectories and churches of Hindlestone, &c. Lakenham, &c. twenty-five rectories in the county of Norfolk, &c. and also

ac etiam omnes illas rectorias et ecclesias nostras de Hindlenoston, &c. Lakenham, &c. viginti quinque rectorias in com. Norf. &c. ac etiam advocaciones, donationes, jura patronatús vicariorum prædictarum ecclesiarum, et earum cujuslibet; necnon omnia et singula maneria, messuagia, &c. reddit'. &c. glebas, decimas, oblationes, obventiones, pensiones, portiones, advocaciones, jura patronatús, proficua, et hereditamenta nostra quæcumque, in villis, &c. de Hindlenoston, Newton, &c. Lakenham, &c. in com. Norf. &c. ad dictam ecclesiam cathedralẽ dudum spectant' Except' tamen, et nobis, hæredibus, et successoribus nostris, reservat' maner' de Hemilby ac rectorid' et advocacione vicariæ de Wykelwood in com. Norf. necnon omnibus et singulis messuagiis, terris, decimis, redditibus, et hereditamentis, in Hemingsby, Lakenham, &c. aut alibi, dict' maner' de Hemilby, Lakenham, &c. ac rector'. de Hemilby, seu eorum alicui, quoquomodo spectant'. ac except'. omnibus terris, &c. decimis, jacentibus in Eaton, ac assignat' maner' de Lakenham, extra dict' maner' de Eaton, ac extra dict' maner' de Ameringhale, ac modo in tenur' Roberti Flint.

By patent, 1 July, 7 Edw. 6. the King grants to Thomas Graham, esquire, * "*Manerium de Lakenham ac tot' rector' et ecclesiam de Lakenham, ac advocacionem, et jus patronatús, vicariæ ecclesiæ ibi, &c. ac omnia et singula, messuagia, grangias, &c. glebas, &c. ac decimas garbar' blader'. granor'. feni, et connabi, ac al' decimas quascunque in Westacre, Lakenham, &c. dict' maner' et ecclesiæ, seu eorum alicui spectant', &c.*

Ward answered the said bill, and this term the court directed Ward to pay Folchier the vicarial tithes in kind, for the said lands; but, by the minutes taken on the hearing of the cause, the tithe of hay was expressly excepted, that being a great, and not a vicarial tithe.

also advowsons, donatives, rights of presentation, in the aforesaid vicarages, churches, and every of them; and moreover all and singular our manors, messuages, &c. rents, &c. glebes, tithes, oblations, obventions, pensions, corrodiæ, advowsons, rights of presentations, profits, and hereditaments whatsoever, in the towns of Hindleston, &c. Newton, &c. Lakenham, &c. to the aforesaid cathedral church heretofore belonging; except however, and reserving to us, our heirs, and successors, the manor of Hemilby, and the rectories and advowsons of the vicarage of Wykelwood, in the county of Norfolk; and moreover, all and singular the messuages, lands, tithes, rents, and hereditaments in Hemingsby, Lakenham,

&c. or elsewhere, in the said manor of Hemilby, Lakenham, &c. or to any of them in anywise belonging; and except all lands, &c. and titles lying in Eaton, and assigned to the manor of Lakenham, out of the said manor of Eaton, and out of the said manor of Ameringhale, and late in the tenure of Robert Flint."

* "The manor of Lakenham, and the whole rectory and church of Lakenham, with the advowson, and right of presentation, to the vicarage of the church there, &c. and all and singular the messuages, farms, &c. glebe, &c. and tithes of corn, grass, grain, hay, and other tithes whatsoever in Westacre, Lakenham, &c. belonging to the said manor and church, or to either of them."

Tr. 11 W. 3. B. R.

Godfrey v. Lewellin. [Holt, 593.] 2 Salk. 549.

WHERE the matter suggested for a prohibition appears on the face of the libel, an affidavit of it is not required; but if it do not appear there, or if you move for a prohibition as to more than appears upon the face of the libel, to be out of their jurisdiction, you ought to have affidavit of the truth of the suggestion. And in another case he said, wherever the matter which you suggest for your prohibition is foreign to the libel, it must be pleaded below, before you can have a prohibition; it is otherwise where the cause of prohibition appears on the face of the libel. Also where it does appear in the libel, or by the proceedings in the cause, that the consuance of it does not belong to the spiritual court, a prohibition may be moved for and granted after sentence; and this holds in all cases, but when one is sued out of his diocese, upon the statute 23 H. 8. in which case, by pleading you own their jurisdiction.

Where the matter suggested for a prohibition appears on the face of the libel, an affidavit is not required; but if it do not appear there, or the prohibition is as to more than appears, an affidavit of the truth is necessary.

Tr.

Wherever the matter suggested for a prohibition is foreign to the libel, it must be pleaded below, before a prohibition can be granted; but it is otherwise where the cause of the prohibition appears on the face of the libel.

Where it appears from the libel or proceedings in the cause that the consuance of it does not belong to the spiritual court, a prohibition may be had after sentence; and this holds in all cases, except where one is sued out of his diocese, in which by pleading the jurisdiction is owned.

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Though a defendant has mistaken the ground of his defence, yet where the court saw that the lands might be discharged in law, and no tithes had been paid, the bill was dismissed.

Tr. 11 W. 3. Scacc.

Thorngate v. Wallop. [Dodd's MS. 193.] Ray. 93.

THE plaintiff, as farmer of the impropriate rectory of Hursburn Priors, and St. Mary Brame, in Southampton, brought his bill for the tithes of hay and wood: the defendant insisted that the bishop of Winton had the first mowth of four acres in Honey Mead, in discharge of the tithe of hay arising upon Honey Mead, and other meadows in the parish, occupied by him; and that no tithes in kind were ever paid; and as to the wood, he never heard that any tithes were paid for that; and that it formerly belonged to the priory of Hursburn, and being so vested in the church, is exempt from payment of any tithes.

On the hearing of the cause, it appeared that these woods and meadows belonged to the hospital of St. Swithin's, in Winton, and came to the crown, 30 Hen. 8. and though the defendant had not by answer so set it forth, and for the meadow had made another defence; yet no tithe having ever been paid, the court dismissed the bill.

Tr. 11 W. 3. Scacc.

Hunt v. Codrington. [Dodd's MS. 192. 1 Wood, 391.] Ray. 94.

Teasels are a small tithe; and where it appeared to the court that the vicar was endowed of all small tithes, they dismissed the bill of the farmer of the impropriation, though the tithes of teasels had since their introduction always been paid to the impropriator.

BILL by the farmer of an impropriation, for the tithe of teasels planted, and afterwards used by clothiers, (note, it appeared they were first planted in this parish of Congresburgh, in the county of Somerset, about forty-five years ago though immemorably in other places,) and the tithes always since paid to the impropriator, and four successive vicars in all this time never demanded or received the same; but now, because it appeared that the vicar was endowed of all small tithes, the court adjudged this a small tithe, and to belong to him, in regard the time of planting it was known, and dismissed the bill.—[*Dodd's MS.*]

Somersetshire, 26th June, 1700.

THE bill stated, that the plaintiff, as lessee under the dean and chapter of Wells, had for several years rented the rectory or parsonage of Congresbury, in the county of Somerset, and was entitled to all tithes, and particularly to the tithes of teasels, sown or planted within the said rectory; that time out of mind, the tithes of teasels had been paid to the owners or farmers of the said parsonage, but that the defendant Codrington, being vicar of the said parish, pretends some right to the tithes thereof, and had forbidden the parishioners to pay the said plaintiff the tithes, and had received and taken the tithes thereof; that the other defendants had in the years 1696 and 1697, a great quantity of teasels, but they pretend that the same are small tithes, and so belong to the vicar, and not to the impropriator.

Three of the defendants answered, and admitted the plaintiff to be farmer of the rectory, and entitled to all tithes belonging thereto, but denied his right to the tithes of teasels.

The defendant Codrington said, that he had for several years claimed the tithes of teasels, as vicar of the said parish, for that they are small tithes, and that the vicarage was endowed with all small tithes.

The defendants Boucher and Wollin said, they had teasels in the said years, and they set forth the quantities and values, and insisted that the tithes belonged to the defendant Codrington.

The plaintiff replied, the defendants rejoined, and witnesses were examined on both sides; and on reading the proofs in the cause, and also a copy of an endowment of the vicarage, whereby it appeared that the said vicarage is endowed with all small tithes, and that the vicar has been paid all small tithes;

The court took time to consider of the matter, and having so done, they this day declared, that the tithes of teasels belong to the defendant Codrington, as vicar of the vicarage, they being first planted in the parish in gardens.

It is thereupon ordered by the court, that the said bill be dismissed, with

costs to be taxed, but that the said defendants are not to prosecute the plaintiff for the same until this court make further order therein.

EDW. WARD, LITTLETON POWIS, HEN. HATSELL.

1700.

HUNT

v.
CODRINGTON.

A custom in *non decimando* that no tithes shall be paid in a parish for wood and furze burnt is good.

Tr. 12 W. S. Scacc. *Dowdeswell v. Harker*. [Dodd's MS. 193.]

THE plaintiff brought his bill (amongst other things) as rector of Kingham, in Oxon, for the tithe of furze or wood: upon the defendant's answer and hearing the cause, it appeared to be burnt in the house; and the defendant having said generally, that no tithe of furze or wood burnt in the house was payable by the custom of the parish, the court resolved accordingly, and said that, generally speaking, tithe of wood burnt shall be paid; but if there be a custom in the parish to the contrary, viz. in *non decimando*, it is good, and so the books shall be intended. See Moo. 909.(1) Cro. Car. 113.(2) 1 Sid. 447.(3) 1 Ro. Abr. 644, and dismissed the bill as to that demand.

(1) *Austyn v. Lucas*, ante, p. 142.

(3) *Tilden v. Waller*, ante, p. 481.

(2) *Norton v. Harmer*, ante, p. 363.

Tr. 12 W. S. Scacc. *Pugh v. Pascall*. [Dodd's MS. 192.]

THE plaintiff prefers his bill for tithes, as vicar of Much Baddow, in Essex. The defendant says, that it is a vicarage with cure of above 8*l*. value, and that the defendant, before the time in demand, was instituted and inducted into the rectory of Snoweham, within the parish of Latchington, in Essex, being a benefice with cure without any qualification. And upon hearing this cause, it appeared that the Bishop of London had instituted the plaintiff into this rectory *sine cura*, &c. The court resolved that the plaintiff had not accepted a rectory with cure, and that in case it be a rectory with cure, then the institution was null and void. *Quære*, for it appears to me that the institution is good, and the adding the words *sine cura* null and void. As to the second point, it was resolved, that the defendant in this suit (as the plaintiff had done the work, and this was but in the nature of wages) should not take advantage of it; and the court said that in *nil debet* on the statute he should not take advantage in such case. *Quære*, for it appears to me contrary.

Note, the defendant was patron, and therefore the court said ought rather to try the point in a new presentation, or by *quære impedit*, than in this suit.

Quære, Whether institution into what has been falsely alleged to be a sinecure, shall vacate the institution and induction to a second living, above 8*l*. in value.

M. 11 W. S. B. R. *Stedman v. Lye*. [1 Ld. Raym. 504.]

MR. STEPHENS moved for a prohibition to be directed to the consistory court of the Bishop of Worcester, to stay proceedings in a suit there for tithes of hops, upon suggestion of a *modus* time whereof, &c. there used, that if the parson send a servant, &c. to pull *aliquam partem lupularum*, he shall have the tithes of them, &c. Upon which a rule was made to shew cause why a prohibition should not be granted. And now Mr. Bannister shewed for cause against the prohibition. 1. The custom is void for uncertainty, for it does not appear how much hops ought to be pulled, &c. 2. That it is an ill custom, because it is no benefit at all to the parson, but drives him to more pains than the law requires to entitle him to that which by law he ought to have in the same manner without such pains. Of which opinion was the whole court. And therefore the rule was discharged.

A custom that if the parson send a servant to pull some of the hops, he shall have tithes of them, is void for uncertainty; for it does not appear how much ought to be pulled; and besides it is no benefit to the parson, for it

puts him to trouble to obtain that which by law he is entitled to without.

E. 12 W. S. B. R. *Anon*. [12 Mod. 397.] Holt, 657.

HOLT, Ch. J. If a pension be by prescription out of a rectory inappropriate, though the rectory come into lay hands, yet it may be sued in the spiritual court, because it might have commenced by a spiritual act; and if such a prescription

Pension by prescription may be sued for in the spiritual

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court, because it might have commenced by a spiritual act; but a *modus* pleaded there shall be tried at common law.

a prescription be denied, it shall be tried there; but 'if a *modus decimandi* be pleaded, it shall be tried at common law; and if it be not found, a consultation shall go.

a spiritual act; but a *modus* pleaded there shall be tried at common law.

Tr. 12 W. 3. B. R. *Smith v. Wallett*. [1 Ld. Raym. 587.]

If in a suggestion the existence of a vicarage is denied, it must be tried at common law.

If a suggestion, though good in law, appear to the court to be notoriously false in fact, they will not grant a prohibition.

THE sequestrator of the tithes of a vicarage sued the impropiator in the spiritual court for tithes upon the endowment. And the defendant moved here for a prohibition, upon a suggestion that it was not a vicarage, and that that ought to be tried at common law. *HOLT*, Ch. J. said, that the suggestion is good in point of law; but if the suggestion appear to the court to be notoriously false, the King's Bench will not grant a prohibition; for they ought to examine into the truth of the suggestion, and see what foundation it has; for if it appear plainly to be false in fact, the King's Bench ought not to grant a prohibition. *Hob. 66, Aston v. Castle-Birmidge*; and it is held there that, though the surmise be matter of fact, and triable by a jury, yet it is in the discretion of the court to deny a prohibition. So it was done *Hob. 185, Jones v. Jones*. But at last in this case a prohibition was granted by consent, and issue to be taken, vicarage or not, and to be tried at the next assizes, to settle the right. Note, *Mr. Bury* shewed in this case a copy of an endowment, and of the book of first-fruits, where the vicarage was rated at —, and receipts for first-fruits. *Ex relatione m'ri Jacob*.

Tr. 12 W. 3. B. R. *Jones v. Stone*. [2 Salk. 550.] *Holt*, 596.

A person may be bound to an ecclesiastical duty by custom, and the spiritual court may punish him if he neglect that duty; and a bare prescription only is not sufficient ground for a prohibition, unless it concerns a layman, or a temporal right.

DAVID JONES, the vicar of N. was libelled against in the spiritual court, for that by custom time out of mind, the vicars of S. had, by themselves or others, said and performed divine service in the Chapel of Chawbury, for which there was such a recompense; and that he neglected. The defendant came for a prohibition, and without traversing this custom, suggested that all customs were triable at common law: and *Mr. Harcourt* urged, that it was enough for a prohibition that a custom appeared to charge the vicar with a duty for which he was not liable of common right. *Et per Holt*, Ch. J. A person may be bound to an ecclesiastical duty by custom; and when he is bound by custom, the spiritual court may punish him if he neglect that duty: the custom might have a reasonable commencement by composition in the spiritual court, and begin by an ecclesiastical act: and a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here it is an ecclesiastical right, an ecclesiastical person and an ecclesiastical duty, and the prescription not denied; notwithstanding 2 Inst. 491, I never could get a prohibition to stay a suit in the spiritual court against a parson for a pension by prescription. Vide 1 Vent. 3. 120. 265.

Tr. 12 W. 3. Scacc.

Staughton and others v. Hide and another. [1 Wood, 394.]

Berkshire, 27th June, 1700.

A custom that aftergrass is put into cocks, the owner is not to rake together the grass round the said cocks, is void.

THE bill stated, that the plaintiffs, Staughton and Morris, were proprietors, trustees, and farmers of the rectory or parsonage impropriate of Shinfield, in the county of Berks, and entitled to the tithes of corn, grain, hay, withies, osiers, and the other tithes and dues belonging to the said rectory, in trust for the plaintiff, Mary Jones.

The defendants said, that after the grass is put into cocks, it is the custom of the said parish, that the parishioners are not to rake together the grass round the said cocks.

The

The court declared, that the custom insisted upon by the defendants not to rake up their grass into cocks in order to setting out the full tithes thereof, is a void custom, and that the defendant ought to account for the tithes of the said hay, and also for the tithes and duties demanded by the bill.

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STAUGHTON
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v.
BIDE AND
ANOTHER.

M. 12 W. 3. B. R. *Blaxton v. Honore*. [12 Mod. 435.]

DARNELL urged, that if it appear on the face of the libel, that the ecclesiastical court has no jurisdiction, they may be prohibited without suggestion.

But *Curia contra*; for the suggestion is a fundamental point, and is the declaration on the writ.

Prohibition not to go to the spiritual court without suggestion.

H. 12 W. 3. B. R. *Anon*. [2 Salk. 551.]

IN the bishop of *Winchester's* case, 2 Co. 45.(1) it is held, That in a suit for tithes in the spiritual court, H. may have a prohibition, suggesting a prescription or *modus*, before or without pleading. But this seems not to be law, for 12 W. 3. B. R. a prohibition was moved, for suggesting a custom, &c. *Et per Holt*, Ch. J. and the court it was denied, unless they pleaded it below, because perhaps they might admit the plea. Also 10 W. 3. B. R. it was said by *Holt*, Ch. J. that if a *modus* be pleaded in the spiritual court and admitted, no prohibition shall go; but if the question be, whether a *modus* or no *modus*, a prohibition shall go, and so is the law, viz. wherever the matter which you suggest for a prohibition is foreign to the libel, you must plead it below, before you can have a prohibition; otherwise where the cause of prohibition appears on the face of the libel.

Holt, C. J. and the court held, that a prohibition should not be granted upon suggestion of a custom, unless it had been pleaded below, because perhaps they might admit the plea.

(1) *Ante*, p. 119.

H. 12 W. 3. Scacc. *Trewin v. Bond*. [1 Wood, 398.]

Devonshire, 20th February, 1700.

THE plaintiff claimed the tithes of corn and other grain as lessee of the rectory of Woodbury, in the county of Devon, from and under the custos and college of vicars of the choir of the cathedral church of Saint Peter, in Exeter.

The defendants insisted on an immemorial custom to set up their corn and grain there grown and reaped, in sticks, being twelve sheaves placed in a row, six sheaves against six sheaves; or in stitches, being ten sheaves placed in a row, five sheaves against five sheaves; and that if there happen, upon the whole quantity of corn, to be any stick or sticks, stich or stitches, not amounting to the number of ten, no tithes is paid of such under the number of ten.

The court declared, that the said pretended custom is a void custom; and therefore ordered, that the defendants shall pay to the plaintiff the tithes of all the wheat, barley, and other corn; particularly for the tenth part of all the odd sticks or stitches of wheat, barley, or other corn, not amounting to the number of ten, which they respectively had in every field or inclosure within the said parish.

A custom to set out the tithe of corn in sticks of twelve sheaves, or stitches of ten sheaves, and to pay no tithes for the odd number of sheaves under ten, is void.

E. 13 W. 3. C. B.

Durrant v. Booty. [2 Lutw. 1071.] 2 Gw. 578.

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BE it remembered, that on the day of May, in this same term, comes here into court Thomas Durrant, of Scottowe in the county of Norfolk, gent. by Henry Palmer his attorney, and gives the court here to understand and be informed, that he the said Thomas holds and occupies, and for the space of twenty years now last past has held and occupied one messuage, one hundred acres of land, twenty acres of meadow and eighty acres of pasture, with the appurtenances

A custom to make the first mowth of grass into equal cocks at the expense of the parishioner, and to set out the tenth cock in full

satisfaction of the tithes as well of the latter mowth as of that mowth is good, and there is no difference between clover grass and ordinary grass.

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nances in Scottowe; and whereas within the parish of Scottowe aforesaid is and from time whereof the memory of man is not to the contrary, has been such a custom and *modus decimandi*, viz. that every person having and possessing any meadow or farm in any one year within the parish aforesaid, and the bounds, limits, and titheable places thereof, from whence hay has in the same year been obtained, and has arisen for all the time aforesaid, has been used and accustomed in every year at fit times of the year to mow and cut the grass growing upon such farms or meadows at his own costs and charges, and the first mowth of such grass after the mowing and cutting thereof unless he has otherwise agreed with the vicar of the parish church of Scottowe aforesaid, or his farmer for the time being for the tithes thereof, at his like costs and charges, justly and of as equal quantities as could be without fraud or deceit to heap upon the same meadows and farms and each tenth heap thereof so heaped to divide and set out from the other nine heaps thereof to the use of the vicar of the parish-church or his farmer of the tithes thereof for the time being in full and entire contentment and payment, satisfaction and discharge and in the name and place as well of all and singular the tithes of that grass in the same year arising, coming, increasing, renewing, or happening, as of all and singular the tithes of grass of any latter mowth from the said meadows or farms, in the same year arising, renewing, or happening.

And then alleged that the vicar for time whereof, &c. had taken the same accordingly, and that he had performed the custom, yet that the vicar libelled him in court-christian for non-payment of the latter mowth of clover grass according to a schedule annexed thereto.

Which schedule contained the following words :

"In the year of our Lord, 1700, now running, and in the months successively happening in the same year, or in some one or more of the said months, five acres of clover renewing and growing in a close, next or near a field commonly called or known by the name of Chequer-fields, in the parish and titheable places of Scottowe, libellate the said clover cut and severed from the ground, the whole crop of clover worth 4*l.* lawful English money, per acre, one acre of clover with another, and the tithe accordingly two-third parts, or at least above one half part of the said tithe was and is subtracted, withholden, and yet unpaid." And then alleged that the said vicar pursued his suit in court-christian, whereupon he prayed a prohibition. The court inclined to be of opinion, that a prohibition did not lie in such case without the allegation of a custom; but upon debate of counsel on both sides in the case, a rule for a prohibition nisi, &c. was made absolute, and no difference made between the latter mowth of clover grass and of ordinary grass. 2 Cro. 116. and Yelv. 86. *Greene and Austin's case.*(1)

(1) *Antè*, 165.

E. 13 W. 3. B. R. *Selby v. Bank.* [12 Mod. 496.]

By the common law pasturage is as much titheable as hay. Tithe is due for grass upon the mowing of it. Tithe lamb is to be paid where it falls, but by the received canon law, regard is to be had to the place of feeding. One is not bound to pay tithe-lamb for any number under ten, because they are entire things, and not divisible as wool is.

One may prescribe in *non decimando* for wood spent in an ancient messuage for husbandry, for formerly tithe was not paid for wood, but it is settled by statute to be paid only where it was usually paid; so that if there was a custom before, the statute does not take it away.

BROTHERICK moved for a prohibition to the spiritual court, the libel being for tithe hay and lamb, upon suggestion, as to the hay, that it was cut in a certain waste within such a manor; in which manor there was a custom that any thing employed for foddering of things titheable should pay no tithe, and avers that the hay for which, &c. was employed in foddering of sheep. As to the tithe lamb, it was suggested that there was a custom, that for all the lambs that were yeaned there, for what time soever the ewes were fed there, the tenth lamb should be paid for tithes: in consideration whereof they were tithe free for lambs of ewes that fed, but did not yeane there. And he relied on 1 Roll. Abr. 648. where such a custom as to the second point was held good, be-

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because, as he said, it was more than was due for tithes of lamb of common right; for he said the tenth lamb of common right did not belong to the parson in whose parish they fall; but regard will be had to the place where the ewes are fed, and the ecclesiastical court will make equal distribution between the parishes where they were fed, and where they yeaned, which is excluded by this *modus*.

Cheshire, contrd. The suggestion is a plain *non decimando* to pretend to pay no tithe hay, because he feeds his sheep with it; and cited 1 Roll. Abr. 650. 2 Cro. 47. Moore, 683, *Warner's case*. And as to the lambs, it is very unreasonable, for thus by moving the ewes into another parish when they begin to yeane, the parson is ousted of his tithes, though they fed all the year before in his parish; or suppose nine fall he shall have nothing.

HOLT, Ch. J. Of common right tithe-lamb is payable where they fall, but by canon law there is a regard to be had to the place where they were engendered and bred. And your custom for hay is void, for hay is a predial tithe; and though you feed your cattle with it, yet you ought to pay tithe. Of wood spent in an ancient messuage for husbandry, one may prescribe a *non decimando*, for that formerly tithe was not paid for wood; but you cannot lay such a custom for corn, for corn is a predial tithe, but tithe-wood is settled by act of parliament, to be paid only where it was usually paid; so that if there was a custom before, the statute does not take it away; and besides you have not said that the hay was fodder to cattle employed in husbandry, but only say that the tithe will be the better for it. And by the common law pasturage is as much titheable as hay, but the difference is pasturage being taken by the mouth of cattle, but the hay is titheable before it is severed from the ground; pasturage shall pay no tithe, but the cattle that feed it shall; but cattle of pail and plough shall pay no tithe if you feed them upon pasture all the year long; and the reason of that is, for that because they are as tools of husbandry, by which tithes are meliorated. And no tithe is originally due by law in that case, but tithe is originally due upon mowing of the grass; and your subsequent application of it, though to cattle of pail and plough, shall not discharge you of a charge to which you are liable before upon the mowing. And the grass is titheable only in respect of the feeding, that is, the use and application makes it titheable; and for that you cannot have any other tithe than from the profit of the cattle that do feed it. And as to the other point of the lambs, one tithe in specie cannot be a discharge of another tithe in kind; and though, as I said before, tithe-lamb is to be paid where they fall, yet by the received canon law there is regard to the place of feeding; and Marsh, 79. 1 Mod. 239. were cited.

And after consideration the court declared at another day, that no prohibition should go in either part; for as to the lambs, it is a dangerous custom, because easily converted into fraud, by taking the sheep away in yeanning time. And the other point is clear upon the case put out of Cro. Jac. &c. and aftermath of common right is titheable, and no prohibition. *Per totam curiam*.

Note, per HOLT, Ch. J. *hic*. One is not bound to pay tithe-lamb if he have any number under ten, because they are entire things; but if he have nine pounds of wool, he shall pay tithe for it, viz. by an inferior weight, as by ounces, for that is divisible.

Tr. 13 W. S. B. R. *Selby v. Clarke*. [1 Ld. Raym. 677.]

MR. BRODERICK moved for a prohibition, to be directed to the spiritual court of — to stay a suit there against the plaintiff for tithes of hay, and lambs fed, dropped and nourished upon the plaintiff's lands, &c. upon suggestion of a *modus*, that in consideration that they used to pay the tenth lamb of all the lambs dropped in their parish, they used to be discharged of the tithes of all lambs there fed, &c. and as to the tithes of hay, it suggested a custom within the parish, that if any parishioner fed his sheep with his grass until June and August, that then he might mow the coarse grass, with which they fed their sheep in the winter, whereby the parson had *uberiores decimas* of the sheep,

A custom that in consideration that they used to pay the tenth lamb of all the lambs dropped in the parish, they used to be discharged of the tithes of all lambs there fed, &c. &c. is bad, and

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in reality no *modus* at all.

2. The tenth lamb is due to the parson by common right, and though they may make a distribution in the ecclesiastical courts, that is only among the parsons themselves, and does not concern the owner of the land.

3. Wool is severable and every part of it titheable, and the parson may have the tenth ounce, or part of an ounce, but lambs are entire,

and it is not a prescription in *non decimando* to pay the tenth lamb, because under the tenth, tithe is not due.

4. A custom, that if a parishioner fed his sheep with his grass until June or August, that then he might mow the coarse grass with which they fed their sheep in winter, whereby the parson had *uberiores decimas* of the sheep, &c. without setting out any tithe, is in *non decimando*, and void.

&c. And a rule was made, to shew cause wherefore, &c. And now Mr. Chesyre against the prohibition urged, that this was a plain prescription in *non decimando*, because nothing was payable, if there were not ten lambs; like the case of *Delman v. Barton*, 1 Roll. Abr. 648. c. 4. 1 Mod. 229.

But Mr. Broderick, *è contrà*, urged, that this was a good *modus*, because by the canon law distribution ought to be made of the tithes of the lambs, at the places where the sheep had been all the year; and therefore the parson not having right to every tenth, because some of them might be but newly bought, the plaintiff paying every tenth lamb, might well in consideration thereof prescribe to be discharged of the lambs there fed. And he cited 1 Roll. Abr. 648. c. 1. 649. pl. 7. But *per Holt*, Ch. J. the tenth lamb is due to the parson of common right. And though they may make distribution in the ecclesiastical courts, that is only among the parsons themselves, but does not concern the proprietor of the land, who ought to pay the tenth lamb to the parson by the common law; and therefore this custom cannot be esteemed by this court as beneficial to the parson, and consequently it is no ground for a prohibition. But this case differs from the case cited by Chesyre, because wool is severable, and every part of it titheable, and the parson may have the tenth ounce, or part of an ounce, but lambs are entire. But this is not a prescription in *non decimando*, because under the tenth, tithe is not due. And therefore this is not a *modus in non decimando*, but no *modus* at all.

2. As to the *modus* for the hay, Chesyre urged, that it was a plain *non decimando*. And for that he cited 1 Roll. Abr. 650. pl. 13. Cro. Jac. 47. Moor, 683. And the court held it to be a void custom, and therefore the rule was discharged.

Tr. 13 W. 3. B. R. *Fox v. Thexton*. [12 Mod. 524.]

Germes of the roots of oak trees not cut till after twenty years old not titheable, but growing from a root the tree

whereof was not twenty years old when cut, tithes shall be paid.

PER CURIAM. Of germes of oak growing not of a root, the tree whereof was twenty years old when cut, there shall be tithes paid; for oak or other timber cut under that age shall pay tithes as other underwood; but if the oak or other timber tree was twenty years old when cut, it was not titheable, and for that the germes of the roots of such trees cut at that age shall pay no tithe. 2 Inst. 463.

Tr. 13 W. 3. Scacc.

Conyers v. Sweetland and Leate. [1 Wood, 400.]

Devonshire, 30th June, 1701.

Modus of four-pence for a hoghead of cider, four-pence an acre for grass made into hay; four-pence for a calf, a penny for a garden, and a hearth-penny for firewood, decreed.

THE vicar of East Budleigh in the county of Devon, with the chapel of Withercomb Rawleigh annexed, claimed the customary rates in lieu of the tithes of cider, hay, calves, garden stuff, firewood, herbage, and Easter offerings.

The defendant said that the plaintiff was an alien born in France, and not made a denizen, and submitted to the court whether they should pay him tithes, or whether he had any right until he was made free by act of parliament.

The plaintiff replied, the defendant rejoined, and witnesses were examined on both sides; and upon debate of the matter, and reading the depositions, it appeared by the plaintiff's proofs, that the *modus* or customary payment of cider was four-pence a hoghead, and not three-pence only, as was set forth in the defendant's answer; for grass mowed and made into hay, four-pence an acre; for every calf, four-pence; for his garden, one penny a-year; for firewood, a hearth penny yearly; and for Easter offerings, as confessed by the answer, four-pence for man and wife.

And the court decreed the same to be paid by the defendants accordingly.

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M. 13 W. S. C. B. *Buxton v. Cookerman.* [2 Lutw. 1062.]

FOR a suggestion to stay a suit for tithes of glebe land brought by a curate and sequestrator, it was alleged, that one hundred acres of land with the appurtenances were parcel of the rectory, and of the glebe land thereof, and that all the rectors of the church aforesaid for the time being (being seised thereof in demesne as of fee in right of the church,) for themselves, their farmers and tenants of such glebe land, with the appurtenances, held and enjoyed all the land, with the appurtenance, and had been used and accustomed to hold and enjoy the same discharged and acquitted and privileged of and from the payment of all tithes whatsoever to the vicar of the vicarage for the time being for any things whatsoever increasing, renewing, coming or happening upon that land; that the rector had demised the same to the plaintiff.

The opinion of the whole court was, that the matter of the suggestion was sufficient ground for a prohibition; but upon affidavits made that the lands were not glebe lands, the prohibition was denied. Upon this point, see Cro. El. 479. *Blincowe's case*, Moo. 457. 2 Roll. Abr. 335. No. 7.

The court also held that the suit in the spiritual court was well brought in the name of the curate and sequestrator, and for that see the statute 28 H. 8. c. 11. the Register, consultation 51. F. N. B. 52. G.

Incumbents may by their wills dispose of any corn sown by them upon their glebe. A suit in the spiritual court may be brought by a curate to whom sequestration has been granted by virtue of 28 Hen. 8. c. 11.

Where a vicar libelled a tenant for tithes, a suggestion that the land was glebe parcel of the rectory, and that the rector had always held the same for himself, his farmers and tenants, free from payment of tithes, was held sufficient for a prohibition; but in the principal case it was refused upon an affidavit that the land was not

M. 13 W. S. B. R.

Byne v. Dodderidge. [1 Ld. Raym. 696.] 12 Mod. 563. 2 Gw. 578.

MR. CHESHYRE moved against a rule for setting this aside, being granted to discharge another rule before made, by which a prohibition was granted to the spiritual court, to stay a suit there for tithes upon suggestion of a *modus*, and this last rule was made upon allegation, that the plaintiff had had a prohibition granted before, and that he had declared upon it, and that issue had been joined upon it, and a verdict found in it against the plaintiff. And that which Mr. Cheshyre now urged against this last rule was, that the *modus*, upon which the rule was made for the granting of a prohibition, varies from the *modus* upon which the prohibition had been granted before, and the verdict had; and therefore, that this case was not within 50 E. 3. c. 4. For the present *modus* suggested is, that they have used to pay two shillings in the pound of the rent reserved; whereas the former *modus* was, that they used, &c. to pay two shillings in the pound of the profits received. And he cited Hob. 192.

Against this, Mr. Broderick said, that this *modus* was not good; for as it is laid in the suggestion, if the plaintiff keep the lands in his own hands, he shall pay nothing to the parson; for the *modus* is laid to be paid out of the rent reserved. 2. He may let a lease at a smaller rent upon payment of a fine. And he cited 1 Roll. Rep. 378. 2 Vent. 47.

But (*per Cheshyre*) that would be a fraud.

Curia contrâ. It would not be a fraud. And, *per Holt*, Ch. J. 1. This cannot be a *modus*, it amounting to as much as tithes in kind; but, it may be a composition. 2. A custom cannot be applied to rents reserved from time to time upon frequent new reservations. And the rule for discharging the rule granted for the prohibition was made absolute.

A *modus* to pay 2s. in the pound out of the rents reserved is void.

H. 13 W. S. Scacc. *Coe v. Smith.* [1 Wood, 400.]

Suffolk, 19th February, 1701.

THE rector of Elmsett, in the county of Suffolk, claimed the tithe of log trees, and the loppings and topping of other trees in kind, and for the agistment of barren and unprofitable cattle.

The defendant admitted that the plaintiff was rector, and entitled to all tithes

Tithe in kind is due for wood converted into charcoal.

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COR. V. SMITH.

belonging to the said rectory, and stated that he was an inhabitant of the parish of Hadleigh; that he neither inhabited, nor occupied, or owned any lands nor tenements whatsoever in the parish of Elmsett, but he confessed that he had bought log trees, and loppings and toppings for four pounds ten shillings, and had felled and converted them into charcoal, the tithes of which, if titheable, were worth twenty shillings. He also confessed, that in one year he had put ten bullocks to pasture for five weeks, with an owner or occupier of lands in the parish of Elmsett, and averred that the said owner or occupier had paid the tithes of his lands in the said parish.

The court was of opinion, that tithes in kind are due for wood converted into charcoal, and also for the tithe herbage, the value of which tithes the parties, by consent, admitted to amount to six pounds, twelve shillings and sixpence.

It was accordingly decreed, that the defendant do satisfy and pay to the plaintiff the said sum for the value of the said tithes, together with costs of suit, to be taxed by the deputy remembrancer of this court.

WARD, Ch. B.

TRACY, B.

HATSELL, B.

BURY, B.

H. 11 W. S. C. B. *Machin v. Moulton.* [2 Lutw. 1057.]

It had been agreed between former rector and his parishioners, that he should hold a certain quantity of land in lieu of tithes, and a prohibition was granted upon suggestion of a confirmation of this agreement by the rector, who sued in the spiritual court for tithes in kind.

NOTTINGHAM (to wit). W. M. rector of the church of South Collingham in the county of Nottingham aforesaid, was attached to answer I. M. who sues as well for our Lord the King as for himself in this behalf, of a plea wherefore he pursued his plea against him I. M. in the court-christian to the injury of the crown and dignity of the said Lord the king, and against the prohibition of the same Lord the King to him before directed and delivered to the contrary, &c. And thereupon the said I. M. who as well, &c. by J. C. his attorney, complains, for that he the said I. W. in the year of our Lord 1668, and continually from that time to the end of the year of our Lord 1693, was inhabiting within the parish of S. C. aforesaid, and the bounds, limits, and titheable places thereof, and an occupier and possessor of divers parcels of land, with the appurtenances lying and being within that parish. And that the said W. M. now is, and many years then last past, to wit, twenty-nine years and more, was rector of the parish church of the parish aforesaid. And that long before the said W. M. had any thing of and in that rectory, with the appurtenance, one W. B. was rector of the church aforesaid, and seised of that rectory, with the appurtenances, in his demesne as of fee in right of his church aforesaid, and being so seised thereof it was agreed between the aforesaid W. B. on the part of the said W. and his successors of the one part, and the proprietors and tenements of the same parish, to wit, at S. C. aforesaid, on the last day of September, in the year of our Lord, 1650, that the lands lying within that parish should be inclosed with hedges and fences at the cost of such proprietors and tenements for the melioration of the land. And that the same W. B. and all his successors, rectors of the church of the parish aforesaid, for the time being, had the tenth acre of titheable land lying and being within the parish aforesaid, and the bounds, limits, and titheable places of the same parish, separated and inclosed from the rest of the land there, to the sole use and benefit of the aforesaid W. B. and his successors, rectors of the rectory aforesaid for the time being, in full satisfaction and discharge of all tithes, oblations, and ecclesiastical rights whatsoever annually increasing, renewing, coming, and happening within the parish aforesaid, and the bounds, limits, and titheable places of the same parish: and that in pursuance of the agreement aforesaid, all the lands lying within the parish aforesaid, were inclosed according to the agreement aforesaid, and ten acres of titheable land within the parish aforesaid were separated and inclosed for the aforesaid W. B. and his successors, and by the aforesaid W. B. accepted and had in full satisfaction of all tithes, oblations, and ecclesiastical rights aforesaid, according to the agreement aforesaid, for all the time which W. B. afterwards remained rector of the church of S. C. aforesaid, and

and after the death of the aforesaid W. B., to wit, on the last day of February, in the year of our Lord, 1668, the aforesaid W. M. was instituted and inducted into the rectory aforesaid, and thence hitherto was rector of the said church, and is, and then agreed with all the proprietors and tenements in the agreement aforesaid contained, and into the aforesaid ten acres so as is before stated inclosed by the rector aforesaid, entered, and for all the time aforesaid, in which, as before said, he was rector of that church, held and occupied, and yet holds and occupies, according to the agreement aforesaid, and the aforesaid proprietors and tenements for all the aforesaid time in which the aforesaid W. M. was rector of the church aforesaid, were, according to the agreement aforesaid, discharged from the payment of all tithes, oblations, and ecclesiastical rights, until W. M. in the court-christian, before H. W. Doctor of Laws, after mentioned, drew him into plea by libelling, as is below shewn. And whereas, all pleas concerning any contracts, bargains and compositions, between any subjects of this realm of England, for any tithes, goods or chattels whatsoever, arising and happening within the realm of England, and their validity in law, and all other pleas and matters of this kind belong and appertain to our Lord the now King and his royal crown, and not in any manner to the ecclesiastical or civil court, and in the court of our Lord the King of record before his justices, and other judges secular and temporal, and not in court-christian before spiritual judges or elsewhere, ought to be tried, finished and discussed, and always hitherto have been used and ought; yet the aforesaid W. M. well knowing the premises, but contriving and fraudulently intending the same I. M. against the due form of law of this kingdom of England, and the effect of the composition and agreement aforesaid, unduly to molest, oppress, and harass, and our Lord the now King to disinherit and to draw the consuance of a plea which belongs and appertains to our said Lord the now King and his royal crown, to another tribunal in court-christian, the said I. M. in court-christian before the aforesaid H. M. Doctor of Laws, official principal of the consistory-court at York lawfully constituted, or some other competent judge in that behalf, of and for the subtraction of tithes in the libel hereafter mentioned, increasing, renewing, coming and happening of and out of his tenements within the parish aforesaid, the bounds, limits, and titheable places thereof, against the form of the composition and agreement aforesaid, has drawn him into plea by craftily and cunningly libelling against him the said I. M. in the same court-christian.

And then shewed the libel, and alleged that he had pleaded all the matter in the court, and the defendant traversed the agreement, and issue thereupon and verdict and judgment for the plaintiff. After several debates, in arrest of judgment, the plaintiff had judgment for him in Trinity term, 1 Anne, by the opinion of the whole court.

E. 1 Anne. B. R. *Anon.* [11 Mod. 5.]

ALL prohibitions are to be granted upon some suggestion, and not otherwise, which suggestions are to be brought into office.

But *quere* of prohibitions to the admiralty; for the court of admiralty does not use to set forth the special matter whereon they give sentence; but only reciting that they have heard both sides, and so proceed to give judgment, and then they pretend that it is too late to move for a prohibition.

But by HOLR, Ch. J. it is never too late to move for a prohibition after sentence, in any case but one, and that is to the ecclesiastical court, on the statute of 23 Hen. 8. c. 9, where the suit is out of the diocese: and the reason why a prohibition is denied in that case is, because you have by pleading owned their jurisdiction.

And Note, Although in the case of *Acuna v. Joliffe*, a rule is laid down, that for any thing not appearing in the libel, but only suggested as a matter collateral to it, no prohibition shall go after sentence; yet in the case of *Shatter v. Friend*, a prohibition went to the spiritual court after sentence, where they had disallowed proof by one witness, though that matter did not appear in the libel (or sentence): and DOLBEN, J. in that case said, that a prohibition ought to

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If the spiritual court have no consuance, a prohibition will lie after sentence in every case except for suing out of the diocese. All prohibitions are to be granted upon some suggestion which is to be brought into the office.

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go rather after sentence than before; for then it will best appear that they have disallowed such proof.

An action lies against the sheriff where a man escaped, who had been arrested upon an *excommunicato capiendi* issued upon an excommunication for not obeying the sentence of the spiritual court for tithes and costs.

Tr. 1 Anne. C. B. *Slipper v. Mason*. [2 Ld. Raym. 788.] 1 Lutw. 122.

THE plaintiff obtained sentence against J. S. for 210*l*. in the spiritual court for non-payment of tithes, besides his expenses of suit, and for not obeying the sentence J. S. was excommunicate, and arrested upon an *excommunicato capiendi*, and being in custody of the defendant then sheriff of the county, he permitted him to escape. Upon which the plaintiff brought a special action upon his case against the defendant for this escape. And upon not guilty pleaded, the plaintiff recovered a verdict for the 210*l*. Afterwards it was several times moved in C. B. in arrest of judgment, that this action would not lie against the defendant. But it was judged unanimously by all the judges of the Common Pleas, viz. Sir THOMAS TREVOR, Ch. J. NEVILLE, POWELL, and BLACKCOWE, J.J. that the action well lay, Thursday, the 19th of June, as serjeant Jenner told me. And the court relied much upon the case, where it is held, that the case lies against the sheriff, for suffering a man to escape, being arrested upon a *capias utlagatum*, after outlawry upon mesne process.

Tr. 1 Anne. Scacc. *Camell v. Clavering*. [2 Ld. Raym. 789.]

Ejectment lies for small tithes.

AN ejectment was brought in the Exchequer *de minutis decimis*. And upon not guilty pleaded, verdict for the plaintiff. And Mr. Cheskyre about five or six years ago moved in arrest of judgment, that an ejectment would not lie for small tithes. 1. Because eggs are small tithes; and it is absurd to say that an ejectment would lie of an egg. 2. Because the sheriff does not know of what he is to deliver possession, upon *habere facias possessionem*. *Sed non allocatur*. Because it has been adjudged, that an ejectment lies of wool, being tithe, and by the same reason for an egg. And therefore by all the barons judgment was given for the plaintiff. 11 Co. 25. *Ex relatione m^{ri} Cheskyre*.

Tr. 1 Anne. Scacc. *Burrell v. Greenacres*. [1 Wood, 404.]

Norfolk, 15th June, 1702.

Timber trees above twenty years growth, logs made into billets and faggots and burnt in the house, and underwood and thorns used for repairing the fences, pay no tithes.

THE plaintiff, as rector of Woollerton, in the county of Norfolk, stated, that by common right, the tithe of wood ought to be paid in kind; and that the defendant had occupied several acres of wood land, and had cut down and converted several loads of wood to his own use; the tithes whereof were worth forty shillings a-year.

The defendant denied that the plaintiff was entitled, either by common right or immemorial custom, to the tithe of wood, for that the wood and trees, which he had cut down within the said parish, were in their nature *grosse boys*, or timber, except such as grew in the hedge-rows, and which he had applied with the thorn for repairing the hedge-rows, and for the better improvement of the tithes and herbage of the inclosures in the said parish; that the trees were all above twenty years growth; that the underwood and thorns, growing in the said hedge-rows, had, for the greater part, been used in repairing the fences, and the remainder made into faggots and billets, and burnt in his house; that in the said parish there was a custom immemorial, that if the farmers or occupiers of lands cut any underwood or thorns growing upon ditches and inclosures, and employed the same in mending or new fencing within their houses, or on their farms in the said parish, no tithes should be paid for the same, but that the tithes of the hay, corn, and grass so improved should be taken in full satisfaction of the underwood and thorns growing upon such ditches.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides.

The court ordered the bill to be dismissed.

M. 1 Anne. *Dike v. Browne*. [2 Ld. Raym. 835.]

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UPON a motion for a prohibition, the case was, the defendant libelled in the spiritual court for tithes of faggots made of loppings of trees; and the suggestion for a prohibition was, that these loppings were cut from the stumps of timber-trees above the growth of twenty years. And it was alleged, that sentence was given in the spiritual court, and therefore the plaintiff comes here too late to have a prohibition. But, *per Holt*, Ch. J. the sentence will not hinder the having a prohibition in any case, but in case of prohibitions grounded upon 23 Hen. 8. c. 9. for citing out of the diocese. But because the plaintiff had not pleaded this matter in the spiritual court, they denied the prohibition; because the spiritual court has general jurisdiction of tithes, and if any special matter deprive them of their jurisdiction, it must be pleaded there. And if it had been pleaded there, and issue joined upon it, and upon the trial it had been found not to be *sita cadua*, it had been well. But if they had refused to admit the plea, a prohibition should have been granted.

A prohibition was moved for on suggestion that the libel was for loppings cut from the stumps of timber trees above the growth of twenty years; but it was refused because it had not been pleaded below, and any special matter which deprives the spiritual court of jurisdiction

must be pleaded there. If they had refused to admit the plea, prohibition would have been granted

M. 1 Anne. B. R. *Harrow's case*. [7 Mod. 113.]

LIBEL in the spiritual court for subtraction of tithes, for agistment of cattle.

They pleaded below that they were inhabitants of that parish, and the other tithes were better for the agistment of cattle there; and this matter they also suggested for a prohibition; but in their declaration upon a prohibition, they alleged they were occupiers.

Per curiam. The declaration ought not to vary from the suggestion, and if you do not declare pursuant to suggestion, a consultation ought to go; for if you discontinue your prohibition, it shall go of course; and the reason why agisted cattle shall not pay tithes is, because the other tithes of the same parish are the better for the agistment there.

Holt, Ch. J. If you have a house in one parish and live there, you must not pay agistment for dry cattle there. But if you be not a housekeeper there, you must pay tithes for agistment. And if there be cattle of the plough agisted in another parish, they must pay tithes there where they agist, because they are not cattle of the plough there.

The court gave them leave to discontinue upon paying costs, and to pray another prohibition.

keeper there, you must pay tithes for agistment. And if there be cattle of the plough agisted in another parish, they must pay tithes there where they agist, because they are not cattle of plough there.

A declaration in prohibition ought not to vary from the suggestion; but the court allowed the plaintiff to discontinue upon payment of costs, and to pray another prohibition. By *Holt*, Ch. J. If you have a house in one parish, and live there, you must not pay agistment for dry cattle there. But if you be not a house-

M. 1 Anne. Scacc. *Mallabar v. Young and others*. [1 Wood, 408.]

Cambridgeshire, 9th December, 1702.

THE bill stated, that the archdeacon of Ely, having been seised of the impropriation or rectory of Wilberton, in the Isle of Ely, in the county of Cambridge, in right of the archdeaconry, or as a corps annexed thereto, had used to let the same for three lives, or twenty-one years; that W. Saywell, D. D. and archdeacon of Ely, being seised of the said rectory, did, in his lifetime, by indenture, dated the 26th of March, 1700, made between him and the plaintiff, demise to the plaintiff, his heirs and assigns, all the said rectory, with all houses, lands, rents, woods, liberties, and tithes thereto belonging, to have and to hold the same to him and his heirs for three lives, paying yearly to the said W. Saywell, and his successor, thirty-four pounds, at two payments, and

To a bill for tithes, the defendants say that two parcels of land, called Pale Piece and Butts Way, were formerly given to the owner of the rectory in lieu of the tithes of Doles Fen, and that a certain moveable

lot or portion of Leisure Fen was also assigned by the lord of the manor of Wilberton, to the rector of the said parish, in lieu of the tithes of the said Fen. An issue directed to try, whether the lands were so assigned in lieu of tithes, and a verdict being found for the defendants, the bill dismissed with costs.

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and also paying yearly to such as should serve the cure there fifty pounds; that there are within the said rectory two fens, called Leizure Fen and Doles Fen, which, for two years past, had been possessed and enjoyed by the defendants; and that the said fens were very rich, and bore great crops, and had been used in tillage, mowing, and feeding of cattle.

The defendants admitted, that within Wilberton there were two fens, called Leizure Fen and Doles Fen, and that in the said years they severally held certain pieces of fen ground in Doles Fen, and also certain pieces of fen ground in Leizure Fen; that they mowed the grass of the lands in Doles Fen, and made the same into hay, and ploughed part of the land in Leizure Fen, and sowed the same with colesseed and oats, and fed the other part with cows and horses; that they have not paid any tithes in kind, or made any composition with the plaintiff for lands in Doles Fen, for that certain parcels of land then or late in the plaintiff's occupation, called Pale Piece and Butts Way, about nine acres, lying near to the parsonage-house, and other lands in Doles Fen, which were, upon the draining thereof by an act of parliament in the fifteenth year of Charles II., intituled "An Act for Draining Bedford Level," taken in by the adventurers from the owners of the rectory of Wilberton, were formerly, beyond the memory of man, exchanged by some former owners thereof, with such persons as were then owners of the said rectory to each other's satisfaction, in lieu of all tithes for ever after, on account of the said Doles Fen; that Leizure Fen was formerly part of the waste ground belonging to some former lord or owner of the manor of Wilberton, and was, time immemorial, till the late division thereof by the said act, used in the following manner, viz. from Candlemas to Lammas yearly it was laid to be mown by way of moveable lots, being sometimes more and sometimes less (except the lords of the said manor's lot, which was always in a place certain), and afterwards converted into hay or fodder for wintering the owner's cattle of the said several lots; and from Lammas to Candlemas it was fed with the cattle of such as had right thereto, who were the lord, or owner, and his or their tenants, which privilege anciently began, as is conceived, by the grant of some such former lord or owner of the said manor, for their under-tenants better support in the management of the lands by them held; that, by the like grant, the owners and farmers of the impropriation or rectory had a considerable moveable lot or lots in Leizure Fen in lieu of all tithes, both great and small, for ever after yearly arising from all persons on account of the said fen, for which reason the said fen had been taken to be freed from the payment of all tithes whatever to the said rectory; and that when the said fen was divided by the said act, the rector had a considerable lot to hold to him and his successors in lieu of all tithes, and the same has been so held in severalty by the rector and his successors, and is at present so held by the plaintiff; that the several lots of other persons have been held tithe free, and that no part thereof, before the said division, ever paid any tithes, except some small matter that might probably be paid in kind by some persons who were influenced thereto by the plaintiff, or some others, the predecessors of the plaintiff in the said rectory.

An issue was directed to try, "whether the lands in the defendant's answer mentioned, or any and which of them have been held and enjoyed, and ought to be held and enjoyed by the owners, rectors, and impropriators of the rectory of Wilberton, in the Isle of Ely, in the county of Cambridge, for the time being, and their lessees or farmers, in lien and satisfaction of all tithes, both great and small, arising, happening, and being upon the two fens called Doles Fen and Leizure Fen, within the said rectory of Wilberton, or not?" to be tried by a Cambridgehire special jury, but no inhabitants in the Isle of Ely, nor any owner, occupier, or tenant of any lands within the titheable places thereof, to be on the jury; the judge to indorse on the *postea* any thing special. The issue was accordingly tried, and a verdict thereupon given for the defendants.

The court therefore ordered the defendants to be dismissed from the said bill, and their costs to be taxed by the deputy-remembrancer of this court.

EDW. WARD.

RO. PRICE.

THO. BURY.

J. SMITH.

M. 1

M. 1 Anne. Scacc. *Pidsley v. Carew*. [1 Wood, 410.]

1702.

Devonshire, 30th November, 1702.

THE plaintiffs, inhabitants and owners of several lands, tenements, and estates lying within the rectory and parish of Rickley, in the county of Devon, as well for themselves on their own behalf, as on behalf of all others the inhabitants, owners, and occupiers of lands and estates within the said rectory and the titheable places thereof, filed their bill against the rector of the said rectory and parish church of Rickley and the lessee of the tithes under the said rector, to establish and confirm the several immemorial customs following: First, To pay one shilling yearly, in lieu of the tithe of the milk of every milch cow depastured, and the calf of such milch cow calved or fallen, and for the whole product of such cow yearly.—Secondly, Sixpence for every milch heifer depastured, for all the milk yearly of such heifer, and for her calf, and for the whole product of such heifer in the year wherein she had her first calf.—Thirdly, One penny, called a garden penny, in lieu of all tithes, herbs, and garden stuff, and other garden fruits arising yearly within such garden.—Fourthly, one penny, in lieu of the tithes of all wood and furze cut and felled on the said lands and tenements, coppice woods or underwoods. Fifthly, fourpence an acre for every acre of ancient meadow, when the grass of such ancient meadow has been mowed and made into hay, in lieu of the tithes of the hay thereof.—Sixthly, Sixpence an acre, when the grass grown on such lands has been cut, mowed, and made into hay, for and in lieu of the tithes of every acre of such their several lands (not ancient meadow) so cut and made into hay.—Seventhly, Fourpence a hogshead for every hogshead of cider which has been made of apples yearly, when such apples have been converted into cider, for and in lieu of all such apples so converted into cider.—Eighthly, One penny yearly, for and in lieu of the tithes of all apples not converted into cider. In case there be no cider made of any apples grown on such orchards and lands, then the owners and possessors of such lands have been accustomed to pay one penny only, in lieu of the tithes of all such apples.

The defendant Carew denied the *modus*, and confessed, that by deed, dated the twelfth of March, 1700, and duly executed, he did grant the said rectory, glebe-lands, and tithes to the defendant Oliver for five years.

An issue was directed to try the customs or *modus* in the bill set forth; and it was found that there were such customs or *modus* as above set forth.

The court accordingly ordered, adjudged, and decreed, that the said customs and *modus* shall be and hereby are established, ratified, and confirmed.

EDW. WARD. RO. PRICE.

THO. BURY. J. SMITH.

M. 1 Anne. Scacc. *Holwell v. Woolston*. [1 Wood, 411.]

Devonshire, 30th November, 1702.

THE rector of Torbryan, in the county of Devon, claimed tithes in kind. The defendants insisted on the following customary payments: *viz.* for every inhabitant, above sixteen years of age, two-pence, for Easter offerings; for wood and furze burnt and used within the said parish, one penny yearly, called a hearth-penny; for the tithe of gardens, one penny, called a garden penny; for all calves sold, two shillings out of every twenty shillings; for every other calf kept for store, one half-penny; for every milch cow, fourpence; for a new milch cow, calving after Midsummer, two-pence; for every ten ewes milked, two-pence halfpenny, and so proportionably for a greater or lesser number; for every hogshead of cider, two-pence, in lieu not only of apples, but of pears and all orchard fruit; and they insisted on a custom to tithe lambs on St. Mark's day, and, on refusal, to put the tithe lambs under a yew tree in the churchyard; but they denied that any thing is due for the agistment of horses and oxen.

The court, on reading the depositions of the witnesses on both sides, ordered the defendants to pay to the plaintiff for the several years demanded by the bill, for the tithe of gardens, one penny yearly, called a garden penny, in lieu

Moduses established of one shilling for each cow in lieu of tithes of milk and calf of such cow.

6d. for each heifer's milk and calf.
For garden stuff and fruits, a garden-penny.
1d. for wood and furze.

4d. an acre for ancient meadow hay.

6d. an acre for new meadow hay.

4d. a hogshead for all apples made into cider.
For all other apples, 1d.

1d. called a garden penny for the tithe of gardens;
4d. for a milch cow;
one farthing for every milked ewe;
1d. called a hearth-penny for wood and furze burnt, decreed to be good *modus*.

1702.

MOLWELL
v.
WOOLSTON.

lieu of all herbs and roots there growing; for every milch cow, four-pence yearly; and for every milked ewe, one farthing; and one penny yearly, for and in lieu of all wood and furze burnt in the said parish, called an hearth-penny, according to the said *modus* set forth in the answer; and that the said defendants shall account for the value of the tithes of all woods and furze, not used or burnt in the said parish; for the tithe of all wheat, barley, oats, beans, peas, and other grain demanded by the bill; for the value of tithe hay, and the tithes of the wool of lambs, hogs, calves, pasturage of sheep, barren cattle, colts, oxen, horses, or other cattle agisted and not used for the plough or pail; and for apples, pears, fruit, turkeys, ducks, cocks, hens, eggs, honey, wax, and all other titheable matters and things not comprehended under the several *modi* aforesaid.

1703.

H. 1 Anne. B. R. *Matthew v. Burdett*. [2 Salk. 412. 672.]

If the king and clergy make a canon, it binds the clergy in *re ecclesiastica*, but it does not bind laymen; they are not represented in convocation; their consent is neither asked nor given.

IN the primitive church, the laity were present at all synods: when the empire became Christian, no canon was made without the emperor's consent: the emperor's consent included that of the people, he having in himself the whole legislative power, which our kings have not: therefore, if the king and clergy make a canon, it binds the clergy in *re ecclesiastica* but it does not bind laymen; they are not represented in convocation; their consent is neither asked nor given.

In a prohibition the plaintiff declared, that whereas by the common law it was lawful to teach others, and instruct them in any honest art or science, and that teaching *est res merè laica*, &c. yet that he was sued in the spiritual court for teaching children in the elements of grammar, without license from the ordinary: on demurrer it was insisted for the plaintiff,

First, That the law favours means of livelihood; that grammar was equally useful to all literate professions, and that a lawyer or physician could be no more without it than a divine. That all the colleges in the university were lay corporations; that though the members of the college might be all of them spiritual persons, yet the corporation was lay and temporal; because the institution and end was temporal, viz. to advance learning, which shews that a schoolmaster is a lay employment, and was formerly under the care of the civil magistrate. *Stillinglee's Orig. Brit.* 210. 212, 213. That the common law takes no notice of it but as temporal. *Vide* 11 H. 4. 47. *Poph.* 170. *Reg.* 35. And that the only mention of it before the Reformation, is *Anno Domini*, 1408. *Per Lyndewode*, 282. That schoolmasters permit not their scholars to dispute of religion, under penalty of being censured for heresy, to which every body was liable; which provision was to prevent the spreading of Wickliffe's doctrine: that no law or canon required a license till the council of Lateran, *Anno Domini* 1215. *Decret.* 6. Tit. 5. cap. 1, 2, 3. and that is, that there shall be a schoolmaster in every cathedral, and that he shall be licensed by the bishop. That the several acts of parliament which require the schoolmaster's taking a license from the bishop, shew it was not necessary before, nor was there any such usage or practice that can be made appear. *Vide* stat. 23 Eliz. c. 2. 1 Jac. 1. c. 4. 14 Car. 2. c. 4.

Secondly, That if this was a calling which a layman might follow by the common law, a canon cannot restrain him of the liberty the law gave him; the common law and custom of the realm cannot be altered or abrogated, but by act of parliament, and therefore a canon cannot do it, though ordained by the King's royal license, or afterwards confirmed by his royal authority. *Vide* 12 Co. 72. 2 Inst. 97. 647. 653. 657. 2 Ro. Ab. 454. Mo. 782. *Ratio est*, because being a layman, he is not represented, and therefore his consent is not given, and a man cannot be under the obligation of a canon without his consent expressed or implied. In the primitive church the laity were present at all synods. When the empire became christian, no canon was ever attempted without the consent of the emperor; and his concurrence included the assent of the whole body of the people; because he had the sole legislative power in him: but this is not the case of our king; for he has not the whole legislative power in him: *Ergo*, his consent, to a canon in *re ecclesiastica*, makes it a law to bind the clergy, but not to bind the laity. *Vide* 20 H. 6. 13. Br. Ordinary, 1. 2 Ro. Ab. 226. 2 Cro. 670. 2 Brownl. 38. Cro. Car. 588. Palm. 379.

Thirdly,

Thirdly, Where the common law or a statute gives a remedy *in foro seculari*, whether the matter be temporal or spiritual, the consueance of that matter belongs to the king's temporal courts only, unless the jurisdiction of the spiritual court be saved by that statute which gives the penalty; for otherwise one might be twice punished for the same thing. Vide Lit. Sect. 136, 137. Cro. Car. 229. 1 Mod. 21, 22. 1 Jon. 320. Where a crime which was punishable in the ecclesiastical court, is made felony, their jurisdiction is gone. For nota; the nature of the crime is altered. So 2 Leon. 53. 4 Leon. 92. That in this case the act of parliament which gives a temporal penalty, does not save the jurisdiction of the spiritual court; which was urged as an argument that the parliament did not look upon it as an ecclesiastical matter; for in all cases where acts of parliament have imposed farther penalties in ecclesiastical offences, there is a saving added for the jurisdiction of the ecclesiastical officers; so is 13 Eliz. cap. 5. of usury. 31 Eliz. c. 6. of simony. 4 Jac. 1. of drunkenness. 3 Car. 1. c. 1. of the observation of the sabbath. 3 Jac. 1. c. 4. of recusancy. And they urged also that these parliaments had not added these savings, if they had been useless; but it was their opinion, that imposing a penalty made it a temporal offence, and that their jurisdiction would have been lost without such a saving. And lastly this difference was taken, that where an act of parliament gives a remedy for a spiritual matter in the temporal courts, the spiritual jurisdiction is gone; but where an act gives a remedy in a temporal matter to be prosecuted in the spiritual court, yet the remedy at common law remains, as *pro violenta injectione manuum in clericum*. Note; in the statute *de circumspcctis agatis*, the words are, *commissum fuit aliis*, which must be understood of a jurisdiction before granted to them.

On the other side it was said, that the canon of Lateran before mentioned, was received in England as well as the other canon of the same council for parochial tithes, and that it appears by custom, that the bishop is to superintend the education of youth. Vide Lyndew. l. 5. tit. De Magistris, and the several statutes, requiring that he shall have a license from the ordinary: and it was said, that the toleration act did not influence this case, for that did not exempt men in places of trust from qualifying themselves according to the rites of the church of England.

H. 1 Anne. B. R. *Anon.* [7 Mod. 137.]

UPON a motion for a prohibition to a suit in spiritual court for tithe-wood: Holt, Ch. J. One may prescribe in a *non decimando* of wood; or it is a good plea that it is for boughs, loppings, germs, &c. of timber trees of twenty years standing; and if that plea be denied below, it is good cause of prohibition; but if they receive and traverse it, they may try it here.

One may prescribe in a *non decimando* of wood; or it is a good plea, that it is for boughs, germs, &c. of

timber trees of twenty years standing; and if that plea be denied below, prohibition lies, but if they receive it, they may try it.

E. 2 Anne. Scacc. *Ekins v. Bridges* and others. [1 Wood, 416.]

Northamptonshire, 26th April, 1703.

THE bill stated, that the plaintiff, being rector of the parish church of Barton Seagrave, in the county of Northampton, ought to have the great and small tithes arising therein; that the defendants held several lands in Barton aforesaid, from January, 1698; some part of which they had sown with grain; and had depastured the other part with cows and sheep, and received great benefit by agisting barren cattle; that they had a number of colts, calves, lambs, fleeces of wool, and milk; and did mow other ground, and had carried away the hay; of all which tithes ought to have been paid to the plaintiff; that the tithe lambs ought to be marked and set out the seventeenth of May yearly, and run with their dams till the first of August, the rector paying two-pence a lamb to the parishioners; all which the defendants had refused to pay, pretending some agreement of two shillings in the pound for the tithes of hay, wool,

Customs, that tithe lambs ought to be set out on the 17th of May, the lamb to run on the same ground till the first of August, when two-pence is to be paid by the parson:

That tithe milk be paid every ninth night and every tenth

morning after Easter Monday till the first lamb is yeaned alive after New Year's day, such milk to be delivered, are good.

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wool, and lamb, and other dues, which they have paid to the twenty-fifth of March, 1699, and insisted to continue the same, not having had due notice; that the said articles were not to be obligatory till a commission, therein mentioned, had been executed, at the joint charge of the plaintiff and the defendant Bridges, for the perpetuating the testimony of witnesses; and that the defendants refused to join in the same, and therefore the articles were of no force; that the defendants had three months notice of the plaintiff's intention to take his tithes in kind before the twenty-fifth of March, 1699; yet, for quietness sake, he was willing to begin to take the same from 1700; and that the defendants ought to pay two shillings in the pound for the year 1699; that the defendants ought to pay the tithe of wool in kind for all sheep shorn in the parish of Barton, though the same be brought into the parish after New Year's day and before shearing day; and two shillings in the pound for the agistment of barren and unprofitable cattle; that the tithe of milk arising within the said parish ought to be brought to the dwelling-house of the rector, or to a place called the Cross, in the said parish, which was not done for the year 1700, for which the plaintiff demands satisfaction. The bill therefore prayed a discovery of the defendant's tithes for the said years, and a full satisfaction for the same.

The defendant Bridges admitted the plaintiff to be lawful rector of the parish, and entitled to the great and small tithes, and he insisted on the articles made between him and the plaintiff, whereby it was agreed, that the plaintiff should take, during their joint lives, two shillings in the pound after the pound rent thereof, in lieu of all tithes of any lands of the defendant which he or his tenants should hold or occupy therein during all such time as such land should be cut for hay, grazed, or depastured, the tithe whereof, when ploughed or sown, to be paid in kind; and therefore he hoped that he and his tenants ought not to pay tithe in kind for his grazing grounds.

The other defendants, as his tenants, insisted upon the benefit of the said articles as to such lands as they rented of the defendant Bridges; and all the defendants who were occupiers of lands within the said parish insisted upon the parol agreement made between the plaintiff and them; and that the same ought to continue till Michaelmas, 1700, for that they had not timely notice of the plaintiff's intention to take his tithes in kind; and they set forth the grounds they held in the said parish, and the titheable matters arising therefrom since Michaelmas, 1700: and they all said, that they did not know of any particular place where tithe-milk ought to be set out and paid; but have heard, that it was not due all the year, but began to be payable the ninth night and tenth morning after Easter, and continued payable until the first lamb should be yeaned after New Year's day; and that the same ought to be paid where it was milked; that the tithe of wool was to be paid in kind for all such sheep as were brought into Barton parish before New Year's day, and there shorn, and a halfpenny a sheep for all brought into the parish after New Year's day, and before shearing day; that tithes of lambs were to be set out about the middle of May, to be kept on the grounds and to run with the dam till the first of August following, the incumbent to pay two-pence a lamb to the occupier of the ground; that two shillings in the pound were due to the rector of the said parish for the agistment of the cattle of strangers which were agisted within the said parish; but that the two shillings ought not to be paid for the herbage of barren cattle, which were the proper stock of the landlord or tenant, but the sum of two-pence half-penny for every beast.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and upon long debate of the matter, and hearing what counsel could allege, and reading the said articles made between the plaintiff and the defendant Bridges and his tenants, dated the twenty-fifth of April, 1689, and the depositions of divers witnesses taken on both sides,

The court declared, they saw no cause to set aside the articles made between the plaintiff and the defendant Bridges in the bill and answers mentioned.

And as to the several customs and usages of paying tithes within the said parish,

The court declared they were satisfied, First, That the tithe of lambs ought to be

be set out in every year on the seventeenth of May, and that the lamb ought to run with the dam on the ground where the same is yeaned until the first of August following, the incumbent to pay two-pence to the occupier of such ground, at the delivery of such lamb on the first of August.—Secondly, That tithe-milk ought to be paid in kind every ninth night and tenth morning after Easter Monday until the first lamb is yeaned alive in the said parish after New Year's day; and that such tithe-milk ought to be brought to the Cross, near the court-yard gate of the defendant Bridges, in the said parish.—Thirdly, That the tithe of herbage ought to be paid for barren cattle, which are the proper stock of the occupiers of land within the said parish, as well as those of strangers.—Fourthly, That tithe-wool in kind of all sheep shorn in the said parish ought to be paid to the plaintiff. Fifthly, That the pretended custom of two-pence half-penny a beast for the tithe of barren cattle, being the proper stock of the occupier, and the pretended custom for the payment of a half-penny a sheep for the tithe-wool of such sheep as are brought into the parish after New Year's day, and insisted upon by the defendants, ought to be rejected.

It is thereupon ordered and decreed by the court, that the defendants do account with the plaintiff for the lands they respectively held within the said parish from Lady Day, 1699, to the filing of the bill, pursuant to the said articles in the answer mentioned; and that they do pay to the plaintiff so much money as shall appear to be due to him upon such account; and that the several customs for the setting out of the tithe lambs on the seventeenth day of May every year, and that the lamb shall run with the dam on the ground where the same was yeaned till the first of August, the incumbent to pay two-pence to the occupier of such ground for every such lamb; and the said custom of paying tithe-milk in kind every ninth night and tenth morning after Easter Monday until the first lamb yeaned alive in the said parish after New Year's day, and for bringing and delivering the milk at the place, called the Cross, near the defendant Bridges' court-yard gate, in the said parish, by the parishioners, to be there taken by the rector of his servants for the time being, shall be, and are by the decree in this court ratified, established, and confirmed.

And it is further ordered, that the defendants Danty, Hunt, and Palmer, do respectively account with and pay to the plaintiff a composition after the rate of two shillings in the pound for their tithes due for 1699, and to Michaelmas, 1700, according to the several agreements insisted upon by their answers; and they are likewise to account with and pay to the plaintiff for tithe-milk, wool, and barren cattle, and all other tithes arising on the lands which they respectively held and enjoyed within the said parish from Michaelmas, 1700, to the time of filing the bill (excepting for such lands as they held in the parish as tenants to the defendant Bridges, for which they are to account with the plaintiff after the rate of two shillings in the pound rent according to the said articles); and it is referred to the deputy-remembrancer to take the account, and make his report herein. And, by consent (other than the defendant Bridges), the said defendants are to pay the plaintiff forty pounds costs in this cause.

EDW. WARD.
THO. BURY.

RO. PRICE.
J. SMITH.

E. 2 Anne. B. R. Anon. [3 Salk. 289.]

PER Ch. J. In the cases of prohibitions, where they were granted upon a motion, the ancient course was, that the party prohibited sued out a *scire facias*, *quare consultatio non debet concedi post prohibitionem*, in which writ the suggestion was recited, and also a prohibition granted thereon, *ad damnum* of the party.

Afterwards this practice was altered, and the course came to be thus, (*viz.*)
Upon

The ancient course in a prohibition was to grant a *scire facias*; afterwards the court bound the parties in a recognisance to prosecute

an attachment of contempt for suing in the spiritual court after prohibition granted, and then to declare upon the prohibition, so that he who was defendant in that court, became plaintiff in the court above.

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Upon granting a prohibition to the plaintiff, the court bound him in a recognizance to prosecute an attachment of contempt against the defendant, for suing in the spiritual court after a prohibition granted, and then to declare upon the prohibition; so that he who was the defendant in that court, is now become actor or plaintiff in the court above.

Tr. 2 Anne. Scacc.

Conald and others v. Conald and Sir John Collett. [Dodd's MS. 199.]

Hops are small tithes, and belong to the vicar, where he is endowed of them.

THE plaintiff Conald was vicar, and plaintiff Spencer lessee of the impropriation of Boughton under the Bleane, in Kent, the rest occupiers. The vicar brought his bill for tithe-hops, and the impropriator likewise. Hops had not been planted above twenty or twenty-five years; the vicar had all or most of the small tithes; and decreed by the court that hops are small tithes; that where the vicar has generally endowment of small tithes, he shall have them; that grass in new orchards, and so of beans in new gardens, &c. (which were the small tithes the impropriator had received) belongs to the impropriator; and when the vicar has them, it is intended in ancient. The impropriator had once taken weld, flax, &c. yet decreed for the vicar, for the court thought upon the proofs he had all the small tithes.

Tr. 2 Anne. C. B. *Anon.* [2 Ld. Raym. 991.]

Barren land to be exempted by the statute, must be such as is barren *supte naturâ*, and not land upon which wood or the like

POWELL, J. Barren inclosed, which is within the meaning of the statute of Edw. 6. to be exempted from payment of tithes, must be such land as is barren *supte naturâ*, and not land upon which wood or the like grew before, and which is afterwards burnt, and the land converted into tillage. And on a suggestion for a prohibition to a suit for tithes of such land, it must be alleged to be barren *supte naturâ*.

grew before, which is afterwards burnt, and the land tilled.

Tr. 2 Anne. Scacc. *Lister v. Foy.* [1 Wood, 422.] 2 Gw. 579.

Dorsetshire, 1st June, 1703.

A *modus* to pay the tenth ordinary cheese, or tenth day's milk once skimmed, and made into cheese between St. Mark's day and All Saints' yearly, in full for cow white; the cheese to be collected when stiff, or every fortnight or three weeks, is void.

A custom to tithe such lambs as are able to subsist without the ewes on St. Mark's day, and the others when able to subsist, is good.

Lacks of wool are not tithable.

THE bill stated, that the vicarage of Buckland Abbas, otherwise Newton, in the county of Dorset, being void, the plaintiff was in the year 1690 lawfully instituted and inducted thereunto, and ought to receive all small tithes and other duties therein, and in the tithings of Buckland, Knowle, Brockhampton, Dunlish, Mineterne Parva, and Plush thereto belonging.

The defendant Foy stated the custom of tithing in the said parish to be as follows: First, That any inhabitant having under seven calves or lambs fallen, ought to pay to the vicar one half-penny for each calf or lamb; if seven or above, and not ten, to pay one, the vicar paying the inhabitant; if not above seven, three half-pence; if eight, then one penny; and if nine, then a half-penny.—Secondly, For a calf killed, to be spent in the inhabitant's own house, the vicar to have the best shoulder, if the parties have not that year calves enough to make the number of seven.—Thirdly, For every calf sold, where the party had not enough, with the calf sold, to make up seven, the tenth penny for what it was sold was paid.—Fourthly, One penny for every colt foaled, paid at Lammas day, whether afterwards reared or sold, and no greater sum for the pasturage of such colt.—Fifthly, That after tithes paid for calves as aforesaid, no further consideration was by custom to be given in lieu of tithes for them for any year after till such calf reared and used for plough or pail; and nothing paid for the tithe of pasturage of any calf, heifer, or sheep, or colt intended for plough or pail; nor for any plough cattle used about managing arable land out of which the vicar or person had tithe corn.—Sixthly, That the custom in Brockhampton and Dunlish tithing and Clinger was, for every inhabitant, between St. Mark's day and All Saints' day yearly, to pay the tenth ordinary cheese, to be collected when stiff, or every fortnight or three weeks.—

Seventhly,

Seventhly, That the custom of tithing in Minster Parva and Plash (except Clinger) was to pay two-pence *per annum* for each cow, and three half-pence for each heifer, in full of tithe of cow white; and in Henley three-pence each milk cow, and two-pence each milk heifer; and in Hustwell farm four-pence a cow, and three-pence a heifer; and in Knowle tithing the like, and two-pence for every barren cow milked, in full for tithe of cow white.—Eighthly, That the inhabitants ought to be free from payment of tithes of locks of wool.—Ninthly, That calves ought to be paid for at the end of a month after their fall.—Tenthly, That tithe-apples and pears ought to be paid (except fallings). And, eleventhly, One penny for a garden, and two-pence for every communicant.

The defendant Hopkins also insisted on the said *modus*.

To which answers the plaintiff put in a special replication, and thereby admitted to have received several tithes and titheable matters from the defendants, arising within the said parish and the several tithings thereof for the time demanded by the bill; but said, that the defendants had several other tithes and titheable matters charged in the bill within the said parish and the titheable places thereof, for which they had not paid tithes, but ought to pay the same.

The defendants rejoined; and witnesses were examined on both sides: and upon full debate of the matter,

The court declared, the custom set forth in the defendant's answer, for every inhabitant in Brockhampton and Dunlish hamlets and Clinger, between Saint Mark's day and All Saints' day yearly, to pay the tenth ordinary cheese, or tenth day's milk once skimmed and made into cheese, in full for cow white, the cheese to be collected when stiff, or every fortnight or three weeks, to be a void custom.

And as for the custom of tithing of lambs on Saint Mark's day,

The court allows the custom, that such lambs as are able to subsist without ewes on Saint Mark's day, are to be tithed; but that such other lambs as are not able to subsist without the ewes on Saint Mark's day, are to be tithed when they are able to subsist without the ewes.

It is thereupon ordered by the court, that the said defendants shall account with and pay to the plaintiff the value of their several and respective tithes due and in arrear from them to the time of the bill (except for locks of wool, for which they are not to account). But that they are to account for all fleece wool whatever.

And it is further ordered, that they shall account for the tithes of such apples as fall from the trees.

EDW. WARD.
THO. BURY.

RO. PRICE.
J. SMITH.

Tr. 2 Anne. Scacc.

Horton v. Harrington. [1 Br. P. C. 140.] 2 Gw. 594. Rayn.
95. 104. 1 Wood. 424.

1702.

4th February, 1706.

THE manor, demesne lands, and parsonage of Bedminster and Redcliff, in the county of Somerset, have immemorially belonged, as a corps, to the prebendary of the prebend of Bedminster and Redcliff, in the cathedral church of Sarum; and, having been usually leased out for lives, were, for above 100 years, held by Sir Hugh Smith, Bart. and his ancestors, as lessees thereof; who had besides, a very large estate of inheritance, lying within this impropriation.

In order to ground an exemption from the payment of tithe hay in kind, the Smiths agreed with their tenants, to accept a yearly composition for the tithe hay, arising out of their respective farms, amounting in the whole to £3 : 14 : 5 payable

In a suit for tithe of hay, the defendants, by their answer only, set up several *modus* under the name of straw-tithes, which were overruled by the court of Exchequer, and an account decreed: this decree was

reversed, and issues directed to try the existence of the *modus*.

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payable yearly, on Good Friday; but such of the lands, held by those tenants, as belonged to the prebend, were not comprehended in this agreement, and were therefore left at large, to pay their tithe hay in kind.

These compositions were generally paid for the greatest part of the time that the Smiths enjoyed the parsonage; but there were sometimes small variations in them, at other times the tithe in kind was paid, and sometimes money, to the full value of the tithe.

On the death of Sir Hugh Smith, the respondent's father being then prebendary of the prebend, became seised of the parsonage; and, in the year 1698, he granted the same to the respondent for three lives.

In Easter Term, 1700, the respondent exhibited his bill in the court of Exchequer, against Sir John Smith, the son and heir of Sir Hugh, and also against the appellants, as his tenants, for recovery of his tithe hay, and the arrears, from the time of his grant. To this bill, the appellants, by their answer, denied tithe hay in kind to be due; and set up the several sums, so payable by composition, as so many *modus*es, in lieu of the tithe hay, under the name of strew-tithes; but the defendant, Sir John, in his answer, set forth a paper which he found among his father's writings, relating to the profits of the parsonage, in which was the following article: "*Item*, There is a duty paid there, in lieu of tithe hay, called strew-tithe, and it is due upon Good Friday; for which there is extant a rental of the particulars, what is to be paid out of every tenement, and out of divers particular grounds, which, if they that hold them refuse to pay, then they must pay tithe hay; and, if it can be all gathered, it will come, *per annum*, to about £3: 14s. but it is now hard to be gathered."

On the 22d of June, 1703, the cause came on to be heard; when the court decreed the defendants, the occupiers, to account with, and satisfy the plaintiff, for the value of their tithe hay, and the arrears; and the usual directions were given for taking such account.

But from this decree the defendants appealed; contending, that an issue ought first to have been directed, to try whether tithe hay in kind was, of right, due or payable within the parish. That the respondent's father, for twenty years and upwards, and Sir Hugh Smith and his ancestors, for above an hundred years before, received tithe corn, and all other tithes in the parish; but forgot, for all that time, to ask for so valuable a part as the tithe of hay; which, if it had been really due, seemed very improbable, and scarce to be credited. And, though many debts at law are lost by length of time, and a demand is, in most cases, necessary to preserve the right to a duty, yet the only foundation of this decree in equity, was the length of time, without any demand; so that the laches of the respondent's ancestor, which ought to be for the advantage of the appellants, turned out to their manifest prejudice.

On the other side it was insisted, that tithes in kind are due of common right; and, that there was no proof in the cause sufficient to support the *modus*es, as laid in the answer. For tithes in kind were proved to be paid for some of the lands alleged to be covered by these *modus*es; and, as to other farms, the customary payments were proved to be different from those mentioned in the answer; and some of the lands were destitute even of the pretence of a *modus*. And, as to the objection that there ought to have been a trial at law, it was answered, that a court of equity does not send any fact to be tried at law, but where it is rendered doubtful by a contrariety of evidence; but, as the appellants had wholly failed in proving their *modus*es, there was no foundation to send any one of them to such a trial.

But, after hearing counsel on this appeal, it was ordered and adjudged, that the decree complained of, should be so far reversed, as, that several issues should be tried in the proper county, at the next Summer Assizes; whether the several *modus*es, insisted on by the defendants in the court below, in their answers, (who are now appellants) have been, time out of mind, paid and payable, for and in lieu of tithe hay in kind; and, that the court of Exchequer should proceed, upon the issues directed, as should be just: and, if any difference should arise between the parties in settling the issues, it was ordered, that they should apply to Mr. Baron PRICE, to settle the issues so to be tried.

H. 2 Anne, Scacc. *Grodfrey v. Trinder and others.* [1 Wood, 433.]
Oxfordshire, 21st February, 1703.

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THE bill stated, that the plaintiff was seised in fee of the rectory of Holwell, in the county of Oxford, and of all tithes, both great and small, thereunto belonging; that the defendant, H. Trinder, was owner of all the lands there, except one yard-land, which the plaintiff had for a long term of years; that there having been several suits between them, both in law and equity, the plaintiff consented to an inclosure; for which purpose articles were entered into the twenty-third of May, 1693, as stated in the bill; but that the defendant had not complied with the said articles. The bill therefore prayed, that the defendants might for the future sow four hundred acres, or pay two shillings an acre for what was wanting, pursuant to the articles; that the acres might be measured; that the defendants might pay tithes of the green peas and turnips; that they might maintain the mound between the two lordships; and that the agreement might be performed, the tithes paid, and the plaintiff quieted in his possession.

To a suit in the Exchequer, the defendants pleaded a suit and decree in the court of Chancery on the same subject; and it appearing the matter was settled in Chancery, bill dismissed.

The defendants put in their answers and plea, and pleaded an original and cross bill, and all the proceedings therein in the Court of Chancery; and answered as to part, and set forth their quantities, and said, that tithes of turnips were not due to the plaintiff, for that Holwell was within the parish of Broadwell, where there was a vicarage endowed, whereto belonged all small tithes (all but corn and hay cut at harvest); and that the defendant Charles Trinder had compounded with the vicar of Broadwell.

To which plea and answer of the defendants Henry and Charles Trinder, and also to the two answers of the defendant Bolt, the plaintiff replied; and the defendants rejoined; and witnesses were examined on both sides.

Upon opening the pleadings, and reading the depositions of several witnesses examined on both sides in the cause, and upon reading several of the proceedings in the causes lately depending in the Court of Chancery between the now plaintiff and Henry and Charles Trinder, and which were pleaded by the said defendants in this cause; and, upon long debate of the matter, it appearing to the court that the plaintiff had replied to the said plea, and that there are such decrees, orders, and other proceedings in the Court of Chancery as in the said defendant's plea are set forth, and that the said matters pleaded to as aforesaid are settled and determined by the High Court of Chancery,

It is ordered by the Court, that the said defendants be, and are hereby dismissed of and from the said bill, and the matters and things therein contained.

M. 2 Anne. B. R. *Horner v. Bonner.* [6 Mod. 86. 96.]

SUIT was for tithes: A prohibition was moved for, suggesting the land to have been barren ground cultivated, and therefore ought to be exempted so long, &c.

CURIA. If land yield any profit before, as wood, &c. it is not within the statute 2 & 3 Edw. 6. c. 13. for it ought to be *suapte natura sterilis*.

Prohibition was moved for upon the statute of 2 & 3 Edw. 6. c. 13. for suing for tithes of barren ground newly cultivated.

But it was denied for two reasons:

FIRST, Because the suggestion did not allege it to be *suapte natura sterilis*.

SECONDLY, That there was no affidavit that it was pleaded below.

If land yield any profit before, as wood, &c. it is not within the statute as barren land, which ought to be *suapte natura sterilis*; and no prohibition will in such case be granted unless there be an affidavit that it was pleaded below.

H. 2 Anne. B. R. *Anon.* [2 Salk. 553.] Holt, 598.

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PROHIBITION lies for denying a copy of the libel to any ecclesiastical court; *nam jura ecclesiastica sunt limitata*; and the party ought to know whether the matter be within their jurisdiction, and how to answer. 1 Ro. Rep. 337. *Dighton's case.* Et Mich. 2 Ann. B. R. It was said by Holt, Ch. J. that

Prohibition lies to any ecclesiastical court, for denying a copy of the libel; for

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the party ought to know whether the matter be within their jurisdiction, and how to answer.

that it was formerly held by all the judges of England, that when there was a proceeding *ex officio* in the ecclesiastical court, they were not bound to give the party a copy of the articles; but the law is otherwise: for in such case, if they refuse to give a copy of the articles a prohibition shall go *quousque* it be given; and accordingly a prohibition was granted *per curiam*. *Nota tamen Pasch.* 11 W. 3. B. R. *Hall* moved for a prohibition to the Admiralty for refusing a copy of the libel; and it was denied *per Holt*, Ch. J. *quia n'est deus le stat.*

E. 3 Anne. Scacc.

Gee v. Perch. [1 Wood, 436. Dodd's MS. 200.] 2 Gw. 581.
Ray. 97.

Kent, 11th May, 1704.

Setting out tithe wood by loose heaps is good, but there may be a different custom in a parish, and in such case there shall be no allowance for the charge of binding, &c. *Quere*, whether ash poles used in husbandry be titheable.

Tithe of hops must, *de jure*, be paid when picked into the bin by measure, and not by hill or pole, &c.

Milk shall be paid by the tenth meal.

THE plaintiff, as administrator, with the will annexed, of Mary Gee, widow, deceased, stated, that the said Mary Gee, for two years ending at Michaelmas, 1698, had been lessee of the rectory of Orpington, in the county of Kent, and that the plaintiff, for two years ending at Michaelmas, 1702, had been, and still was, lessee of the said rectory; that by virtue thereof the said Mary Gee and the plaintiff were, for those years respectively, entitled to all tithes of corn, hops, wood, and other things; that the defendant used a wood called Clay-wood, containing twenty acres, and another wood adjoining to Crawton Heath, containing six acres, and divers other woods in the said parish, from which, in the said years, he did fell, grub, cut down, and carry away quantities of wood, the tithes whereof were of great value; that the said defendant did, in the third year, hold and enjoy several acres of hop grounds in the said parish, upon which he had grown several quantities of hops, which he gathered and carried away, the tithes whereof ought to have been duly set out as they became due; that the defendant did not set out his tithe wood in such manner as he ought to have done, he leaving only some loose ranges or heaps of wood for his tithes, without ingrain, binding, or making up the same, as by the law, custom, and manner of tithing used in the said parish he ought to have done; that the defendant did not, in the said years, set out his tithe hops as he ought to have done, but left, as he pretends, the tenth hill or pole without picking, in lieu of tithes; and that the defendant ought to have picked his hops from the bines or poles before he set out the tithes thereof.

The defendant said, that for the years in the bill mentioned he had held and occupied in the said parish about one hundred acres of coppice wood, and particularly Clay-wood, containing twenty acres, and the wood also adjoining to Crawton Heath, four acres; that in 1698 he cut Crawton Heath wood, and in 1701 and 1702 Clay-wood, but that before he cut down and carried away any of the said wood, he applied to the plaintiffs to see the tithes of the said woods set out and separated from the nine parts as follows; viz. when his servants had cut down a small parcel they piled it up in ten several heaps of equal size and goodness, and, to prevent disputes about the tithes, he had the said ten heaps viewed by indifferent persons, and caused the best of the said ten heaps to be left for Mrs. Gee and the plaintiff's tithes; and then the defendant's workmen proceeded in the same method from place to place, until the tithes of both woods were duly and fully set forth; and he said, that he believed that the like method of paying tithe wood was and had been the only method used in the said parish, and that the said wood was not to be size bound, or made up at the defendant's charge into a marketable ware; that the wood adjoining to Crawton Heath, when cut down, was not worth above forty shillings an acre, and Clay-wood three pounds an acre, to be sold, and that, after the tithes set out, the said woods cost him more than the remaining nine parts of the same were worth; that notwithstanding he set out the full tenth part of Crawton Heath wood, wherein he had for his nine parts but three thousand six hundred and seventy bays; that he had used three thousand four hundred and twenty-three of the same for necessary firing upon his farm, for which he need not to have paid any tithes; that in 1702 he cut down and carried away one load and a half

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a half of ashen trees, of about fifty shillings value, without setting out his tithes, he having occasion to use them to make and mend ploughs, harrows, and other utensils of husbandry about his farm, and sold no part thereof; for which reasons, and because they were about twenty years growth, no tithes were due for the same. The defendant also stated, that in 1698 and 1702, he had three acres of hop ground, and being informed that there was a composition between the former farmer of the said rectory and his farm, that it should pay ten shillings an acre to the rector for every acre of hop ground, whether hops or no hops grew thereon, he, for the year ending at Michaelmas, 1698, did pick and carry away the said three acres of hops without setting out the tithe, but before he picked the said hops, he went to the defendant, and desired him to take his tithe hops in kind, or ten shillings an acre, which he refused, until the court had decided whether he should pay his hops in kind or ten shillings an acre; that before this suit was commenced, he tendered to the said Mary Gee, or to the plaintiff, ten shillings an acre for the tithe of his said hops for the said year, which was as much as they were worth before they were picked and dried; that all the hops growing on the three acres that year were not worth above fifteen pounds, and the tithes thereof, if taken in kind, not worth above thirty shillings, which he was ready to pay; that for the three acres of hops growing in 1702, he gave the plaintiff notice when he intended to pick them, that he might see the tithes thereof duly set out, and which he did set out; viz. the defendant's servants separated from the freehold ten hills at a time, and then set forth all, not the tenth hill, but the tenth part of the ten hills stripped from the poles, for the plaintiff's tithes of the said ten hills, and so left the same in a heap for the plaintiff; and so the defendant's workmen, upon cutting every ten hills, set forth the full tenth part of such ten hills in a heap, until the plaintiff's tithe of the said hop ground was set out, which said heaps were rather more than the tenth part of the defendant's said hops; and he said, that all the hops he had on the said three acres in the said year for his nine parts, did not amount to fifty hundred weight, and were not worth above twenty pounds, and which he kept for his own use; and he denied that the occupiers of hop grounds ought to pick their hops before they set out their tithes.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon reading the depositions, and hearing what could be alleged by counsel on both sides, and on long debate of the matter,

The Court are of opinion, and do declare, that the way and method used by the defendant in setting out his tithe wood by loose heaps, in boughs, is a good way of setting out his tithe wood; but that it appears by the proofs taken in the cause, that the usage and manner of tithing of wood in the parish is, and time out of mind has been, for the occupiers to bind up the wood before the tithes thereof are set out, and that no such manner of tithing by loose heaps or ranges was ever known in the parish.

The Court do also declare, that the method insisted on by the defendant for setting out his tithe hops, by stripping the bines from the poles and leaving the same in loose heaps before the hops are picked and gathered, is no good setting out of the tithe of his hops, but that the hops ought to be picked and gathered from the bines before the same are titheable.

It is therefore ordered and decreed, that the defendant do pay to the plaintiff for all the tithes of the woods in the bill mentioned; to wit, for Clay-wood, and the wood lying near Crowth Heath, according to their respective values thereof when the wood is cut and bound, as usually has been done by the occupiers.

It is also further ordered and decreed, that the defendant do account for the tithe of his hops in the years in the bill mentioned, according to the value of the defendant's hops in the said years respectively when picked and gathered from the bines.

WARD, Ch. B. said, that if wood has been used to be bound by the parishioners, the tithes of the said woods ought also to be bound up. That as to hops,

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hops, the tithes of them cannot be paid till they are picked; and that ash poles, not fit for timber, are to pay tithes.

BURY, B. said, that the method set forth by the defendant for setting out the tithes of wood in heaps is not good. That ash poles are titheable though they are of twenty years' growth; and, as to hops, that the defendant's *parlance* was not good.

PRICE, B. as to the tithe of hops, was of the same opinion, and that the defendant do account. But as to the ash poles used in husbandry, he thought they were not titheable. And as to wood, that the defendant had rightly set it out, and that the plaintiff ought to have no account.

SMITH, B. said, that as to ash poles, he was of opinion that the defendant is not to account; but that, as for the tithe of hops, the defendant's *parlance* was not good, he having not rightly set out the tithes thereof. And that he ought to account for the tithe of wood, the plaintiff having proved the usage.

Note. The plaintiff relinquished his claim as to the ash poles.—[*Dec. Book.*]

In a tithe bill, brought by the plaintiff, as impropiator of Orpington, in Kent, resolved, that tithe hops *de jure* must be set out when picked into the bin, by measure; and that the setting out either by hill, or pole, or by separating the tenth hill from the freehold, or by laying them all in heaps before picked from the vine, is not good: and so resolved between the same parties 1698, and then decreed by the court accordingly; and it was now said by the Chief Baron, that it was so done in Sir Thomas Vernon's case, in Farnham.

2. That tithe wood is not to be set out in heaps, on the falling, but ought to be bound and made up in stackwood, faggots, bavins, &c. as the owner does his own; but in this the court did not agree. PRICE, B. that it was good setting out in heaps; and SMITH, B. doubting; but he and all were satisfied in the proof, that it was the custom of the parish, and then that they should be so set out, without any allowance for the charge, though in this case that was proved to be equal to the value of the wood.

3. The Chief Baron and BURY held, that ash fallen, above twenty years growth, and used for the plough and cart, shall pay tithe. But the other two contrary, and so the point waived; though the Chief Baron and BURY said, it must be used in building, which is not law.

4. It was said in this case, by the Chief Baron, that milk shall be paid not the tenth pint, nor tenth quart, nor the tenth day, but the tenth meal for necessity and convenience.—[*Dodd.*]

Tr. 3 Anne. Scacc. *Danvers v. Wood.* [1 Wood, 441.]
Essex, 12th July, 1704.

To a bill by the rector of Shenfield, in Essex, for tithes in kind, the defendant says, he is a poor labourer, who inhabits a cottage on a common near Brentwood, in the parish of Southweale, and has two ewes and a sow, which run on the common; and denied having any land in Shenfield. The bill dismissed with full costs.

THE bill stated, that James Scambler, clerk, rector of Shenfield, in the county of Essex, did, about the twentieth of March, 1696, demise all tithes whatsoever arising in the said parish and titheable places thereof, to the plaintiffs, his executors, &c. for seven years; that the defendant, for years past, had occupied lands and tenements therein, and had withheld from him the tithes thereof.

The defendant admitted, that J. Scambler might be rector, and make such lease; but denied, that he ever held any lands or tenements within the said parish of Shenfield; and said, that he then dwelt, and for seventeen years past had dwelt, in a little cottage of the value of between thirty and forty shillings a-year, near Brentwood, in the parish of Southweale, held of the manor of Coaled, in the parish of Southweale, and that he never held any lands in the said parish, but only the said cottage; and set forth, that he kept two ewes and a sow, which fed on the common, but could not set forth the value, for that he never knew nor heard that any tithes were paid or demanded by either the rectors or their lessees of the parishes of Southweale or Shenfield for any sheep or cattle going on the common, until lately the plaintiff demanded of the defendant tithes for the defendant's sheep, he being only a day-labouring man.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and on reading several depositions of witnesses in the said cause on both sides, and upon debate of the matter,

The court did not think fit to relieve the plaintiff on his said bill; and thereupon ordered, that the bill be dismissed, with full costs for the defendant, to be taxed by the deputy-remembrancer.

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Tr. 3 Anne. Scacc. *Ross v. Windsor* and others. [Dodd's MS. 201.]

RESOLVED, 1. That tithes shall be paid of new mills.

2. That it shall be the tenth toll dish. *Note.* It was decreed by the Chief Baron, *vehementer*, &c. Baron PRICE thought it ought be personal tithe: but did not agree how it was to be paid.

The tenth toll-dish is due of new mills.

Note. That it was an ancient mill pulled down and set up in another place; also the defendant insisted upon a *modus* in his answer, but did not prove it: also there was a new-erected windmill. They were the mills of Hanley Castle, in Shropshire. *Note.* It seems to me, that if any tithe be due, it is only personal tithe, and then only payable where by custom personal tithes are payable. The objection was upon the stat. *quod de molendino de novo erecto non jacet prohibitio*. See 1 Ro. Rep. 405. 2 Inst. 622. 1 Ro. 656. Deg. 260. See post, *Newte* and *Chamberlain* and others.

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The Archbishop of York v. the Duke of Newcastle. [3 Salk. 556. Dodd's MS. 202.] 1 Ray. 99, 100. 1 Wood, 446. 2 Gw. 583.

H PRESCRIBED to pay ten fleeces of wool and two lambs, in lieu of all tithes; and PRICE and BURY, Barons, were of opinion this was an ill *modus*, because it is one kind of tithe for another, and there is great uncertainty, for one fleece may be twice as big, and three times the value of another. See 2 Lutw. 1052. 3 Cro. 786. 276. Mo. 909. 1 Ro. Ab. 649. Dy. 149. Hard. 174. WARD, Ch. B. and SMITH, B. *contrd.* First. A *modus* is nothing but a real composition, for or in lieu of tithes, or an annual profit certain and permanent; and they held, that the payment of any one chattel for tithe, was or might be a good *modus*, as well as money; for why might not the person originally agree to take ten fleeces for his tithe, as well as a penny? They admitted, that the payment of tithe of one kind, or payment of a *modus* for one kind of tithe, could not be a discharge as to another kind; but they held, that this was not a payment of tithe, nor a payment for a species of tithe, because it was to be paid at all events, whether there were sheep or no; and they denied the case of 1 Rol. Abr. 651. and held it no more uncertain, than to pay a *modus* of ten cheeses, which may differ vastly, both in nature, quantity and value; and it tends to the disquiet of the country, to break in upon customs and usages, and it ought not to be done, but on plain and manifest reason.—[*Salkeld*.]

Court divided, whether a *modus* of ten fleeces of wool, and two lambs, for all tithes, good or not. Payment of tithe of one kind, or payment of a *modus* for one kind of tithe, cannot be a discharge as to another kind.

A *modus* is nothing but a real composition for or in lieu of tithes, or an annual profit certain and permanent.

An issue directed to try whether a certain farm was discharged of great tithes and subject to a *modus* for small tithes.

BILL for tithes of the rectory of Kilburne, against the farmers of part of the abbey of Ryland, these several *moduses* were debated:—

1. Ten fleeces of wool, and two lambs and a half, or eighteen-pence for the half lamb, payable at Midsummer, in lieu of all tithes arising on Bosomworth's Farm: Chief Baron and SMITH, that it is a good *modus*, for it is not in discharge of wool and lamb only, but of all tithes; and any thing, though of a titheable nature, may be given in discharge of tithes, as well as money, as an acre of land, &c. and the difference is, where it is in discharge of the species of tithe, and where of the land. Littl. sect. 144. Noy, 148. Dy. 349. b. Hob. 44, 45. But by PRICE and BURY *contrd.* for it is titheable matters for tithes, which is not good. Cro. Eliz. 446. 475. Mo. 554. 909. 1 Rol. Abr. 649. 651. Hardr. 174. Cro. Car. 276. 786. Dy. 149. Hard. 124. Rol. Rep. 120. Hob 39.

2. Second

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2. Second *modus*, six fleeces of wool and three lambs, in lieu of small tithes of Cawkerdale and Raper's farms. This *ut supra*.

3. Eight fleeces of wool and four shillings, in lieu of all tithes for Rowland's farm, good; by the Chief Baron, PRICE, SMITH, (BURY, *contra*), directed to try all, with other *moduses*, whether the fact be as alleged.—[*Dodd*.] (1)

In answer to the present bill,

The Duke of Newcastle, the Earl of Chesterfield, and the other defendants Hales and Le Neve, admitted Barnes's title to the rectory and tithes; and after severally setting forth their respective titles to the site of the dissolved monastery of Byland, insisted, that the said lands and farms were parcel of Byland Abbey; that the abbot, at the time of the dissolution of the said abbey, held the same discharged from the payment of tithes; that the said monastery was afterwards vested in the crown, and therefore discharged from the payment of tithes by virtue thereof, or by virtue of some *modus*, of which they claimed the benefit.

The defendants Forster and Salmon said, that they had been tenants of two messuages and several lands in the said parish; and that both the said farms were called Great Camb, otherwise East Camb, and had formerly been one entire farm; that they ought not, for the reason assigned by the other defendants, to pay any tithes; and that they, and all those whose estates they had, had immemorially paid to the rector or impropiator of the said parish, ten fleeces of wool and two and a half lambs, or eighteen-pence in money in lieu of the half lamb, at Midsummer, when demanded, in full discharge of all tithes whatsoever.

The defendants Day and Forster, as tenants of the farms formerly called Cawkerdale's Farm and Raper's Farm, insisted, that they were not liable to pay any tithes of corn, grain, and hay, or any thing in lieu thereof, or any small tithes, except six fleeces of wool and three lambs, as a *modus* for all small tithes whatsoever, for that the late abbot of the monastery of Byland, and his predecessors abbots thereof, had been immemorially seised in fee of the said farms, in right of the said monastery, and held the same discharged from the payment of any tithes of corn, grain, and hay; that the said abbot, and all his predecessors, abbots of the said monastery, had also, time out of mind, rendered and yearly paid, on the twenty-fifth of June, to the rector of Kilburne, six fleeces of wool and three lambs, in discharge of all small tithes

(1) On the 8th June, 1676, Trinity Term, 28 Car. 2. Lord Hollis, as tenant in fee simple of the site of Ryland Abbey; John Rowland, as tenant of Oldstead Farm; K. Bosomworth, as tenant of Great Camb; and Maynard, as tenant of certain lands in Oldstead; filed their bill in this court against Barnes, the rector of Kilbourne, to establish a *modus* of eighteen shillings a-year, payable at Michaelmas, in lieu of all tithes of Oldstead Farm; and ten fleeces of wool, and two lambs and a half at Midsummer, and one shilling and six-pence in money, in lieu of tithes of Great Camb; and one shilling and five-pence a year, in lieu of tithes of Maynard's Farm. The defendant denied the existence of the *moduses*; stated his title under the Archbishop of York, and admitted that he had cited the plaintiffs to the ecclesiastical court, and libelled against them there for not setting forth their tithes. And on reading the depositions, it not appearing that there are any such prescriptions for discharging the said messuages, lands, and tenements, the court of exchequer dismissed the bill as against the plaintiffs Rowland, Maynard, and Bosom-

worth. But as to such part of it as concerned Lord Hollis, and his lessee, the plaintiff Lee, an issue was directed to try, whether the messuage and lands in Lee's possession are discharged from the payment of tithes; but no trial appears to have been had. On the 18th of June, 1678, Trinity Term, 30 Car. 2. the said plaintiff filed another bill against Barnes, insisting on a *modus* of eight fleeces of wool, and four shillings in money, for Rowland's Farm; ten fleeces of wool, and two lambs and a half, for Bosomworth's Farm; and one shilling and five-pence for Maynard's Farm. The rector said, that he believed that ten fleeces of wool and two lambs and a half had been, for many years last past, paid for Bosomworth's Farm; in lieu of the tithes of wool and lamb only, and denied any other prescription or *modus* in lieu of tithes. Three issues were directed to try the three several *moduses*, as stated in bill, with respect to Rowland's, Maynard's, and Bosomworth's Farms. But it does not appear by the exchequer books, that any further proceeding was had on the bill.

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whatsoever, upon the said farms and lands; and that the said abbot held the same so discharged at the time of the surrender and dissolution of the said monastery; that the monastery was one of the greater abbeys, and, with the lands thereunto belonging, came to and was vested in the crown; and that King Henry the Eighth, by virtue of the statute 31 H. 8. c. 12. became seised thereof, and that the said farms in the defendant's possession, as belonging to the same, were not only discharged from all tithes of corn, grain, and hay, but also from all small tithes in kind, or any thing in lieu thereof; the yearly payment of the said six fleeces of wool and three lambs only excepted.

The defendants Wood, Lee, and Rowland, as tenants of a farm formerly occupied by the defendant Rowland, insisted, that the plaintiff ought not to have any tithes, either great or small; for that the defendant the Duke of Newcastle, and others, were seised in fee of the said farm and lands, and that they, and all those whose estates they had therein, had, time out of mind of man, yearly paid to the rector eight fleeces of wool and four shillings in money, about the twenty-fifth of June, in discharge of all tithes whatsoever for the said farm and lands.

The defendants Clarke and Webster, as tenants of a farm called the Isle of Marr, insisted also, that they ought not to pay any tithes whatsoever, either great or small, as the said farm had belonged to the monastery of Byland, and was discharged from the payment of tithes by the statute 31 H. 8. c. 12.

The defendant Barton, as farmer of a messuage and several closes of ground in Newstead within the said rectory, insisted also upon the like prescription in a *non decimando*, in discharge of payment of all tithes for the said farm.

The plaintiffs replied; the defendants rejoined; and witnesses were examined on both sides; and the cause came on to be heard on the thirteenth of May last; and upon reading the depositions, and hearing counsel, the court ordered a case to be made, and stated by the counsel on both sides, with which the Barons were to be attended, and counsel to be heard on both sides. In pursuance of which order a case was made as to three of the farms, viz. the farms called Great Camb and East Camb; the farm called Cawkerdale and Raper's Farm; and the farm called Rowland's; in which, first, the defendant Foster insisted on a *modus* of ten fleeces of wool, two lambs and a half, or one shilling and six-pence for the half lamb, at Midsummer, or afterwards upon demand, in lieu of all tithes for the said farm formerly in Bosomworth's possession, and called Great Camb and East Camb. Secondly, the defendants Wood, Lee, and Rowland, insisted upon a *modus* of eight fleeces of wool and four shillings in money, at or about the twenty-fifth of June yearly, in lieu of all tithes for the farm called Rowland's Farm.

The Barons were accordingly attended, and counsel on both sides were severally heard thereupon; and the cause stood this day in the paper for the Barons to deliver their opinions.

But the court, upon hearing counsel on both sides, ordered a trial at law between the parties touching the said *moduses*, in five issues; the plaintiffs in equity to be plaintiffs at law.

First, Whether the owners or occupiers of Bosomworth's Farm, called Great Camb and East Camb, in the possession of the defendant J. Foster, have, time out of mind, paid, or ought to pay, to the owners of the rectory of Kilburne, a *modus* of ten fleeces of wool and two lambs and a half, or one shilling and six-pence in lieu of the half lamb, yearly, for and in lieu of all tithes arising or happening on the said farm.

Secondly, Whether the farm called Cawkerdale and Raper's Farm, in the possession of the defendants Day and Forster, was parcel of the monastery of Byland, in the county of York, at the dissolution thereof, and by virtue thereof discharged of and from the payment of all great tithes, or any thing in lieu thereof; and, Whether the owners or occupiers of the said farm have, time out of mind, paid, or ought to pay to the owners of the rectory of Kilburne, a *modus* of six fleeces of wool and three lambs yearly, for and in lieu of all small tithes whatsoever arising or happening upon the said farm.

Thirdly, Whether the owners or occupiers of the farm called Rowland's Farm,

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Farm, ought to pay, &c. eight fleeces of wool and four shillings in money yearly, in lieu of all tithes, &c.

Fourthly, Whether the farm called the Isle of Marr, formerly Lee's Farm, was parcel of the possessions of the said monastery of Byland at the dissolution thereof, and is thereby discharged of and from the payment of all tithes arising, &c. on the said farm.

Fifthly, Like issue as to the farm called Newstead Farm.

The issues were tried, and a verdict found in favour of the Archbishop of York. But on the tenth of December, 1706, when the cause came on upon the equity reserved, the defendants' counsel moved for a new trial, and the court ordered a new trial to be accordingly had at the next ensuing assizes upon the former issues, on the defendants paying the costs of the former trial. But it does not appear from the books of the court, that any further proceedings were had between the parties.

M. 3 Anne. Scacc.

Witherington v. Harris. [1 Wood, 445.] 2 Gw. 584.

Essex, 5th December, 1704.

A custom to set out the first crop of clover in swathes, and to pay no tithes for the second crop, is not good.

THE bill stated, that the plaintiff, for five years past, had been lessee and farmer of the great tithes, and particularly of hay and wood, arising within the parish and parsonage impropriate of Thorpe, in the county of Essex, which he took by indenture, for a term of years, from the owner of the said impropriate parsonage, by virtue whereof he was entitled to the said tithes; that the defendant, for two years past, had been occupier of several lands therein, whereon he had wheat by him sowed and cut, and also hay and clover grass, which he cut and sold, without setting out the tithes thereof.

The defendant confessed the plaintiff to be farmer, and that in the year 1701 he had cut clover grass twice, and set out the tithes of both the first and second crop in swathes, according to the custom used in the said parish; that in the said year he cut six acres of grass, three acres of which he set out in grass cocks, which the plaintiff accepted, and the other three in swathes; and in that year he had wheat, the tithe of which being duly set out, the plaintiff accepted. He confessed, that in 1702 he mowed a second crop of the clover grass, but did not set out the tithes thereof, insisting that no tithe was due, or ever had been paid, for the second crop of clover grass. He also confessed, that in the said years he had cut and sold two loads of firewood, being the loppings of Old Bowlings, for which, he insisted, no tithes were due.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon reading the proofs taken in the cause,

The court disallowed the custom insisted upon by the defendant, in his answer for setting out his tithes in swathes, and ordered the defendant to account for and satisfy the plaintiff the value of the tithes of his first and second crop of clover grass, and of his other grass, and for his wheat, and for the wood by him cut and sold for which no tithes had been paid.

P. 5 Anne. Scacc.

Bishop v. Arundel and others. [Dodd's MS. 109. 1 Wood, 459.] Rayn. 98. Bunb. 301. 2 Gw. 585.

A modus of twenty-six pounds a-year for a farm allowed.

If a person would avoid a farm modus, it is incumbent on him to prove the value of the farm.

PLAINTIFF, rector of Tarant Kynston, in the county of Dorset, brought a bill for tithes; the defendant insisted upon a modus of twenty-six pounds a-year, for a farm called "Tarant Kynston Farm," but set out no value of the farm, nor did the plaintiff prove any. The court resolved,

1. That if the plaintiff would avoid the modus, as unreasonable in value, it lay upon him to prove the value of the farm; and not necessary for the defendant to make it reasonable, in respect of the value.

2. That the modus was not on the face of it void, in respect of its largeness,

A farm modus is not void on the face of it, in respect of its largeness.

ness, and being for a farm only; nor would the court permit the value to be inquired of, but generally directed the *modus* to be tried, *Quod mirum*, for I never knew a twenty-six pounds *modus* before.—[*Dodd.*]

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BILL by the rector of Tarrant Keynston, in Dorsetshire, for tithes in kind.

The defendant Arundell, by his answer, said, that the plaintiff was rector of the said parish, and entitled as stated in the bill; that he, the defendant, was owner of Tarrant Keynston Farm, and of several lands thereto belonging, in the occupation of the other defendants his tenants; that he had no part of the said farm in his occupation during the said time, except two coppices and wood grounds, called Ash Leys Coppice and Heath Coppice; that Ash Leys Coppice was reputed to be no part of the said farm, but that Heath Coppice was; and he set forth the particulars of the wood cut upon the said coppices in 1701 and 1702, part of which he said was used in fencing, and the remainder sold, and that he had duly paid the plaintiff for the tithes thereof; that in the year 1703 no wood was cut; that, time beyond the memory of man, no tithes in kind had been paid for the said farm and lands, but that the defendant, and those whose estate he had, paid to the rector a *modus* of twenty-six pounds a-year, in full discharge of all tithes for the said farm; that the defendant had, from time to time, paid the plaintiff, all the time he had been rector, the said *modus* of twenty-six pounds a-year, which he had accepted, in discharge of the said tithes, except for one year only, ending at Michaelmas, which the defendant had tendered to him before the filing of his bill, and offered the same by his answer.

The other defendants admitted the plaintiff to be rector, and set up the said *modus*, which they said they had tendered to pay their proportions of, and that no tithes in kind had ever been paid, and they set forth their titheable matters.

Two issues were directed to be tried, first, whether there is, and, time whereof the memory of man is not to the contrary, has been a *modus* of twenty-six pounds *per annum* payable to the rector of Tarrant Keynston, for the time being, by the owners and occupiers of Tarrant Keynston Farm, in satisfaction and discharge of all tithes arising upon the said farm, and the lands and grounds thereunto belonging.

Secondly, Whether the coppice and wood grounds in the said parish, called Ash Leys Coppice, is part of the said farm called Tarrant Keynston Farm?

A trial was accordingly had upon the said issues, and the jury found the same for the defendants; but, upon reading the said order and *postea*, a new trial was directed to be had upon the two following issues:

First, What was the annual value, one year with another, of Tarrant Keynston Farm, now in question, at the time of exhibiting the plaintiff's bill against the defendants, and for the major part of sixty years before?

Secondly, Whether there is, and time whereof the memory of man is not to the contrary hath been, a *modus* of twenty-six pounds *per annum*, payable to the rector of Tarrant Keynston for the time being, by the owners and occupiers of Tarrant Keynston Farm, in satisfaction and discharge of all tithes arising upon the said farm and the lands and grounds thereunto belonging?

To be tried by a special jury; and the defendants to have the costs of the last trial taxed and paid before they proceed to trial.

A trial was accordingly had upon the last-mentioned issues, and the jury found both the issues for the plaintiff, viz.

As to the first issue, that the yearly value of Tarrant Keynston Farm, for sixty years before the filing of the plaintiff's bill in this court, was four hundred pounds a-year; that thirty years before filing such bill the same was three hundred and fifty pounds, and at the time of filing, three hundred pounds *per annum*.

As to the second issue, the jury found that there was no such *modus* of twenty-six pounds *per annum* payable in discharge of the tithes of Tarrant Keynston Farm, as by the defendants was pretended.

The defendant's counsel now alleging that the verdict was not to the satisfaction of the judge who tried the cause, Mr. Baron SMITH was desired to speak to him.

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Upon reading the order the 12th of November last, and the return of the *posita*, whereby it appeared the verdicts were given as aforesaid; and upon hearing counsel on both sides, and it appearing to the court that the judge who tried the cause was not dissatisfied with the said verdict, it was ordered, that the several defendants should account with, satisfy, and pay to the plaintiff for the tithes of the several titheable matters and things which they respectively had renewing and arising on their respective tenements, lands, and grounds, and the heath coppice which they respectively held and occupied within the said parish and rectory of Tarrant Keynston during the time in the bill charged.—[*Decree Book.*]

M. 3 Anne. B. R. *Anon.* [6 Mod. 223.]

Tithe of fish is due by custom only. So of wood.

BY the court, first, no tithe is due of fish of common right, but it may be by custom.

2dly. No wood is titheable of common right, but only by custom.

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E. 4 Anne. B. R.

Startup v. Dodderidge. [2 Ld. Raym. 1158. 11 Mod. 60.] 2 Gw. 587. 2 Salk. 657. Lill. Ent. 19.

A custom to pay 2s. in the pound of the true improved yearly rent of land in lieu of the tithes of it, is void.

And so is a custom to pay a proportion of the true improved yearly value. A suggestion for a prohibition to a suit for tithes on account of a *modus*, need not shew a compliance, or an offer to comply with the *modus*.

A *modus* is a composition time out of mind. A *modus* is a good suggestion to stay a suit in the spiritual court for tithes in kind, for the suit there ought to be for the *modus*.

MR. BRODERICK moved for a prohibition to a suit in the ecclesiastical court for tithes, upon this suggestion, *quid a tempore cujus, &c. habebatur talis antiquus usus et consuetudo de modo decimandi de et pro omnibus decimis quibuscunque infra parochiam de W. et fines, limites, et loca decimabilia ejusdem quoque modo crescentibus, renovantibus, sive contingentibus, viz. quod omnes et singuli proprietarii, eorum firmarii, vel occupatores aliquarum terrarum vel tenementorum infra parochiam de W. prædictam, &c. per totum tempus prædictum annuatim solverunt, et solvere consueverunt, rectori ecclesie parochialis de W. prædicto firmario sive deputato rectorie illius pro tempore existenti upon request secundum ratam 2s. legalis monete Angliæ pro quolibet et utràque librâ veri adaucti annuallis redditibus vel valoris, Anglicis, of the true improved yearly rent or value, respectivorum terrarum et tenementorum infra parochiam de Whittington prædictam, &c. et non ultra, in nomine, loco ac in plena satisfactione, omnium et singularum decimarum quarumcunque annuatim crescentium, &c. in vel supra respectiva terras et tenements sua infra parochiam de W. prædictam, &c. which the several rectors, &c. have time out of mind accepted in full satisfaction, &c. of all tithes, and the custom aforesaid inviolably observed; yet the defendant knowing the premises, has sued the plaintiff in court-christian for subtraction and non-payment of tithes of hay and wheat in and upon the lands and tenements aforesaid, in the tenure and occupation of the plaintiff, being in the year of our Lord 1696, growing, &c. and supposed by him to be subtracted and taken away, licet the plaintiff, &c. And a rule was made for the defendant to shew cause, why a prohibition should not be granted. And now Mr. Pengelly moved, that the rule might be discharged. He said, this *modus* was not good for the uncertainty, for the yearly rent or value is variable and utterly uncertain, and may change every year; but a *modus*, which is against common right, and goes in destruction of the original right of the parson to take his tithes in specie, ought to give the parson a certain recompense for a certain duty, otherwise the court cannot sjudge that it is suitable. And he cited the case of *Perry v. Soame*, Cro. Eliz. 139. where, in a suit in the spiritual court for tithes of herbage of dry cattle, the defendant surmised for a prohibition, that every parishioner there, who had milch kine and calves under the number of seven, shall pay for every calf he rears a halfpenny, for every one he kills a penny, and for every one he sells the tenth penny; and if he has seven or above, to give one in satisfaction of tithes of them, and of all dry cattle. And they held this to be an ill *modus*, because, if the parishioner had only dry cattle, and no calves, he pays nothing, and it is uncertain whether he shall have calves or not, and so it is an uncertain thing for a certain duty. And *Allen's case*, 2 Roll. 265. p. 2. a prescription to pay one penny, or thereabouts, for every acre of arable land, in*

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in lieu of tithes, naught for the uncertainty. And 1 Keb. 612. *Took v. Ledger*, a *modus* to pay four shillings for every day's ploughing of wheat, and two shillings for every day's ploughing of barley, is not good for the uncertainty; but if the *modus* had been, so much for every day's work, with an averment that it is certainly known, and the contents of it, it might be. And a note on the side of Dr. *Leyfield's* case, in Hob. 11. where the principal case was, a libel for tithes of stables, suggesting a prescription time out of mind for the persons to have a *modus decimandi* for the houses, stables, and buildings, viz. after the rate of the tenth part of the yearly rent or value of the same, and a prohibition was granted in the case, with directions to declare. And on the side of that case is this note, viz. that *modus decimandi* can hardly stand to rise and fall according to the rent by prescription. And though such a *modus* be allowed to be good in Dr. *Grant's* case, 11 Co. 15. b. yet that case is made a question in 1 Roll. 642. n. 1. and the authority of Dr. *Leyfield's* case opposed to it. Secondly, this *modus* is void, because it gives room to the parishioner to defraud the parson, for it is in the power of the parishioner to take a great fine, and reserve a small rent, and so the parson shall have nothing. For the custom is to pay 2s. per pound *veri adaucti annualis redditus vel valoris, Anglicæ*, of the true improved yearly rent or value, *respectuorum terrarum et tenementorum*; also, the parson cannot come to the certain knowledge, what rent was reserved. And he cited the case of *Wilson v. le Evesque de Carlisle*, Hob. 107. 1 Roll. Abr. 647. pl. 5. 2 Danv. 601. pl. 5. a *modus* for tithe wool, that if the parishioner had under ten fleeces, that he should pay one penny to the parson for each, in lieu of tithes; and if he had more, that he should deliver to the parson the tenth part of his wool, upon his conscience, without fraud or covin, *sine viâ vel tactu* of the parson; and held to be ill, because it lays the parson open to be defrauded. And my Lord Hobart, in his report of the case, says, that it is a weak answer to say, that if it be not a just tenth, the parson may refuse it, and sue for his dues: for first, he hath no means to be assured whether it be true or not, so his suit may be causeless; sure he may be it may be fruitless. Hob. 107. 1 Roll. 647, 648. p. 5. Secondly, the suggestion in this case is not sufficient, because it is not averred, what was the value of the land, nor what rent was paid for it, as it ought to have been; for it only said, *licet the plaintiff obtulit et paratus fuit et exivit ad solvendam prædictam ratam 2s. pro quilibet et utraque librâ veri adaucti annualis redditus vel valoris terrarum et tenementorum prædictorum, &c.* without saying how much that was, or what sum was tendered; and for this the suggestion is ill. For in every suggestion of a *modus*, the party ought to aver the performance of the consideration, or something which tantamounts, and so bring his case within the compass of the custom, by averring that he has done as the custom requires. And for that he cited 1 Roll. Rep. 38, 39. 62. Cro. Eliz. 139. [Note, the case in Rolle is against the objection, and takes the distinction, where the *modus* extends to such of the parishioners as keep cows, &c. there, the plaintiff must shew, that he keeps cows; but where the *modus* is to pay money, &c. in lieu of tithes, there, the plaintiff need not allege payment, &c. because it is a good ground for a prohibition, that the parson sues for tithes in kind, whereas a *modus* ought only to be paid, and not tithes in kind, and consequently, the parson ought to sue for the *modus*. 1 Roll. Rep. 63. S. C. And the case of *Croke, Eliz.* 139. well understood, turns upon the same distinction.]

Mr. Serjt. *Broderick* said, that the value of land was certain enough, and made the *modus* certain enough, according to the rule, *id certum est quod certum reddi potest*; that the value of land was such a certainty as the law took notice of; and therefore, where a man demised a chamber, paying for it yearly so much as it should be reasonably worth, debt was brought for the rent, with an averment that the lessee held the chamber from such a time to such a time, and that for that time it was reasonably worth so much. *Stiles, 397. Farmer and Lawrence*. And in powers in settlements for tenants for life to make leases, it is a common *proviso*, the best improved rent, that may be reasonably had for the same, be reserved. And Cro. Jac. 671. *Page's* case, it was held to be a good custom of a manor, that the land was demiseable for twenty-one years, paying three years value. So 2 Leon. 117. a tenure was

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by the service, *solvendi post quolibet vacationem sine alienationem* the value of the annual profits of the lands. So is the case of *Titus v. Perkins*, 3 Mod. 132. the custom of a copyhold manor was for the tenant, upon admittance to pay to the lord for a fine, *tantum denariorum summam quantum* the tenements *valebant per annum tempore talis admissionis*; and adjudged by the common pleas, and affirmed by a writ of error in the King's bench to be a good custom, because it is certain enough, and issuable, and triable by the country, if it be of such a yearly value or not. 3 Lev. 255. 3 Mod. 132. And that, as it is certain enough, so of consequence it is well enough known. He said, that the principal case of Dr. *Leyfield* was for him; and that as to the marginal notes, they were not to be regarded, being added, as he supposed, by the editor of the book, but were not my Lord Hobart's, many of them being of matters which happened after his death. He said, that Dr. *Grant*'s case was in point, where the case was, a libel by Dr. *Grant* in the spiritual court alleged a custom for every parishioner, &c. occupying, &c. a mansion-house, &c. to pay quarterly *nomine et loco decimarum suarum juxta ratam ejuslibet 20s. rent per annum ex quolibet hujusmodi domo, &c. 2s.* and upon a suggestion of a discharge by the 31 H. 8. a prohibition was granted, and upon traverse of the suggestion, there was a verdict for *Grant*, and upon motion by *Grant* for a consultation, it was opposed, because the custom was against common right, no tithes being to be paid for houses, and therefore void. But a consultation was granted, because this might have a lawful commencement; for this *modus decimandi* might have been paid time out of mind for all the tithes of the land, upon which the houses were built, and the lands being built after would not take away the right of the parson. 11 Co. 15 b. He said, that though, according to this *modus*, the parson might have more one year, and less another, yet that would not make it void; and for that he compared it to the case in Co. Litt. 96 a. a tenure to shear all the sheep depasturing within the lord's manor; that is certain enough, although the lord hath sometimes a greater number there and sometimes a less, being referred to the manor, which is certain.

HOLT, Ch. J. was of opinion upon the first stirring of this case; that the *modus* was not good; and that upon the face of it, it appeared plainly to be nothing but an agreement between the parson and the parishioners. If it were an ancient composition with the consent of the patron and ordinary, before the 13 Eliz. c. 10. that would bind the parson; but then that was no ground for a prohibition, being it might be pleaded and tried below in the ecclesiastical court. That there had been formerly prohibitions granted upon suggestions of compositions, and that there were old cases to that purpose, but that it had been held otherwise since; which POWELL agreed. But, if it were a composition made since 13 Eliz. it was void. He said, that a composition time out of mind was a *modus*. Taking it to be a *modus*, it would be hard to maintain it to be good; taking it as to the yearly rent, it could not be good, because the land might be unlet, and then no tithes would be paid; or it might be let at an under-rent with a fine, and then the parson would be cheated. And as to the value, in case the lands should be unlet, who should determine what that was? He said, that if the *modus* were void, it was in vain to grant a prohibition to try it, because, though it should be found for the plaintiff, yet the court must grant a consultation. And to that purpose he remembered the case of *Hicks v. Woodeson*, adjudged Hil. 8 Will. 3. B. R. ante, 550: where a prohibition was granted upon a suggestion of a custom within the hundred of D. to pay no tithes for agistment of barren cattle, and in a declaration upon the prohibition issue was joined upon the custom, and found for the plaintiff, and notwithstanding, because the custom was void in law, a consultation was awarded. And he remembered the distinctions taken in that case, about a custom *in non decimando*. He said, that Dr. *Leyfield*'s case was a full case against the *modus*, for that the parson might sue in the spiritual court for the customary duty; which the rest of the judges agreed. As to the exception to the suggestion, he said, it was well enough; for it was enough for the plaintiff that came for the prohibition to bar the defendant of his suit in the court below, which is sufficiently done by the suggestion of this *modus*, if it be good; for then the parson ought

ought not to sue for tithes in kind, but for the *modus*. But the last time the case was stirred; after hearing Mr. Serjeant Broderick, he was for granting a prohibition, and putting the plaintiff to declare, and the defendant might demur, and the point be determined judicially. I did not well hear his reasons, but I apprehended them to be, because the value of land was a thing well known, and consequently certain enough: that if such a composition had been made before 13 Eliz. and confirmed, it would have bound the successors: that as the parsons might by custom have tithes of things, of which they had no right to have any by the common law, as fish, &c. so custom might model or restrain their tithes, or alter them.

But the other three judges were against granting a prohibition, because this was a void *modus*, being an uncertain recompense for a certain duty. And therefore, though it might be certain enough for a tenure or contract, yet it was not so certain, as that in consideration of that, they could adjudge the parson ought to be barred of his tithes in kind. Also, they thought this unreasonable, because the *quantum* of the rent was not in the conscience of the parson, and so he could not know what to demand or sue for, and was exposed to be cheated; and for the value of the land, they thought it unreasonable, that the parson should be put under a necessity every year of trying that, upon any difference between him and his parishioners, upon the peril of costs. They said, that it was plain this was an agreement between the parishioners and some of their former parsons, and now they had a mind to turn this into a *modus*; but that it could not be.

POWELL, J. said, there was no case like this in the law, where a prohibition had been granted upon such an uncertain *modus*. POWYS, J. said, that the *modus* was too high, viz. two shillings in the pound, and that while he sat in the Exchequer, if a *modus* were high, they always disallowed it; your ancient *moduses* being very low, one penny, or two-pence, &c. And the rule to shew cause was discharged by the three judges against the chief justice. The same motion was made in the Common Pleas in Trinity term following by Serjeant Weld, and opposed by Serjeant Parker. And the Ch. J. and NEVILL, and BLENCOWE, held the *modus* void; but TRACY gave no opinion, it not being necessary. And in a case by English bill in the Exchequer between the same parties, the *modus* was decreed to be void by all the barons. In consideration of which judgments in the King's Bench and Exchequer, the three judges of the Common Pleas said, that they would not have granted a prohibition, though they had not thought it so clearly a void *modus*. *Ex relatione m'ri Pengelly*.—[*Ld. Raymond*.]

And a rule was made for the defendant to shew cause, why a prohibition should not be granted.

Mr. *Pengelly* cited the following cases to shew, that where a *modus* is uncertain, or exposes the parson to be defrauded, it is a void *modus*: *Perry v. Soame*, (1) *Allen's case*, (2) *Took v. Ledgard*, (3) *Wilson v. The Bishop of Carlisle*, (4) *Farmer v. Lawrence*, (5) and *Page's case*. (6)

Broderick, *contra*, cited the case of *Tenures*, (7) *Titus v. Perkins*, (8) a case in Leonard, (9) and the Fourth Institute. (10)

HOLT, Ch. J. said, that whatever may be good by agreement may be good by custom; and as custom may diminish tithes, so it may increase them. So, by custom, lead in Derbyshire pays tithe. Whenever a *modus* runs high, it is a strong presumption that it is no *modus*.

The court refused a prohibition; because it appeared that the *modus* (as it was pretended to be) was of nigh the full value—[*Mod. Rep.*]

(1) Cro. Eliz. 139.

(2) 2 Roll. 264.

(3) 1 Keb. 612.

(4) Hob. 107.

(5) Styles, 397.

(6) Cro. Jac. 671.

(7) 11 Co. 15.

(8) 3 Mod. 132.

(9) 2 Leon. 107. 117.

(10) 4 Inst. 91. 96.

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No tithe is payable for cream, but as milk.

M. 3 Anne. Scacc. *Lister v. Foy*. [1 Strode, 30. No. 365.]

A MOTION for a prohibition to the ecclesiastical court for libelling there for a tithe of milk in kind, and suggested a custom for to have the tenth day's milk from the twenty-fifth of March to the first of November, yearly, after once skimmed and turned into cheese, in full for all tithe milk. Now this is the only labour for which he has the most valuable part of the milk, and it does not pay him very well for his trouble, and is very unreasonable.

Darwell, e contra, cited Cro. El. 609. Moo. 907. and said, as to the labour of the parishioner it is some sort of consideration for a *modus*. Latch. 226. in *Austin* and *Lucas's* case, and in Cro. Note, if the parishioner have somewhat that he gives in lieu of the thing he ought to give in kind, as here he does the making the milk once skimmed into cheese; it is to be supposed to be in full satisfaction for all tithe in kind of that thing and discharges him from all the benefit thereof. See Raym. 277. Note, no tithe is payable for cream, as cream, but as milk. A prohibition granted and to demur thereto, or go to trial.

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A parson cannot sue for tithes after institution and before induction, for they are temporal; though he is entitled to oblations, &c. which are spiritual.

E. 4 Anne. Scacc. *Anon.* [11 Mod. 46.]

IF a parson is instituted only, he cannot have an action of trespass until induction.

But HOLY, Ch. J. said, he is intitled to the spiritual profits, as oblations, &c. before induction: he is likewise liable to be sued in the spiritual court before induction, if he neglect the cure; but he cannot sue for great tithes before induction, for they are temporal.

Tr. 4 Anne. B. R.

Foy v. Lister. [2 Ld. Raym. 1171.] 6 Mod. 261. 2 Salk. 554.

A prohibition was granted to a suit for tithe-milk upon a suggestion of a *modus* to pay from April to November the tenth day's milk once skimmed made into cheese in lieu of all tithe-milk, with the intent to have the custom tried, that the question might be judicially determined; but a consultation was granted because the plaintiff had not proved his suggestion within six months; and the decision of the question consequently evaded.

A PROHIBITION was granted in this cause in Michaelmas Term last to a suit in the ecclesiastical court for tithe milk, upon a suggestion of a *modus* to pay from April to November the tenth day's milk once skimmed made into cheese, in lieu of all tithe milk, with intent to have the custom tried, and that the question might be judicially determined. For the plaintiff in the prohibition were cited the cases of *Austin* and *Lucas*, 3 Cro. 609. Moore, 909. a *modus* to pay the tenth cheese made from May day until the first of August, in recompense of all tithe milk for the whole year, is good, because of the labour of the parishioner, which goes to the making the milk into cheese. And Latch. 226. a *modus* to be excused of tithes of the odd sheaves of corn, for making the rest into shocks.

Mr. Eyre for the defendant argued, that the labour of the parishioner here was employed about the less valuable part of the tithe, and that would distinguish this from all the cases. For though he admitted it was a good *modus*, in consideration that the parishioner wound up the tenth fleece of his wool at his shearing for the parson, to be discharged of tithes of neckings, or the dirty locks; or in consideration that the parishioner made the grass into hay for the parson, to be discharged of tithes of the after-mowth, yet it would not hold *vice versa*.

Now this term Mr. Eyre came and moved the court for a consultation, because the plaintiff in the prohibition had not proved his suggestion within six months, according to the statute of 2 Edw. 6. which six months he said were to be accounted from the *teste* of the writ of prohibition, which in this case was the 25th of November, and consequently the time of proof expired the 25th of May. The chief justice upon the motion doubted if this clause extended any

The six months within which a suggestion is to be proved, are to be reckoned from the *teste* of the prohibition, and vacation counts as well as term.

The stat. 2 E. 6. extends to suggestions for prohibition in cases respecting small tithes as well as great.

any farther than prohibitions to suits for predial tithes, and upon that the counsel were directed to look farther into it. And after upon motion by Mr. Eyre in the absence of the chief justice, it was agreed by the counsel for the plaintiff in the prohibition, and by the court, that the act extended to prohibitions to suits for small tithes as well as great. Watson, 489. Yelv. 102. 2 Keb. 134. and the court granted a consultation. And Mr. Eyre moved, that it might be part of the rule, that they should have their double costs and damages according to the statute. But the court said, that could not be made part of the rule, but that they must have them of consequence. Mr. King for the plaintiff in the prohibition, cited the case in Moore, 573. that the time of six months given by the 2 Edw. 6. to prove the suggestion, ought to be intended six months in term time, and that the vacation should be no part of the time, and that consequently the time in this case was not expired. But the court overruled him, and said, it had been adjudged contrarywise since.

1705.

JOY V. LISTER.

Tr. 4 Anne. Scacc.

Waterman v. Jones and others. [1 Wood, 463.]

Berkshire, 8th June, 1705.

THE vicar, with the owners, occupiers, and tenants of lands within the rectory impropriate and parish of Shinfield, in the county of Berks and Wilts, on behalf of themselves and the rest of the inhabitants of the said parish, filed their bill against the defendants and the dean and chapter of Hereford, stating, 1. That by an immemorial custom within the said parish, every inhabitant, exercising husbandry within the said parish, cutting and lopping any wood and trees, increasing on any lands or tenements occupied by such inhabitant, together with an ancient house of husbandry for the fire bote of such inhabitant in the said house, therein to be burnt, or for necessary making or repairing the fences there about the grounds, and employing the same for the purposes aforesaid, (by reason whereof a greater increase of tithe might come to the said rector,) have, in all the times aforesaid, been, and of right ought to be discharged from the tithe thereof; that the plaintiffs, some of them, are owners or occupiers of several ancient houses of husbandry, and of several coppices and other wood grounds thereto belonging, within the said parish, and within several years last past had cut several quantities of wood and trees, which were used for fire wood in their respective houses, or in the repairing or amending of the fences of the said lands belonging to such farms; 2. That there were several acres called Lot Acres in East Mead in the said parish, for which tithes in kind were due and payable, of which the plaintiffs, or some or one of them, were seised in fee simple; that the said impropiators and their predecessors, from time immemorial, had enjoyed a piece of meadow called the Dole, or East Mead, and every occupier of the said Lot Acres, for every acre, upon reasonable request made by the rector or farmer once in every year, ought to have cut, for the said rector or farmer enjoying the said Dole, one swath of grass growing on the said Dole when ripe, in full satisfaction of all tithes growing upon such Lot Acres, which said Dole was still enjoyed by the proprietors of the said rectory, and the plaintiffs were always ready to cut a swath upon the Dole for the owner or farmer of the said rectory for every lot acre they so possessed, but were never required thereto, and had not been suffered by the owners of the said rectory to cut the same when they had tendered themselves thereto. 3dly. That the said plaintiffs, within seven years last past, had respectively cut within the said parish and rectory several quantities of coppice wood and shawes, and made the same into faggots, hoops, bavins, hop-poles, and hurdle rods, and set out the tithe duly; that in the said parish, for time immemorial, there was and had been this custom, that when such coppice woods or shawes have been felled and made into faggots, hoops, bavins, hop-poles, and hurdle rods, and the tenth duly set out, that then such tenant, occupier, or other person so cutting and setting out such tithe have been paid in money the full tenth part of the charge of making such faggots, &c. to the impropiator

A custom that wood burnt in husbandry houses, or spent in repairing the farm fences is discharged of tithes, is good. A custom to cut the grass and ted and spread it, and afterwards to gather it into winrows, and then into grasscocks, and to set out the tenth cock, and by reason thereof to be discharged of the tithes of the hay of the second mow of the same ground, is good; and so of clover set out in great cocks.

A custom that the glebe of the vicar in his own or tenant's hands should be discharged of tithes, is good. No decree was made upon an alleged custom that tares, &c. cut green and given to milch cows and beasts of the plough were tithe free.

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impropriator or farmer of the said rectory. 4thly. That, time immemorial, there has been this custom and manner of tithing within the said parish and rectory; viz. that every occupier of any meadow, cutting or mowing the first math of his or their grass at seasonable times, ought and have used at their own costs to ted and spread abroad the grass so cut and lying in swath, and afterwards to gather in winrows, and afterwards in grass cocks of as just and equal quantity as could be made without fraud, and the same to place, one after the other as to number, and truly numbering the same, and every cock, that should happen to be the tenth, to assign and set out to the use of the rector or impropriator or farmer of the said rectory, and in consideration of the teding and spreading abroad, and making into winrows, and setting out the full and just tithe thereof, every such occupier has been exempt from payment of all other tithes of grass and hay of the first math or cutting, and also of the tithe of the latter math of the same meadow the same year. 5thly. That, by custom and usage of the said parish, every occupier of land sown with clover, within the said parish and titheable places thereof, from time immemorial, have used every year, at their own costs, to cut the first math of the same grass at a seasonable time in the same year, and the clover grass so cut at their like charge to make into hay, and so to make into cocks of an equal quantity without fraud, and every tenth so made to set out to the use of the rector or his farmer, and by reason thereof such occupier has been exempt from payment of all latter math or second cutting of such clover, grass, or hay growing; that the plaintiffs were respectively owners of several parcels of meadow ground, and ground sown with clover, within the said rectory, and at seasonable times cut several quantities of grass and clover yearly, and at their own costs did ted and spread abroad the said grass so cut and lying in swath, and afterwards, at their own charge, gather the same into winrows, and afterwards put into cocks of equal bigness, and the tithes thereof duly set out, but by reason of the said custom ought not to pay any tithe of latter math. 6thly. That during the time aforesaid there was and had been in the said parish a vicar and vicarage endowed with small tithes and several lands within the said parish and rectory, and that the plaintiff Oake was vicar, and that he and his predecessors, from time immemorial, had enjoyed the said lands by themselves and tenants exempt from the payment of all tithes. 7thly. That when the owners and occupiers of lands, pasture, and meadow, within the said rectory, during the time aforesaid, had not had sufficient meadow and pasture for the milk kine and cattle that plough their lands, and that a greater increase of tithe corn, grain, and milk might come to the rector, farmer, and vicar, by means of such cattle and kine, and in regard the said owners and occupiers had used to pay tithes of their ripe tares and vetches, the tenth cock, and for the tithes of clover or other grass, as aforesaid set forth, the said owners and occupiers of such lands have used to be discharged of the tithes of all such tares, vetches, clover, and other grass as they have cut green and unripe, and given for sustenance of such their cattle of the plough and milk kine; that the plaintiffs, or some of them, were respective owners or occupiers of lands whereon such tares, vetches, clover, and other grass have grown, and by them cut green and unripe, and given to their cattle of the plough and kine aforesaid, within ten years last past. 8thly. That the defendants, pretending to be lessees or farmers of the said rectory impropriate, and of the great tithes aforesaid, and intending to set aside the customs aforesaid, pretended that there were no such customs and exemptions, and threatened to sue the plaintiffs for wood burnt and employed in fencing there, and for tithes of the aftermath of clover grass, and other grass; and green vetches, and of their respective lot acres aforesaid, and refused to make any allowance for making of faggots, contrary to the said customs. The bill therefore prayed, that the defendants might set forth whether such exemptions had been used or not, and for how long time, upon what account, whether any tithes were ever paid of wood cut and spent for fuel, or of the aftermath of hay, vetches, or the clover cut green, or of the vicarage lands, and for which of them, and whether the value of the making of faggots had not been paid by the impropriator, and whether any, and what other satisfaction, by whom, to whom,

and how often, and whether they, or some of them, do not enjoy the Dole, and whether the same be not enjoyed in satisfaction of the tithes of the Lot Acres, or some, and which of them, or what other satisfaction they have in lieu thereof, and whether the farmers and defendants had not refused to permit the said swaths to be cut, and when they were cut whether such *modus* or *moduses* of the said hay, grass, vetches, or clover, or some and which of them had not been used in the said parish, by whom, and how long, and that the defendants might answer the premises, and the plaintiffs be relieved therein.

The defendant Jones and his wife, by their answer said, that it might be true that the plaintiffs, or some of them, were owners or occupiers of several ancient messuages, and of several coppices and other wood grounds within the said parish, and within several years past had cut quantities of coppice wood and other wood, but whether they were burnt or used for firewood in their houses, or upon the farms upon which such wood was cut, or in repairing and amending the fences of the lands and tenements belonging to the farms, they knew not, but believed, that they did not set out their tithes, or give any satisfaction, which ought to have been done. They said that they knew not, nor believed the custom and usage by the bill set forth, nor that there was any exemption from tithes, but that all tithes within the parish ought to be paid according to the general law of the land. They said, that there was a piece of ground in Shinfield, which had the denomination of Lot Acres, and that it might lie in East Mead, but they knew not that no tithes in kind were due and payable for the same; neither knew they whether any of the plaintiffs were seised in fee, or farmers of the said Lot Acres, nor that in lieu of the tithes in kind from them, the rectors or impropiators, and their predecessors, from time immemorial, had enjoyed the Dole in East Mead, but that it had always been enjoyed by the dean and chapter of Hereford, under the same title as they held the tithes and other glebe land. They knew not that in lieu of the tithes of the said Lot Acres besides the Dole, every occupier of the said Lot Acres, for every lot acre by him occupied, upon request made by the rector or farmer of the rectory once in every year, ought to cut one swath of grass growing on the said Dole when fit to cut, in full satisfaction of all tithes growing on the said Lot Acres; believed that some of the Lot Acres paid tithes; that there might be a piece of glebe land having the denomination of the Dole, but they denied that they knew the same to be held in lieu of tithes for the Lot Acres; knew not that the plaintiffs, as occupiers of the said Lot Acres, were always ready to cut a swath upon the said Dole; believed they never required it, there being no such duty incumbent on them, or that the plaintiffs, or any on their behalfs, ever tendered themselves; knew not what coppice woods or shawes the plaintiffs had, within seven years past, cut or made into faggots, hoops, bavins, hop-poles, or hurdles, but if they did not duly set out the tithe thereof they would account for and pay the same, denying there was any such custom as in the bill to exempt therefrom; believed all wood ought to be put into a titheable condition, and that the tenth faggot, bavin, hop-pole, and hurdle ought to be paid, but as for hoops, they did not insist that the same ought to be made into hoops, but that what are designed for hoops were to be tithed before worked, or, if worked, then the workmanship to be paid by the impropiator; believed that of right the farmer or occupier, cutting or mowing the first math, ought to ted and spread abroad the grass so cut, and afterwards, at their costs, to gather into winrows, and after into grass cocks of equal bigness, without fraud, and to set out every tenth cock to the use of the rector or his farmer, as in the bill; but denied that, by reason thereof, they were by any custom exempt from the payment of the tithes of grass and hay of latter math; believed that, since clover came into use, the custom of tithing the first crop every year had been in such manner as in the bill; and denied that the second crop, which was better than the first, was by any custom exempt from payment of tithes; they confessed that there was a vicarage endowed with small tithes and several lands within the said parish; that the plaintiff Oake was vicar, and so had been for several years; it might be true the said vicar and his predecessors, seised of the

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vicarage lands, had enjoyed the same tithe free whilst held by themselves; but that the tenants of the same, either under the said vicar or his predecessors, were not, nor ought to be exempt from payment of all tithes growing on the said lands, for that such tenants, as laymen, were by law liable to pay; they denied that the plaintiffs, or other occupiers, ought to be discharged of the tithes of all tares, vetches, clover, and other grass cut green and unripe, and given for sustenance for their cattle of the plough or milk kine when they have not had sufficient meadow and pasture for them, for that the plaintiffs overstocking themselves with more cattle than they had grass for, could not be a sufficient reason for them to lose any part of their tithes; they said that the defendant, Mary Jones, and her trustees, held the inappropriate tithes of Shinfield to her own use, independent of her husband, the other defendant, John Jones, by lease under the dean and chapter of Hereford; and that none of the lessees or farmers of the said rectory and tithes had ever allowed the exemptions and observed the customs and manner of tithing as stated in the bill.

The defendant Stoughton said, that he was trustee for the defendant Mary Jones, but was a stranger to the customs and manner of paying tithes and other matters stated in the bill.

The defendants, the dean and chapter of Hereford, by their answer, confessed that they were seised in fee of the inappropriate rectory or parsonage of Shinfield, and of all the profits, tithes, and hereditaments thereunto belonging; and being so seised; by lease dated the twenty-sixth of June, in the eleventh year of William the Third, made between them and William Stoughton and S Morris, did demise unto them all their said parsonage of Shinfield, with all houses, tithes, barns, and profits thereunto appertaining (the chapel of Swallowfield excepted), to hold for twenty-one years, under the rents, covenants, and agreements therein mentioned; that Stoughton and Morris, their under-tenants or assigns, enjoyed the same, and hoped that they should not be interrupted therein; but that they could not set forth whether there were any such customs or *modus* for payment of tithes, or any exemptions, as in the bill alleged.

The plaintiffs replied; the defendants rejoined; and several witnesses were examined on both sides; and,

Upon opening the pleadings, the plaintiff's counsel prayed the said customs might be confirmed by the decree of this court; and after hearing counsel for the defendants, and reading several depositions taken in the cause, and on full debate,

The court was of opinion, that the custom in the bill charged for wood spent in husbandry houses, and repairing the fences on the premises, to be discharged of tithes, is a good custom; and also that the custom in the bill charged for paying of tithes of the first math of meadow ground in grass cocks, and the clover in great cocks, in lieu of the tithes of the hay of the second math of the same ground, is a good custom; and likewise that the glebe of the vicar of the said vicarage, in the vicar's own, or in his tenant's hands, ought, by the endowment and usage in the bill charged, to be discharged from paying any tithes to the impropiator, his tenant, or under-tenants of the said impropiation; and the same were decreed accordingly. But the court made no decree as to the tithes of the Lot Acres; the number thereof being uncertain; or as to wood made up fit for market; or as to green vetches; and as to them, the bill was dismissed.

EDW. WARD.
THO. BURY.

RO. PRICE.
J. SMITH.

M. 4 Anne. Scacc.

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Humphreys v. Stopher; et à contrà. [1 Wood, 471.] 2 Gw. 593.

Suffolk, 10th December, 1705.

THE rector of Spexhall, in the county of Suffolk, charged by his bill, that the defendant, for two years, farmed and occupied several lands in the said parish, and had yearly quantities of corn, grain, and turnips, growing thereon, and had fed several cows; for all which he ought to have paid tithes.

The defendant said, that he had occupied land in the said parish for three years past; and that in the year 1702 he sowed some acres of turnips, and gave them out, and fed them up with his dairy cattle, and gist cows that had done labouring in the dairy, and other cattle, for which he paid tithe to the plaintiff, either in kind, or according to custom, and did not give out the same to grazing or fat cattle, but fed the same out upon the said farm and in the said parish for the winter feeding the said dairy and titheable cattle, which must have been fed with other meat if not with turnips, and that no tithes were due for turnips so used and fed by the dairy and titheable cattle; that he yearly paid or satisfied the plaintiff for all other tithes, and had a discharge in November, 1702, in full till Lammas, except for the turnips then in the ground, which he insisted were not titheable, having sown the same with an intention to spend them for the purposes aforesaid, and not otherwise; that the said crop so sown, fed, and given out in the said year was not worth above twenty shillings.

The defendant filed his cross-bill against the said plaintiff, setting forth, that there were divers customary payments of tithes for lackage, hay, and other titheable matters in the said parish therein mentioned, which were likewise set forth in his said answer; and prayed to have a discovery of what tithes the said Humphreys had received a satisfaction for from him, and to have the *modus*es and customary payments established by the decree of this court.

The rector said, that he believed the said *modus*es and customary payments to be as in the bill; and confessed, that he had received the same ever since he had been rector, and also satisfaction for all the tithes, either in kind or according to the customs, except turnips; but denied that he pretended to destroy the said customs.

In both the causes, the plaintiffs replied; the defendants rejoined; and witnesses were examined; and they came on to be heard the twenty-sixth of November last; and upon reading the proofs taken in the cause, and on full debate, it was then ordered, that the said causes should stand over for the opinion of the court, and the court to be attended with precedents. And the court having been attended with precedents accordingly,

It is ordered and decreed by the court, that tithes for turnips drawn and severed from the ground, and given to dairy and milch cattle, though upon the farm, and within the said parish wherein the said cattle were kept, are due; and that the defendant Stopher shall forthwith pay to the plaintiff the sum of eighteen shillings for the tithes of nine acres of turnips by him or his order pulled and severed from the ground in 1702, and given to his dairy cattle in the said parish of Spexhall, with his costs, to be taxed by the deputy remembrancer of this court.

H. 5 Anne. Dom. Proc.

Pole v. Gardiner. [1 Br. P. C. 214.] 2 Eq. Ca. Abr. 734. 1 Wood, 472.

8 Vin. 18. 2 Gw. 601.

THE parish of Eckington, in the county of Derby, of which the respondent and his father had been rectors for upwards of sixty years, consists of a town called Killamarsh, and of four quarters called by the name of Spinkill, Mosbrough, Eckington, and Troway; and for time immemorial, there have been paid within this parish certain yearly *modus*es, rates or real compositions, in lieu of tithe-hay, viz. twelve-pence an acre for all low meadows, and eight-pence an acre for all high meadows (except in Troway quarter)

Tithes shall be paid for turnips drawn from the ground and given to milch cows, though upon the farm and in the parish in which the cows were kept.

Twelve-pence an acre for all low meadows, and eight-pence an acre for high meadows, in lieu of tithe-hay, held to be good *modus*es.

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for every year that the same were respectively mowed for hay; and for Trowy quarter, several small sums for every farm, amounting to about eleven shilling.

The appellant being possessed of the lands in the town of Killammarah, and in Spinkill quarter, the respondent in Hilary term, 1704, exhibited his bill against him in the court of exchequer, for an account and satisfaction of tithe-hay in kind; to which the defendant, by his answer, insisted upon the said ancient *modus* of twelve-pence and eight-pence an acre; and that the same had been paid time out of mind, in lieu of tithe-hay, and so accepted by the plaintiff, and all his predecessors, rectors of the said parish.

The cause being at issue, several witnesses were examined on both sides; and, being heard on the twenty-third of February, 1705, the court took time to consider, till the twenty-third of June, 1706; when they declared that the said payments of twelve-pence and eight-pence an acre were no *modus*, but temporary compositions; and that tithe-hay ought to be paid in kind, for those lands for which the said compositions were alleged to be payable; and therefore decreed the defendant to account with, and satisfy the plaintiff for his tithe-hay, with costs.

From this decree the defendant appealed; insisting that the *modus* were good in law, having been inviolably observed, and being fixed and certain, and what might be permanent; that there was not any rule in law to stint or limit the value of *modus*, they were all originally contracts, proceeding from compositions real, which were frequently made till the statute of 13 Eliz. which was above three hundred and fifty years after the time of Richard I. That the owner of a parish might have endowed a church with more than the value of the tithes, if he had thought fit, or might have contracted for twenty times less than the value; and in this, and most other cases, an inviolable usage is the sole evidence of right, when by length of time no account of the reason or beginning of the usage can be given, and therefore it is called a prescription. That the reason given for making this decree was, that the *modus* in question were too great, or near the value of the tithe in kind; for, that in the time of King Richard I. which was accounted the time of memory, twelve-pence or eight-pence might be the value of the inheritance of an acre of meadow: But, according to this reasoning, a farthing an acre would scarce be adjudged a good *modus*, although there were late judgments of the court of exchequer, which confirmed four-pence an acre for marsh land in Kent, and some which allowed six-pence an acre in other places. That it was evident, both from reason and the usage in the Alienation office, that in ancient times, meadow lands were of much greater value than of late years; which was owing to the modern inventions of improving other lands to bear hay. That most parsons quarrelled with a *modus* of twelve-pence or six-pence for a farm of twenty pounds or thirty pounds *per annum*, and, by the unwariness of ignorant tenants in making small alterations, got them set aside; so that within a few years past, more *modus* had been broken than for many ages before, while very few had been complained of, which were half, or near the value of the tithe; but if this decree stood, several hundreds of parishes would be unbinged in all their inviolable *modus*, and manner of tithing, and a multiplicity of suits and endless confusion would be created throughout the kingdom.

On the other side it was contended, that tithe-hay in kind is to be paid to every rector of common right, unless some ancient *modus* be payable in lieu thereof; but that the sums pretended to be *modus* in this case, could only be temporary agreements or compositions, by reason of their largeness; for, in ancient time, when *modus* were introduced, the sums of twelve-pence and eight-pence were of much greater value than the hay of a whole acre: That there were several instances in proof in this cause, both in the time of the respondent and his predecessors, when sometimes the parishioners had refused to pay, and at other times the incumbent had refused to receive these sums of twelve-pence and eight-pence an acre; and, at all those times, tithe-hay had been paid in kind. That in all the neighbouring parishes, the rectors usually compounded with their parishioners for the tithe-hay, at the like rates of twelve-pence

pence and eight-pence an acre; and yet they had the tithe-hay paid them in kind, whenever they thought fit, without any pretence that these payments were *modus*. That considering so small a sum as eleven shillings was paid for the tithe-hay of Troway quarter, containing one thousand acres, and so great sums as twelve-pence and eight-pence for every other acre of the other quarters of the parish, no reason could be given for this difference, but that one was an ancient *modus*, and the other a late composition.

But, after hearing counsel on this appeal, it was ordered and adjudged, that the decree should be reversed; it appearing to their lordships, that the appellant had proved the *modus* insisted on by his answer; and, that the respondent's bill in the court of exchequer should stand dismissed, but without paying any costs to the appellant; his solicitor and agent consenting, at the bar of the house, to waive such costs.

H. 4 Anne. Scacc.

Greenmoay v. The Earl of Kent; et à contrâ. [1 Wood, 479.]

Herefordshire, 31st January, 1705.

THE bill stated, that the plaintiff was, and for twenty-two years past had been, vicar of the parish of Walford, in the county of Hereford, and entitled to all manner of vicarial tithes, and particularly to the tithes of wood and bark; that the late Earl of Kent was in his life-time, and the defendant, the present earl, as executor of his father, was possessed of a coppice called the chase, and other woodland within the said parish and titheable places thereof; that they, or one of them, in 1701 and 1702, cut down upon the chase several quantities of wood, which they sold, and also stripped and sold great quantities of bark from the said wood and poles so cut down; that the greatest part of the said wood and poles was not of twenty years growth: and if any were, the same were, but some few poles growing *sparsum* from the stubs or stocks of other trees, and were not fit for timber but only for firewood, making of laths, or such like uses, and were sold to the iron masters, who used the same for fuel at their furnaces; that the defendants pretended that if any tithes were due for all or any of the said wood or bark, the plaintiff ought to allow thereout the charges of cutting, cording, and stripping the same, and twenty-one cords to the score, though, by the custom of the said parish and other adjacent parishes, the owners of woods, time out of mind, were used and ought to size, make up, and cord their wood into marketable ware, and then to set out the tithes or tenth part thereof.

The defendant confessed that he was seized of the wood called the Chase, in the parishes of Walford and Rope, and other woods in the parish of Ross Weston under Penyard, and other adjacent parishes in the said county, which, upon the death of his father in 1702 came to him, which said woods consisted of innumerable quantities of timber trees, of oak of thirty years growth and upwards, preserved for timber by his ancestors at the respective fallages thereof, and also of coppice wood and underwood of several sorts under twenty years growth; that his father used to cause the young oaks under twenty years growth to be stripped, and the bark to be ranked by itself, distinct from the barks of timber trees of thirty years growth, and then caused the coppice or underwoods to be fallen, cut out, and sized into billets, and corded by itself, and so delivered the same to the iron masters, and caused the stubs and stocks on which such underwood usually grew to be cut off close to the ground, and corded with such coppice wood, and then caused the timber trees of thirty years growth to be stripped, and the bark to be packed by itself, and so delivered to the buyers; and then the timber trees of that growth to be fallen, and the sound and merchantable parts thereof to be sold, and the other employed in repairs, &c.; and the lops and offals he caused to be sized into billets, ranked and corded by itself apart from the coppice woods, and delivered the same to the iron masters; and he said that all such timber trees of thirty years growth and upwards were entirely free from the payment of tithes, and therefore he used separate management, that he might know for what part he ought to pay tithe, and what was tithe free; that the usual method of titthing wood in those parts had been time out of mind, by a proportionable share of the money arising by

1705.

FOLK

GARDINER,

The tithes of underwood and wood above twenty years growth cut and corded, and of the bark stripped from the same, and of saplings cut for poles under twenty years growth decreed; but not for wood of twenty years growth not corded, or of its bark.

A custom alleged by the vicar that owners of woods in his and other adjacent parishes used and ought to size, make up, and cord their wood into marketable ware, and then to set out the tithes thereof.

1705.

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v.
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sale thereof, the person entitled thereto making a proportionable allowance for the cutting and stripping; and that his father having made many fallages, used the above management thereof; that he believed his father ordered the wood in question to be fallen, and separately managed as aforesaid, but before it was completed the defendant ordered the carrying on and finishing thereof according to his father's method, which was done accordingly. He further confessed that if the plaintiff were vicar of Walford, he had a right to the coppice wood, bark, and underwood, so separately stripped, cut, corded and delivered out of the chase in the said years, but he insisted that he had no right of tithe in the timber trees of oak of thirty years growth and upwards, or the bark or offal of the same, not being mixed, and therefore he had refused to pay tithe for the same. He further stated, that the plaintiff had acquiesced without demanding his tithes till September, 1702, when the fallage was almost complete, and his father dying in August following, whereupon the defendant became intitled, but was not applied to about the premises. He said, that as soon as the titheable effects could be brought to a computation, a particular was delivered to the plaintiff, stating an account of the wood and bark of the said fallage; that for the better distinction of the said wood, the bark of the timber trees of oak of thirty years growth was called pole wood, and the cord wood made of the offal thereof was called pole bark, both which he insisted were tithe free, and the bark and cord wood under twenty years growth was called coppice bark and coppice wood. He also confessed, that the plaintiff applied to him, and insisted upon a right of tithe of timber trees, pole wood, and pole bark, but that five shillings per cord for the tithe of three foot wood is a full tenth of the nett money arising by sale of the coppice woods, being allowed for his expenses and damages in the management thereof, and that he ordered his agent to give the plaintiff five shillings and six-pence for three foot wood which he still was ready to pay. But he denied the subtraction of any tithe wood, other than the trees of thirty years growth and upwards; and believed that all the pole wood bark, and underwood, were sold to such persons and at such prices as in the schedules to his answer; and he said, that he was ready to pay the tenth of the money of the coppice wood; but hoped that he was not liable to do so for the timber of thirty years growth and upwards, nor for the pole wood or pole bark made from the stripping and offal thereof.

To which answer the plaintiff replied and the defendant rejoined.

The defendant filed his cross-bill against the plaintiff, thereby setting forth the method used in the felling and stripping of wood and of paying tithes for the same, to the same effect as in his answer aforesaid; and insisted that it was the custom to pay tithes by a share of the money arising from the sale of such wood; that his father, in 1701, proposed to Greenway, that he should have a share of the money so arising, and that a meeting was appointed, but that on the defendant's silence he disposed of the falling, and delivered an account to the defendant with offers which he refused. The bill therefore prayed, that the defendant might answer the premises.

The vicar, by his answer, confessed, that the late Earl of Kent made such separate management as in the bill; but said, that the same was a practice altogether new, and was never offered at till eight years since; he believed, that it had been usual to pay a tenth part of the money arising by sale in lieu of tithes; but insisted that he was not obliged to do so, and said that it was customary to treat about the tithes before the falling, unless the same were paid in kind, and he set forth the earl's letters, and his application to him. He also confessed, that an offer had been made at five shillings and six-pence per cord for the coppice wood, allowing twenty-one cords to the score, which he had refused, having as much paid him in 1683 and 1685, without allowing twenty-one cords to the score, and including the pole wood of twenty years growth and upwards, which was not separated, or denied to be titheable; and he insisted, that he had a right to the tithes of pole wood as coppice wood, the same having been paid, time out of mind, till such separate management was made as aforesaid.

The plaintiff replied, the defendant rejoined, and witnesses were examined in both causes; and the cause came on to be heard on the tenth of July last:

and upon reading the depositions of witnesses taken in the original cause, and upon long debate of the matter, it is ordered by the court, that this cause be continued in the paper of causes for the opinion and judgment of the court. And for as much as no counsel attended for the plaintiff in the cross cause, it is ordered and adjudged by the court, that the defendant Greenway be, and is thereby dismissed of and from the said cross-bill, and all matters and things therein contained, with his costs, to be taxed by the deputy remembrancer of this court.

The original cause standing this day for the opinion of the court,

The court declared, that the plaintiff was entitled to, and ought to be relieved for the tithes of all wood above twenty years growth, as well as underwood cut and corded within the said parish of Walford in 1701 and 1702, and for the bark stripped for the same; but that no tithe was due from such wood above twenty years growth, which was not corded, nor for the bark thereof.

It is thereupon ordered by the court, that the defendant do account with, satisfy, and pay to the plaintiff, as well for the tithes of all wood above twenty years growth as of the underwood cut and corded in the said parish for the said years; and for the tithes of the bark stripped from the same; and for the tithes of saplings under twenty years growth; and it is referred to the deputy remembrancer to take the said account, and report the same.

THO. BURY.

ROB. PRICE.

J. SMITH.

1705.

GREENWAY

v.

EARL OF KENT.

Tender for
tithes.

H. 4 Anne. Scacc. *Drake v. Booking*. [Decree Book.] 2 Gw. 594.

THE defendant tendered five pounds to the plaintiff, desiring him to take his tithe thereout. The court declared it to be no good tender.

H. 4 Anne. Scacc. & Dom. Proc.

Newte v. Chamberlaine and others. [Dodd's MS. 204. 1 Br. P. C. 157.]

1 Eq. Ca. Abr. 366. 2 Eq. Ca. Abr. 731. 9 Vin. Abr. 39.

Rayn. 106. 1087. 1 Wood, 482. 2 Gw. 596.

A BILL for tithe of malt ground at a horse-mill in Tiverton, in Devonshire, erected within six years, and upon the hearing of this cause, the court took time, till 22d April, to deliver their opinion, and then all for the complainant, and that the tenth toll-dish should be paid, and an account decreed accordingly.

The tithe of corn ground in a horse malt mill is a personal tithe, and due only where it has been paid within forty years before, and not payable by the tenth toll-dish of the corn ground, but by a tenth part of the clear profits, over and above all incidental charges.

1. It is a predial tithe, or in nature of a predial tithe.

2. Tithe shall be paid of every new-erected mill.

3. *Semble*, that the statute of *Articuli Cleri* had allowed the canon, and that all consultations or denials of prohibitions are resolutions in point. See *Lindwood*. 2 Ro. Rep. 84. 1 Brownl. 32. 3 Bulstr. 212. 1 Ro. 405. 651. 656. 2 Inst. 490. 622. Cro. Ja. 523, 524.

Note. All the Barons argued solemnly this day.

Note. By the Ch. B., a mill built on lands that were abbey lands and discharged, shall pay tithes, (*quare* by me); and afterwards by *Etterick*, where there is a *modus* for the land, or land discharged of tithes, a new mill erected thereon shall not pay tithes. 2 Inst. 490. 1 Ro. 651.

In *Hughes* and Lord *Hereford's* case, cited in *Hall* and *Hart's* case, in B. R. by *Holt*, in time of *HALES*, it was adjudged, that one may prescribe in *non decimando* for old mills. *Note*, in *Hall* and *Hart's* case the court divided whether predial or personal tithe.

Afterwards, in H. 1706, upon appeal to the House of Lords, this cause was heard, and the lords advised with the judges, who took time to consider; and afterwards all the judges of B. R. and C. B. gave their opinion for reversing the decree, and that it was only a personal tithe, and nothing due, but the tenth part of the clear profits, after charges deducted; and the lords reversed the decree accordingly. I was of counsel in Sc. and afterwards in the House of Lords for the decree. *Note*, now a settled point, and well settled as I conceive; for I myself was all along of this opinion, and in judgment against my client.—[*Dodd's MS.*]

THE respondent was rector and incumbent of the portions of Pitt and Tidcombe, in the borough and parish of Tiverton, in the county of Devon; and was entitled, as such, to tithes of corn, grain, wood, and all other great tithes.

1705.
 NEWTE
 v.
 CHAMBER-
 LAINE
 AND OTHERS.

About the year 1693, the mayor and burgesses of Tiverton erected a mill for grinding malt by horses, within one of the said portions: and, on the 8th of May, 1699, they demised the same to the appellants for three years, from Midsummer then next, at the rent of 30*l.* *per annum.*

The lessees refusing to pay, or compound with the respondent, for any tithes in respect of any malt ground at this mill; he, in Michaelmas term, 1704, exhibited his bill against them in the court of exchequer, praying an account and satisfaction of such tithes. The defendants by their answer insisted, that no tithes were due; but the cause being heard on the 12th of April, 1706, the court decreed, that the defendants should account with, and satisfy and pay unto the plaintiff, for the value of the tenth toll-dish of all corn and grain, ground at the said horse malt mill, for the two first years in the bill mentioned, viz. from the 8th of May, 1699, to the 8th of May, 1701; and should also pay the costs of the suit.

From this decree the defendants appealed; insisting, that if any tithe was due for such malt mills, it could be only a personal tithe; because, there was in this case no natural increase, but only a profit arising from the invention of a machine, and the labour of man and horse; and if personal, the same by law could only be a tenth of the net profit, after deducting all charges. That if a personal tithe was due for such mills, it was only due in such places where personal tithes have been by custom paid for forty years before the statute of Edw. 6.; but no such custom was proved to be for such mills in Tiverton; on the contrary, the appellants had proved, that there was another horse malt mill, and several hand malt mills, and many fulling mills, of long standing, and yet no tithes were ever paid or demanded for the same. That the respondent had charged, by his bill, that tithes for such mills were due by custom, which the appellants had denied by their answer; and yet the respondent had proved no such custom, nor the value of the tenth toll-dish, or any other toll to be taken by the appellants, but only two-pence *per* bushel for grinding; and therefore the decree was not warranted by the proofs and proceedings in the cause. That if the decree should be affirmed, it would sometimes happen, that the tenth toll-dish, as decreed, would be the whole of the proprietor's gain, considering the expense of erecting and maintaining this mill; and, in this event also, the same corn would, against all law and reason, pay tithe twice; for that all, or the greatest part of such corn was grown within the said parish, and the tenth thereof was paid to the respondent in the field; and if any was ground which grew elsewhere, the same, in like manner, paid the tenth to the incumbent of the parish where it was grown. And lastly, this decree would introduce a new sort of tithe, and would affect great numbers of inhabitants in London, and elsewhere; there being at least one hundred such mills used in the city of London, and some thousands of them in other parts of the kingdom, for which tithes were never paid or demanded; but which, if this decree should be affirmed, must all pay tithes.

On the other side it was contended, that tithes were due both by the canon and statute law, for new-erected mills; by the canon law tithes were due for all mills, and by the statute of *Articuli Cleri*, cap. 5. for new-erected mills, and which statute expressly provides, that no prohibition shall lie in such case. That there have, from time to time, been several resolutions and decrees, for tithes of mills; and that the rest of the mills within the respondent's portions, had all along paid tithes, or a composition for the same; and every *modus* for a mill proved tithes to be due, if they were not discharged by such *modus*. That the tithe in question was a predial, not a personal tithe, and the tenth toll-dish was payable for the same; and so agreed both the canon law, and the custom and usage of this kingdom. And, that it was not a double tithe, because it was paid by different persons, and for different purposes; in the first instance, by the owner of the corn, and in the second, by the owner of the mill.

After hearing counsel on this appeal, it was ordered, that the judges should be heard to this point, Whether the tithe payable for corn ground in a horse malt mill, is a personal, predial, or mixed tithe, and in what manner tithe is

to

to be paid for corn ground in such mill, if any tithe is due for the same? And, upon due consideration of what was offered by counsel, and also upon hearing the judges, it was ordered and adjudged, that the decree complained of, should be reversed; and that the plaintiff, in the court below, John Newte (the now respondent), should recover his tithes of the said mill, in the nature of a personal tithe only; that is to say, the tenth part of the clear profits arising from corn ground in the said mill, over and above all the incident charges; and, to that end, an account was to be taken of the profits of the said mill, and charges for the time past, within the time of the demand of the plaintiff John Newte's bill in the exchequer and since; and that the said tithes should so continue to be paid for the future. And it was ordered, that the said court of exchequer should cause the said account to be taken, and what should be found due thereon, paid accordingly. [*Brows.*]

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NEWTE
v.
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E. 5 Anne. C. B. *Anon.* [Com. 147.]

PROHIBITION, upon a suggestion that the suit in the spiritual court was for tithes of heath and barren ground improved, within seven years after the improvement, contrary to the statute; and a rule was prayed for a consultation, because he had not proved his suggestion within six months, for the words of the statute of 2 & 3 Edw. 6. c. 13. are general. In case the suggestion for a prohibition be not proved in six months, &c. the party shall have a consultation without delay; and though there need no proof of the suggestion, where the suit is for tithes contrary to common right, or where the contract of the party is suggested; yet in other cases it ought to be, as well as upon the suggestion of a *modus*. Cro. Car. 208. Jones, 231. and such suggestion was proved. Dy. 170. b. And to this the court inclined.

Though no proof of a suggestion is necessary where the suit is for tithes contrary to common right, or the contract of the party, yet in case of a suggestion of barren land, it ought to be proved, as well as upon a *modus*.

Tr. 5 Anne. Scacc. *Hockmore v. Richards.* [1 Wood, 485.]

Devonshire, 20th June, 1706.

THE plaintiffs, on behalf of themselves and the rest of the parishioners of the parish of Combintinhead, in the county of Devon, filed their bill against the rector of the same, stating the following immemorial customs within the parish; that every owner or occupier of arable land, meadow and pasture grounds ought to set out for the rector, for the tithes of his corn and grain, the tenth sheaf of wheat, rye, and beans, and the tenth score of barley, oats, and peas, and for the tithe of all grass cut and mowed within the said parish, the tenth cock of hay; the tenth of all apples and pears, either by the bushel, peck, or other certain quantity; to pay yearly at Easter one penny for the tithe milk and white sole, of every cow milked by such owner or occupier within the said parish, and one farthing for the milk of every ewe milked, and one penny for every calf, fallen or reared, and also the tenth part of the price for which every calf fallen therein has been sold by such owner or occupier; and also eight-pence for every colt foaled, and one penny in lieu of the tithes of all wood, furze, and brovaie rooted, cut, burnt, sold, or otherwise disposed of; also one penny, called a garden-penny, in lieu of tithes of all garden herbe, roots, staffe, and fruits, which he had used in his house, and if sold, then the tenth part of the price the same were sold for; and for the tithe of eggs of all his tame fowl, two-pence; and that every inhabitant within the said parish, of the age of sixteen years and upwards, had used, and ought to pay, yearly at Easter, two-pence for an Easter offering: that all other tithes, both great and small, not before-mentioned, were due and payable in kind to the rector, according to the common law and statutes of this realm. The bill therefore prayed, that the defendant might answer and discover the truth of all and every the matters aforesaid, and that the said customary rates and payments might be established by the decree of this court, to prevent any disputes concerning the same for the future, and to be relieved in the premises.

The defendant said, that he was willing to comply with the customs and usages of the said parish, and thereby submitted thereunto, and desired that they might be established by the decree of this court.

The cause came on to be heard on the bill and answer.

1706.

Moduses of 1 d. for the tithe milk and white sole of every milch cow; of one farthing for every milch ewe; of 1 d. for every calf, and the tenth of the price for which such calf has been sold; of 8 d. for every colt; of 1 d. for all wood, furze, &c.; of a 1 d. called a garden penny, for all garden stuff and fruits, established.

1706.

HOCKMORE
v.
RICHARDS.

It is ordered, adjudged, and decreed by the court, that the several and respective customs and usages, in the bill set forth, shall be and are hereby established against the defendant, according to the prayer of the said bill, and the submission and consent of the defendant in his answer, and shall be observed and complied with accordingly.

1707.

M. 6 Anne. Scacc.
Pemberton v. Beckwith. [Dodd's MS. 206.] 2 Gw. 603.

Where tithe of wool and lamb were taken by the parson's man, who said that he took them in part, but that they were not his master's full due, and that his master would sue; the court decreed that the wool and lamb should go in part only, and not like corn tithed unequally and the tithe taken, where the parson is bound and cannot take only in part. (*Quere, diversitatem.*)—Dodd.

In a tithe bill, it appeared that the defendant had shorn his sheep, and laid the wool up in a heap, and set eight fleeces for the plaintiff, and when his tithe gatherer came, told him, there was the tithe, but would not let him break up the heap, or tell the heap, and the man took them, but said, he took them in part, but that they were not his master's full due. Also in the lambs, the defendant had a field in another parish, and took out some lambs for that, and then the rest was tithed; but also in tithing the defendant took out two, and then bid the parson's man take out a third for his tenth lamb, but he insisted he ought to take a second, yet he took the third; but said it was not right, and his master would sue. And upon hearing, the court decreed for the complainant, and that the wool and lamb taken should go but in part, and be allowed upon the account in part only, and not like the case where corn is tithed unequally, and the tithe taken, there the parson shall be bound, and cannot falsify and take only in part. *Quere*, the diversity, but asserted by the Ch. B. *vehementer*. *Note*. The Ch. B. said, that these eight fleeces should go for tithe as to the tale, and should not be examined as to the largeness of them, but if ten were due then he should account for the rest.

M. 6 Anne. Scacc.
Bulmer v. Bircham and others. [1 Wood, 498.]
Norfolk, 9th December, 1707.

A payment of a *farm modus* to the vicar in lieu of all tithes, rectorial as well as vicarial, held good.

THE bill stated, that the plaintiff was seised in fee of the rectory impropriate of Grastwick, in the county of Norfolk, and entitled to all manner of tithes of corn, hay, and other predial tithes arising yearly in the said parish; that the defendants, for several years past, had been farmers or owners of divers lands in the said parish, which they had sown and reaped, and had thereon great quantities of hay, for all which they had set out no tithes, or made any composition; that the plaintiff, about seven years ago, obtained a decree in this court (1) for tithes against the farmers and occupiers of Furr Close, Callas Closes, and Milker's Meadow, and against the defendant Athill, then owner of Greengate Lands, all which were part of the lands now occupied by the defendants; that the said defendants, with the defendant Newman, owner of the above three closes, pretended that the said lands were exempt from tithes to the impropriator, and that only small sums of money in lieu thereof, on an ancient endowment of the vicarage or as composition for the tithes of the said premises, were payable to the vicars; and that in pursuance of such endowment, the defendant's predecessors, owners of the said closes,

(1) This decree was made on the 20th July, 1698, in Trinity Term, 10 Will. 3. in the cause of *Bulmer v. Athill* and *Durant*. The plaintiff, as lay impropriator of Grastwick, claimed the tithes of hay and corn for Greengate Lands and the Four Acres. The defendant Athill appeared and answered, but Durant, though obliged to appear *gratis*, made default. The court, on opening the bill and Athill's answer, no counsel appearing for Durant, decreed Athill to account for the tithes of the corn growing on the farm called Greengate

Lands, except the Four Acres mentioned in the answer, for all the time that he had been occupier thereof, and also for hay cut and carried away within the said time. The like account *nisi* was also decreed against Durant for his tithes of corn and hay, on payment of 5*l.* costs of the day. But the account against Athill was ordered to be taken without prejudice to any right he might claim to have for the time to come.—Book of Decrees and Orders.

had,

had, time out of mind, paid to the former and present vicars there yearly, on Lammas-day, as follows, viz. for Great Furr Closes, four shillings; for Callas Close, thirteen shillings and four-pence; for Miller's Meadow, eight-pence; and for Greengate Lands, twelve shillings and four-pence; in full for all tithes then issuing out of the same, payable to the impropiator or vicar; that on a trial at law, on several issues directed out of this court, in a cause depending between the plaintiff and the defendants, the said sums were found to be paid in full satisfaction, and the bill was dismissed, although the plaintiff, by his bill, averred that such payments were for the herbage of those lands as part of the profits with which the said vicarage was endowed, and were known by the name of the customary tithe herbage, which would appear by some receipts of the defendant Newman's, if produced, for want of which the jury was induced to find such payments to be in full of all the tithes of the premises; and that such dismission was to be without prejudice to the plaintiff's right. The object of the bill therefore was, to compel the defendants to account for and pay their tithes.

The defendant Bircham admitted the plaintiff was seised of the said impropriation, but not that he was entitled to the tithe herbage of corn and hay of the Great Furr Closes, and said that he had mowed part of the same and had fed the rest. He acknowledged that he had neither set out the tithes thereof nor compounded for the same, for that there was a vicar endowed within the said parish entitled to customary payments in lieu of tithe-herbage, hay, corn, and other tithes; that he the defendant, and all other owners of the said land, had immemorially paid to the vicar, at Lammas, yearly, four shillings, as a *modus* in full of all herbage-tithe, tithe-corn, and hay, and other tithes issuing out of the said Furr Closes; that he had annually paid the same, since he farmed the land, to the vicar, in full of all such tithes, and that the owner informed him they were free from tithes in kind; that the plaintiff, about seven years since, brought two actions against the defendant and the defendant Bullen for tithe-corn and hay in kind of the premises, and that although both causes were ready for trial, the plaintiff did not think fit to try the same. He believed that a decree was obtained by the plaintiff as was stated in the bill, but that it was through a mistake in the defendant's answer; and he insisted that the same sums of money are payable to the vicar in discharge of all tithes, and that there was nothing due to the plaintiff for the same, for that, on a trial at law on several issues directed out of this court, between the plaintiff and this defendant and others, the said sums were found to be paid in full satisfaction, and the bill was dismissed.

The defendant Bullen owned himself to be occupier of Callas Closes, and of two meadows called Milker's Meadow, and that he did not set out the tithes thereof, or compound for the same, for that he and all other farmers of the said lands paid the vicar yearly at Lammas for Callas Closes thirteen shillings and four-pence, and for Milker's Meadow eight-pence, as a *modus* in lieu of herbage-tithe, hay, and corn, and of all tithes whatsoever; that he had yearly paid the same to the vicar in full satisfaction for all tithes, due either to the impropiator or the vicar, and that the same were found on a trial at law as above stated.

The defendant Athill confessed that he was owner and occupier of Greengate Lands, for which he had paid no tithe in kind, insisting on the said customary *modus* to the vicar, (except for one inclosure thereof of four acres,) the tithe whereof, when sown with corn, was duly set out or compounded for. He said, that for all the other lands called Greengate Lands, he and his predecessors, owners thereof, had yearly paid at Lammas, to the vicar of the said parish, twelve shillings and four-pence in full for all tithes payable to the impropiator or vicar out of the premises (except the four acres); that he had duly paid the vicar the said *modus* of thirteen shillings and four-pence, which was in full of all tithes; that he had occupied the said lands twenty years, and had many considerable titheable matters thereon, yet neither the plaintiff; nor any of his lessees, had ever demanded tithes in kind of him (save for the said four acres when sown) till within ten years past the plaintiff filed his bill for tithes in kind, to which the defendant answered, and through mistake it

1797.
BULMER
v.
BIRCHAM
AND OTHERS.

1707.

BUTMER

v.

BIRCHAM

AND OTHERS.

was expressed that the Four Acres Close, when sown, paid tithes in kind in lieu of all the rest; and though the defendant's witnesses proved that the twelve shillings and four-pence were paid to the vicar in full of all tithes, yet, by reason of that mistake, the court awarded the defendant to account for the tithe in kind; but that the court was then well satisfied that the defendant's witnesses had fully proved the twelve shillings and four-pence, and therefore ordered, that the said decree should be without prejudice to the defendant or his successors; that at the trial at law, brought by the plaintiff for tithe in kind of the premises, as well for hay as for corn, the defendant proved the said *modus* to be in full of all tithes of the said lands (except the four acres when sown), and that a verdict was found for the defendant; and that on a late trial on several issues out of this court, the defendant had another verdict, that the said payment was in full as aforesaid; and that he had produced acquittances on the said trial from the vicar, which were in full for all tithes of the premises, except the four acres.

The defendant Newman admitted that the plaintiff was impropriator, and that he was owner of Callas Closes, Milker's Meadow, and Great Furr Closes, but had never occupied the same; and he believed that no tithe was ever paid for the same, excepting the aforesaid *moduses*, and insisted on the said payments to the vicar to be in full of all herbage-tithe, hay, and all other tithes issuing out of the premises.

The plaintiff replied; the defendants rejoined; and several witnesses were examined on both sides; and upon reading the proofs taken in the cause, and several receipts signed by J. Clarke and J. Martin, vicars of the said parish, and several orders and decrees made in the former causes touching the matters in question, and also the *postea* of the verdict insisted on by the defendants in their answers, and upon full debate,

It is this day ordered and adjudged by the court, that the said bill shall be, and is hereby absolutely dismissed.

EDW. WARD.
THO. BURY.

ROB. PRICE.
J. SMITH.

1709.

E. 8 Anne. Cam. Scacc.

Lloyd v. Green and others. [Dodd's MS. 213. 1 Wood, 501.]

Where tithes were not claimed for lands which had been disparked till 20 or 25 years after the disparking, the court would only decree tithes for four years.

IN a tithe bill, as executor for part of the time, against Green, as administrator for part of the time (twenty years), but in his own right for eight or nine years, against the other defendants in their own right for that time, for the tithes of Nonsuch Park, and the plaintiff's title established upon two trials at law, yet the court would not decree an account for the whole time, and then the plaintiff's counsel waived the time which was sued for, as executor, against the defendant as administrator, and prayed a decree for their own time; and the Ch. B. would not do it only for four years. *Quære* by me, for it seems very strange, when it was agreed that the five and six years, &c. were as plain for the plaintiff as the four years before the bill; but he would not be contradicted, and the rest of the court said little or nothing. *Note*, no tithes had been before paid, but it had been disparked about twenty or twenty-five years; and the Ch. B. said, if we stood still and would let it run so long, we should only have an account for four years. *Quære*, by what law or statute of limitation; and why four years, why not three years or five years? I never observed such a decree before, therefore, *quære*?—[Dodd.]

THE substance of the bill was, to discover and recover the tithes of Nonsuch Park, in the rectory of Cuddington. The bill stated, that the plaintiff's father, deceased, had been, for fifty years past, and that the plaintiff, ever since the year 1703, as his son and heir, had been, and still was, owner, farmer, and impropriator of the rectory, parsonage, or impropriation of Cuddington; otherwise Quiddington, in the county of Surry, and of all tithes and dues thereunto belonging, and of all tithes, dues, and duties whatsoever arising within the hamlets,

hamlets, vills, and fields of Cuddington aforesaid; that the ancestors of the plaintiff Lloyd, or the plaintiff Roke (1), as their lessee, had, during the time aforesaid, taken, enjoyed, and been in possession of the same; that by means thereof the plaintiff Lloyd's father ought, during his life, and the plaintiff ever since the death of his father, or the plaintiff Roke, as their lessee, to have been answered and paid all the said tithes and dues, or some rate, *modus*, or composition in lieu thereof; that the plaintiff, Lloyd's father, made his will, and left the plaintiff Lloyd executor thereof, who having proved the said will, was entitled to the arrears due in his testator's time; that since his father's death the plaintiff, or his lessee, had been entitled to all the tithes aforesaid; that the plaintiff Roke did, by parol lease, hold several of the tithes belonging to and arising within the said rectory and titheable places thereof, both from the plaintiff's father, and from the plaintiff since his father's death, for several years past; that the defendants, for twenty years past, had been, and still were, inhabitants, occupiers, and possessors of several farms, lands, and grounds of great value within the said rectory, parsonage, and impropriation of Cuddington and the titheable places thereof, and ought to have paid the tithes thereof to the plaintiff as aforesaid, but which they had refused to do, pretending that they were abbey lands, and so discharged from tithes. The bill therefore prayed, that the plaintiffs might have a discovery thereof, and of the quantities, qualities, and values of the same.

The defendant, Ann Green, confessed that she was, and for some time had been, by herself and tenants, possessed of ground called Little Nonsuch Park, which anciently had been, and still was, the fee simple of the Crown, by a lease thereof made to her late husband by the Duchess of Cleveland, who claimed some interest therein under the Crown; that the said land was freed and discharged of tithes, and had never paid any, although the greater part thereof had been ploughed many years before she came into possession thereof; that she had never heard of any such parish as Cuddington, nor that any part of the lands laid therein, as in the bill mentioned, but that the same laid in the parish of Nonsuch, which extended itself beyond the said park; that the plaintiff's father had never molested her husband for the pretended tithes which the plaintiffs claimed; that the tithes within the manor of Cuddington, were a portion of tithes granted anciently out of some particular lands, which were in the Crown long before, and since the time of Queen Elizabeth.

All the other defendants said, and insisted upon it, that the lands and grounds in their possessions, lying in Little Nonsuch Park, which they had been told were the lands for which the plaintiffs demanded tithes, were some way or other discharged and exempt from the payment of all manner of tithes, and did never lie in any such parish as Cuddington, but laid in the parish of Nonsuch; that they had kept no account of their respective tithes; nevertheless, to the best of their knowledge, they set forth the quantities, qualities, and values thereof, and insisted upon the exemption.

The defendant Anne Greene said, that she was administratrix to her late husband, deceased; that for seven years during his life-time, the said park was used for grazing, and that, if any thing was due, he died without assets thirteen years ago; and that she had no assets to answer any tithes for the first seven years demanded by the bill.

The plaintiffs replied; the defendants rejoined; and several witnesses were examined; and on reading the proofs taken in the cause, and on debate, it is ordered by the court, that the bill be retained; that the plaintiff Lloyd shall be at liberty to bring an action on the statute for not setting out the tithes; and that if he do not cause such trial to be had within a year (being not hindered by the defendants), the said bill shall stand dismissed.

In pursuance of the said order, an action was commenced, and tried; and

(1) In Michaelmas Term, 4 Anne, the present plaintiff, Lloyd, filed a bill against the defendant Anne Green, to recover the tithes of Nonsuch Park. But on reading the deposition of John Roke, who claimed the same by

lease from the proprietor of the rectory, the bill was dismissed with costs; but without prejudice to the plaintiff's right to the tithes.—MS.

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upon reading the *posita*, it appeared that the plaintiff had recovered tithes in kind against the defendant Anne Green for the lands in question; but on hearing counsel on both sides, a trial at law was directed upon this issue, *viz.* "Whether the lands and grounds in the occupation mentioned in the defendant's answer, or any, and which of them, are in the parish of Cuddington and titheable places thereof, and titheable to the plaintiff;" on which trial a verdict was found for the plaintiff, which exactly distinguished what lands or grounds were in the respective occupations of the several defendants, particularly in the parish of Cuddington and the titheable places thereof, and titheable to the plaintiff; and upon hearing counsel, and what could be alleged on either side, and on mature deliberation of the matter,

It is ordered and decreed by the court, that the said defendants shall severally and respectively account with, satisfy, and pay to the plaintiffs for their several respective tithes in kind due from each and every of them for the first four years preceding the commencement of the suit, according to the proofs in the cause; *viz.* that the defendant Anne Green shall account for four hundred and fifty acres; the defendant Goldsmith for thirty-five; the defendant Claverly for four and a half; and the defendant Furnace for nine; all which said lands and grounds are, by the said verdict, found to lie in Nonsuch Park, within the parish of Cuddington, and titheable to the plaintiff Lloyd as proprietor thereof.

It was accordingly referred to the deputy-remembrancer to report the said account, which he did on the twenty-sixth of November last; and upon reading the said order and report, and no exceptions having been taken, it is ordered by the court, on the eighth of December, 1709, that the said report be confirmed, and that the defendants shall pay to the plaintiff the respective sums reported due from them for their tithes, amounting to two hundred and ninety-four pounds, four shillings, and eight-pence.

EDW. WARD.

THO. BURN.

RO. PRICE.

S. LOVELL. [*Decree Book.*]

1707.

M. 6 Anne. Scacc. *Pern v. Fountain.* [1 Wood, 504.]

Cambridgeshire, 4th December, 1707.

A custom to set out corn by the shock, and not by the sheaf, and to give notice to the parson, decreed.

Moduses restricted to inhabitants.

THE bill stated, that the plaintiff had been rector of Leverington, in the Isle of Ely, in the county of Cambridge, since the year 1682, and, as such, was entitled to all predial and mixed tithes, and to all beneficial customs used in the said parish; that, for the more commodious gathering in of the tithes, there was a custom that the rector ought to have notice of the time of dressing out the tithes of coleseed, and of oats, and other corn bound; that the tithe of coleseed was the tenth bushel, the parson allowing one penny a bushel for dressing; that the tithes of oats were to be set out by the sheaf, or the shock, as the owner intended to carry the crop away; that the plaintiff was entitled to one penny for every sheep depastured in the said parish and sold before Candlemas; to one pig in seven, allowing one halfpenny for each pig wanting of ten; to two-pence for each milch cow; and to one penny for each heifer.

The defendant Fountain admitted that it was usual to give notice of the time of dressing the coleseed, but said that whether it was so of right he knew not, nor whether the tithes of corn were to be set out otherwise than by the sheaf, or whether the tenth bushel of seed ready dressed was to be paid as tithe, or whether one penny was to be paid in lieu of the wool of each sheep. He also admitted that the other tithes were payable as stated in the bill; and averred that he had set out the tithes of coleseed, hemp, and oats in kind, and had given notice thereof to the rector; that for his cows and heifers he had offered one shilling and ten-pence; that he had pigs, sheep, and six lambs on the land about a month in the year 1702, and had paid the plaintiff three-pence for the tithes thereof, but had no wool, nor had he sold any sheep; that he had hens and a cock, for which he was ready to pay, and had no other tithe-

able

able matters. By his second answer, he said that he believed the usage of the said parish was, to give notice when the tithes of coleseed and other tithes were to be set out, and before the same were dressed or removed, and which he said that he had done in this case. He also said, that the tenth bushel was due for coleseed, allowing one penny for the dressing, and that he had fairly set out his tithe of coleseed after it was dressed, and left it on the land where it was dressed, and given the plaintiff notice; that he had forty coombs and two bushels of coleseed, worth ten shillings a coomb; and thirty acres of oats, worth twenty shillings an acre, and no more, the tithes of both which he had set out before he removed the nine parts; and that the tithe oats were set out in sheaves fit for carriage; and he said that his hemp was worth two shillings, and that he was always ready to pay his dues, and then offered them, excepting those which had been set out in kind.

The defendant Lepia said, that he knew of no custom of paying one penny for each sheep sold before Candlemas in the said parish; that in the said years he had occupied several parcels of ground, of which he had mowed seventy-two acres, worth five shillings an acre, being coarse, and had depastured on the rest several sheep, but that, they being low and wet grounds, he had fed them most of the years on other lands out of the said parish; that he did not clip any in that parish in 1702, nor had he any wool, or sold any sheep there; that he had lambs, each lamb worth one shilling, and the tithe one penny each; that he had also kept cows, which had three calves, each calf worth two shillings, and two foals, worth two shillings, and that he had paid the tithe oats in kind; that he had no dwelling or habitation in the parish in either of the said years, and therefore was not chargeable with Easter offerings; that the custom of the parish was, time out of mind, to pay at Easter yearly, two-pence an acre for mown ground, one penny each foal, one penny an acre for fed ground, in full for tithe-herbage, hay, and foals, which custom had been established by a decree of this court; (1) and therefore he insisted that he ought not to pay tithe in kind for hay, grass, or foals, but the said *modus*; that he was always ready to pay the full tithe of calves and lambs, which he had tendered. By his further answer, he admitted that he had occupied in the said parish about one hundred acres of pasture; and as occasion required had removed fifty or sixty sheep to Thorney, which he had repeated several times a year, and never clipped any in the said parish, the tithe wool thereof was worth four shillings; and he said, that if tithe wool were paid in kind for sheep in the said parish, the tithe *pro rata* would amount to six todd, each todd worth sixteen shillings and fourpence; that the lamb tithe was one penny each; that a cow's milk was worth two shillings a-year, but that he had milked none; he admitted twopence a cow to be the ancient tithe for each cow; he said that he had reared seven calves, and before process issued in this cause had tendered three pounds ten shillings for tithe calves and lambs in the said years, and also the said *modus*, and that he was ready to pay the same.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and the cause came on pursuant to an order of the twenty-first of February, 1706, by which the matters were referred to S. Dodd, and H. Sawyer; but they having made no award therein, it now, upon hearing of counsel on both sides, and on reading the depositions of divers witnesses taken in the said cause, and the said former decree the twenty-ninth of April, 1695, *Swain v. Pern*, for settling the manner of tithing in Leverington aforesaid, appeared that the defendant Fountain had not duly and fairly set out the tithes in the said years.

The court declared, that he ought to have set out his said tithes in the same manner as he ordered and carried away the rest of his corn and coleseed; and that the said Fountain's corn, being placed in shocks, the tithe thereof ought to have been set out by the shock, and not by the sheaf, and that the plaintiff ought to have had notice of the time of setting out the same, and all other his tithes.

(1) See *Swain v. Pern*, Easter Term, 7 Will. 3. ant2, p. 607.

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And it appearing further, that the defendant Lepia was not entitled to the benefit of any of the customs or *modus* for tithing in the said parish of Le-verington, he being no inhabitant in the said parish, and that therefore he ought to have set out his tithes in kind, and the said defendant admitting that there was due to the plaintiff from him, for the tithes in question, the sum of fifteen pounds nineteen shillings, and the defendant Fountain admitting that there was due from him to the plaintiff, for the tithes in question, five pounds, four shillings, and tenpence; and the costs in this cause being settled at sixty-seven pounds, fourteen shillings, and sixpence,

It is ordered by the court, with the consent of the said parties, that they do forthwith pay to the plaintiff the aforesaid sums of fifteen pounds, nine shillings, and five pounds, four shillings and tenpence, for their tithes, and sixty-seven pounds, fourteen shillings and sixpence for his costs.

EDW. WARD.
THO. BURY.

RO. PRICE.
J. SMITH.

H. 6 Anne. Scacc.

Pierce v. Russell and others; *et à contrà*. [1 Wood, 507.]

Gloucestershire, 21st February, 1707.

A payment of three bushels of wheat, six bushels of oats, and four groats in money in lieu of all manner of tithes in kind of the capital messuage farm, and demesne lands of the manor of Littleton, and formerly parcel of the possessions of a larger monastery, held good.

THE plaintiff, as rector of the parish of Littleton-upon-Severn, in the county of Gloucester, claimed all the tithes of corn, grain, hay, cheese, wool, and lamb, and all other titheable things arising in the said parish and in the titheable places thereof.

The defendants denied that they ought to set out their tithes in kind, or to make the plaintiff any satisfaction for the same; for that the lands held by them were heretofore parcel of the monastery of Malmesbury, in the county of Wilts, and were part of the demesne lands of the said abbey or monastery; that the abbots of the said monastery and their predecessors had, time out of mind, held the said lands clearly discharged of all manner of tithes; and that the same lands, being part or parcel of the manor of Littleton, came to Henry VIII. upon the dissolution of the said abbey, being one of the greater abbeys, by 31 Hen. 8. c. 13. and were afterwards granted by the said king, by letters patent dated the twenty-ninth of October, in the thirty-third year of his reign, to Sir Richard Long, Knight, and his heirs, under whom the defendants, by several mesne conveyances, claim. (1)

An issue was directed to try, "Whether the lands in the possession of Russell and Stevens, lying in the parish of Littleton-upon-Severn, in the county of Gloucester, were parcel of the possessions of the late dissolved abbey or monastery of Malmesbury, and as such discharged of the payment of tithes in kind, or not?" on the trial of which, the jury brought in their verdict for the defendants; and the bill was accordingly dismissed.

(1) The bill also claimed tithes from *J. Hoptown*, the lord of the manor, who stated in his answer, that he was seised of the demesne lands, for which there had always been yearly paid to the plaintiff *Pierce*, and his predecessors, at Michaelmas, three bushels of wheat, six bushels of oats, and four groats in money, by way of

composition, and in lieu of all manner of tithes in kind arising out of and for the capital messuage farm and demesne lands of Littleton; and on reading the grant from Henry VIII. to Sir Richard Long, the bill, as to the defendant Hoptown, was dismissed with costs.

1708.

E. 7 Anne. Scacc. *Bowles v. Lord Arundel*. [1 Wood, 508.]

Wiltshire, 26th April, 1708.

A *modus* of £3. 8s. and the running of a horse in certain land from the 3d of May to the 20th of September, in lieu of all tithes of such part of a park as lay within the parish of the plaintiff, decreed.

THE plaintiff, as rector, claimed tithes of lands in the parish of Donhead, Saint Andrew, in the county of Wilts, for four years past.

The defendant said, that he had, for five years past, been seised of Wardour Castle, and of the gardens and orchards thereto belonging, and of two several parks or inclosures, called Red Deer Park and Fallow Deer Park, belonging to the said

said castle; in which parks were included the gardens and orchards, and several coppices of wood grounds, and meadow grounds, called Wild Buck Park; that so much of the said parks as contain three hundred and forty acres was within the parish of Dunhead Saint Andrew, and the residue in other parishes; that he was also seised of a coppice, called Little Coppice, which was no part of the said parks, but within the parish; that as to so much of the castle and premises as were within the said rectory or parish, viz. three hundred and forty acres, there was, and time out of mind had been, a certain *modus* of three pounds eight shillings a year, and a horse lease, or the running of a horse, from the third of May to the twentieth of September in the same year, in a piece of land called the Pond Close (part of Red Deer Park), due to the said rector, and which had been constantly received and accepted by him in lieu and full satisfaction of all tithes arising upon the premises (except Little Coppice) which lie within the said parish, or the rectory, and titheable places thereof.

The following issues were directed to be tried; the plaintiff in equity to be plaintiff at law.

First, Whether the sum of three pound eight shillings, and a horse lease, or the running of a horse from the third of May to the twentieth of September yearly, in a certain piece or parcel of land and ground, called the Pond Close, part of Red Deer Park, in the parish of Dunhead Saint Andrew, be a *modus*, time out of mind, payable for all manner of tithes arising upon that part of the said Red Deer Park and Fallow Deer Park, which lies within the said parish, or not?

Secondly, Whether Little Coppice be part of Red Deer Park, or not?

The jury found the *modus* as set forth by the defendant; and also that Little Coppice was no part of Red Deer Park.

The court ordered, that the defendant do pay to the plaintiff seventeen pounds, twelve shillings, in his answer tendered, in full for the arrear of the said *modus* of three pounds eight shillings *per annum*, and in full satisfaction of the said horse lease so due; being after the rate of twenty shillings *per annum* for the horse lease for the said four years in the answer mentioned; and that the said *modus* of three pounds eight shillings *per annum*, and a horse lease, or running of a horse as aforesaid, be hereby decreed and established accordingly; and that the plaintiff do pay to the defendant his costs at law and in equity, to be taxed by the deputy-remembrancer of this court.(1)

(1) In Trinity Term, 3 Anne, Bowles v. Lord Arundell, *et c.* contra, Wiltshire, 14th July, 1704.

The bill stated, that the plaintiff, for eighteen years past, had been rector of Dunhead Saint Andrew, in the county of Wilts, whereby he became entitled to the tithes in kind of all woods and coppices, and of carp and other fish taken out of the defendant's ponds, and of all corn, grain, and seed growing on the lands and grounds in the defendant's occupation, called Red Deer Park and Fallow Deer Park, as being within the said parish.

The defendant confessed, that for three years past, fifty acres of Lawn Park, part of the Fallow Deer Park, were ploughed and sown with oats; but he insisted, that as to that part of Red Deer Park and Fallow Deer Park which lies within the said parish, containing about three hundred and forty acres, tithes in kind are not payable, but a *modus* of three pounds and eight shillings a year, in full satisfaction of and for all great and small tithes arising in and upon the same. And he said, that his father, in kindness to the plaintiff, did yearly give him the running of a horse in Pond Close,

part of the Red Deer Park, and that he, since his father's death, had continued the same, not as a right, or in lieu of any tithes or composition, but as a kindness only.

The defendant filed a cross-bill, with a view to perpetuate the testimony of his aged witnesses, and to establish the *modus* of three pounds eight shillings a year.

The defendant Bowles appeared and answered.

On the hearing of the causes, the court directed an issue to try, Whether there be a *modus* of three pounds eight shillings, payable for all manner of tithes arising upon that part of Red Deer Park and Fallow Deer Park which lies within the parish of Dunhead Saint Andrew, or not? and, on the trial, a verdict was given for the plaintiff.

The court therefore ordered, that the defendant shall pay to the plaintiff his tithes in kind of oats, agistment, hay, wood cut and sold, calves, milk, Easter offerings, geese, and turkies, according to the value thereof; the other articles for which he demanded tithes not being valued.

1708.

Tr. 7 Anne. Scacc.
Ringstead v. Young and others. [1 Wood, 510.]

Norfolk, 2d July, 1708.

Tithes in kind shall be paid for turnips when drawn or dug up and severed from the ground and sold, or given to profitable or other cattle, or otherwise used.

THE plaintiff, as vicar of Foulton, and also as farmer of the rectory of Foulton, in the county of York, claimed the tithes of turnips.

The defendants admitted that they pulled or dug up the turnips, but denied that they fattened any cattle therewith; but said that they fed the same with cows belonging to the dairy, and young stock.

And on debate, whether tithes are due for turnips pulled and digged up, and severed from the ground, though fed by profitable cattle, it was ordered by the court, that the cause should stand over for the opinion of the court, and in the mean time to be attended with precedents; and upon view of several precedents in this court, and on mature consideration of the matter,

The court declared that for turnips when drawn or dug up and severed from the ground, either sold or fed by profitable or other cattle, or otherwise spent or used, tithes in kind are due.

It is therefore ordered and decreed this day by the court, that the several defendants shall account with the plaintiff for the tithes of their turnips drawn and dug up, and severed from the ground, and fed within the parish in the years mentioned in the bill.

Tr. 7 Anne. Scacc. *Hall v. Filtz.* [1 Wood, 510.] 2 Gw. 606.

Middlesex, 1st July, 1708.

Tithes are due for turnips sown for a second crop, though tithes have been paid of the first crop, and the turnips be sown for bettering the next year's crop upon the same ground.

THE plaintiff, as vicar of the vicarage of Ealing, otherwise Zealing, in the county of Middlesex, claimed all manner of small tithes whatsoever yearly arising, &c. therein, and in the titheable places thereof (except of the rector's glebe land there), and also by the custom of the said parish, a mortuary for every person dying possessed of moveable goods within the said parish.

The defendants admitted, that they severally occupied farms within the parish, and set forth the quantities and values of their tithes, and offered payment to the plaintiff for their tithes of lamb, wool, fruit, and garden stuff; and as for turnips they said, that they only fed their sheep therewith, and thereby improved their lands for the bettering their next succeeding year's crop of corn to be sown, and did not make any other advantage thereof, nor did they sell any of their turnips, or pull any, except a few for the use of their family; that they did sell and dispose of their flocks of sheep at such time as the best advantage and opportunity offered, which generally happened before Easter, long before shearing time. They admitted that they had several crops of peas and beans, which they said they had gathered green from the stalks; and that the impropriator of the parsonage had all along, from time to time, claimed the tithe thereof, and that they had paid the same to him. They insisted, that neither the plaintiff nor his predecessors ever had tithes of peas or beans, but that the impropriator always took the same, or some composition in lieu thereof; and also that there was a *modus* or customary payment, used time immemorial in the said parish, that the parishioners and farmers of the said parish ought to pay only yearly for the tithe of every milch cow, and the calf she might yearly bring forth, four-pence, in lieu of the tithe for such calf, and for the milk and herbage of the said cow, and two-pence every year in lieu of tithe for every dry cow which should not bring a calf; and denied any custom in the said parish for the payment of any mortuary.

The defendant Filtz confessed, that he had not set forth his tithes, having paid the former vicar five pounds *per annum* in lieu of all small and privy tithes; and that the plaintiff had several times accepted thereof, although he now refused the same; and he insisted that, by the custom of the said parish, when any of the farmers and occupiers of lands therein had any one year paid tithes, or compounded with the impropriator or farmer for the tithes of any part of the

lands

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lands within the parish, which they might plough, sow, and have a crop upon in one year, and did afterwards sow turnips thereon for a second crop, in order for the bettering and meliorating of the next succeeding year's crop upon the said ground, then such turnips were not titheable, nor ought any tithes to be paid for the same, nor had any tithes in such case ever been demanded or paid for such turnips within the said parish.

The plaintiff replied, and said, as to the tithes of peas and beans growing in the common fields, pulled and gathered green from the stem, in and by the bill demanded, that he did not intend to proceed any further for the same, but thereby discharged the defendants from examining any witnesses thereto.

As to all other the matters in the bill the plaintiff replied generally; and the defendants rejoined; and witnesses were examined on both sides; and upon reading the proofs in the cause,

It is ordered by the court, that the defendants do severally account with the plaintiff for the tithes of the several titheable matters and things by the bill demanded (except peas and beans as aforesaid), but that the defendants are not to be accountable for any mortuaries; and it is referred to the deputy-remembrancer to take and report the said account.

And as to the *modus* of four-pence for every milch cow, and the calf she may yearly bring forth, in lieu of tithe for such calf, and for the milk and herbage of such cow; and two-pence every year, in lieu of tithe for every dry cow which did not bring forth a calf, by the said defendant's answer insisted on, it is hereby referred to a trial at law; the plaintiff in equity to be plaintiff at law; and the cause to be tried before the lord chief baron.

A trial upon the said issues was accordingly had; upon which trial the jury found the issue of four-pence in lieu of the tithe for every milch cow and calf she might yearly bring forth in favour of the defendants, and the other issue of two-pence, in favour of the plaintiff. But a new trial was directed to be had before the lord chief baron upon that issue only, as to the four-pence in lieu of the tithe for every milch cow, and the calf she might yearly bring forth, in lieu of tithe for such calf, and for the milk and herbage of such cow. Upon which trial the jury found the said issue for the defendants.

In pursuance to the order made the first of July, 1708, the deputy-remembrancer made his report, dated the sixteenth of June last; and upon reading the said decree and report, and the exceptions put in thereto; and on hearing counsel on both sides;

It is ordered by the court, that the exception filed by the defendant FilTZ, touching the tithes of thirty-five lambs, at eight shillings a lamb, which he insisted, by the said exception, ought only to be six shillings a-piece, be overruled; and the exception touching three shillings and eight-pence for the agistment tithe of thirty-four ewes and forty ewes be allowed; and that the defendant Davenport's exception, touching one shilling and six-pence half-penny for the agistment tithe of thirty sheep be allowed; and that his exception touching the tithe of twenty lambs, at eleven shillings and six-pence each lamb, which the said defendant, by his exception, insisted to be only worth six shillings a-piece, be allowed at eight shillings a-piece; and that the defendant, Weatherley's exception, touching five shillings for the agistment tithe of one hundred and three weather sheep, be allowed.

And it is hereby referred to the deputy-remembrancer to compute accordingly, and make his further report herein: and it is further ordered by the court, upon reading the said report, and the defendant Winchester's answer, that the said report, as to him, shall be, and is hereby confirmed; and that he do forthwith satisfy and pay to the plaintiff two pounds nine shillings and three farthings, reported due for his tithes. The costs to be reserved till further report come in.

In pursuance of the said order, the deputy-remembrancer made his report, dated the first of February instant, and no exceptions were taken to it; and upon reading the said orders and reports, and on long debate of the matter,

It is finally ordered, that the said report be confirmed with costs for the plaintiff.

x x 2

plaintiff, but that costs for the last trial are to be allowed to the said defendants; and the said defendants are forthwith to pay to the said plaintiff the several sums reported due for their said tithes.

EDW. WARD.
THO. BURY.

RO. PRICE.
S. LOVELL.(1)

(1) Mr. Gwillim has given the following MS. Report of this case, but does not give his authority:—

"The defendant insisted no tithe was due for the second crop of turnips, the same being sown for meliorating the soil against the next year's crop; nor for agistment of sheep on turnips for the same reason. Decree to account for both." It does not appear from the proceedings above, that the latter point was decided.

E. 8 Anne. Scacc.

Dykes v. Thompson and others, et d. contrd. [1 Wood, 513.]

Cumberland, 12th May, 1709.

1709.

The lord of the manor entitled, on paying the rector a prescription rent of £6 a-year, to all tithes of the manor and demesne lands thereof.

THE bill stated, that the plaintiff was seised in fee of the manor or lordship of Warthole, in the county of Cumberland, and of the demesne lands in the parish of Plumbland; that he and his ancestors had, time out of mind, paid to the rector of Plumbland six pounds yearly, on the second of February, in lieu of all manner of tithes arising within the manor and demesne lands, and therefore received the tenth part of all corn, grain, hay, wool, lamb, and other titheable things there, from all the tenants of the customary tenements therein; but that the defendants, combining together, had refused to pay him the same.

An issue was directed to try the *modus*, and a verdict was found for the plaintiff. But the court ordered, that upon the said defendants paying to the plaintiff such costs as shall be taxed by the deputy-remembrancer for the last trial, a new trial shall be had upon the said issue by a special jury. In pursuance of which order the costs were taxed at sixty pounds, and paid.

And thereupon a new trial was had; and upon the trial thereof, the jury gave their verdict again for the plaintiff.

It is ordered and decreed by the court, that the plaintiff as lord and owner of the said manor or reputed manor of Warthole, and of the said demesne lands thereunto belonging, and his heirs, paying the prescription rent of six pounds yearly to the rector of Plumbland, as formerly has been done and accustomed, is, in respect thereof, entitled to have, take, and receive all the tithes of the titheable matters and things yearly arising within the said manor and demesne lands to his own use; and the said usage is hereby, and by the power and authority of this court, established, ratified, and confirmed for ever; and that, in respect thereof, the said plaintiff Dykes, and all persons claiming under him, lords of the said manor or reputed manor, of Warthole, and the demesne lands thereof, for the time being, is and are entitled to, and shall for ever hereafter have, take, and receive, to his and their proper use and uses, all the tithes arising within the said manor or reputed manor of Warthole, and the demesne lands thereof, according to the said several verdicts had.

The plaintiffs and defendants having computed and agreed upon the value of the tithes due to the plaintiff to the time of exhibiting the bill at fifteen shillings,

It is further ordered by the court, that the defendants shall forthwith pay to the plaintiff the said sum of fifteen shillings, so agreed to be due from them, with his costs to be taxed by the deputy-remembrancer.

E. 8 Anne. Scacc. *Smith v. Johnson.* [Dodd's MS. 215.]

A custom for a hundred to be discharged of tithe of herbage is not good.

IN a bill as rector of Bishop's Wearmouth, a custom was alleged that tithe herbage is not payable within the hundred or ward of Easington, in Durham, and that there was a sufficient maintenance, viz. above £300 per annum, besides herbage, to the plaintiff, and upon debate, resolved,

1. That

1. That it was not a good *modus*, and grounded their opinion on *Hicks v. Woodhouse*.

2. That the defendant proved no tithe paid in the hundred, yet as to the maintenance, he examined only to this parish, and not to all the rest, which the court held naught, for the whole hundred must be discharged, because in this parish there is a sufficient maintenance, but *non constat* if so in the other parishes. *LOVELL, B.* against the other three barons.

1709.
SMITH
&
JOHNSON.

Tr. 8 Anne. Dom. Proc.

Mickleburgh v. Crisp. [1 Bro. P. C. 278.] 2 Eq. Ca. Abr. 732.

9 Vin. 43. Rayn. 115. 1091. 1 Wood, 517. 2 Gw. 604.

THERE being a large, open, and uninclosed common, of about 300 acres, called Micklefenn, lying between, and extending itself into the several parishes of Kirby-cane, Stockton, Gelston, Ellingham and other towns in the county of Norfolk; the inhabitants of the several parishes bordering upon this common, had for time immemorial, and in order to prevent a multiplicity of suits, permitted a sort of inter-commoning between one another upon all parts of it; and accordingly, their cattle were driven and fed thereon promiscuously.

This right of common was deemed to belong to the respective farms in each town, and taken to be part of those farms; and the owner of the cattle so fed, always paid the tithes thereof to the parson of that parish in which their farms were situated, and these tithes of consequence became larger, by reason of the right or privilege of feeding upon this common.

The appellant rented one farm in the parish of Kirby-cane, and another in the parish of Stockton; and he constantly paid his full tithes to the respective rectors of those parishes, without any abatement, in respect of his feeding his cattle upon the said common. The appellant also occupied five acres of meadow in the parish of Ellingham, for which there was payable a *modus* of 2d. an acre; and which had accordingly been paid or tendered to the respondent, as rector of that parish.

But in Easter term, 1707, the respondent thought proper to exhibit his bill in the court of Exchequer, against the appellant, for the tithe-herbage of this meadow ground, and also for the tithes of the feed of his cattle on the said common called Micklefenn; suggesting, that he the plaintiff was well entitled to those tithes. To this bill the defendant put in an answer, and thereby insisted on a *modus* of 2d. an acre for the meadow ground, which he was ready to pay; but as to the other demand, he stated, that the inhabitants of the respective parishes adjoining to the common, had time out of mind, paid tithes for their cattle fed thereon, to the incumbent of the parish where the owner of such cattle lived, and where, in the winter season, they were kept; that he had paid tithe for his cattle fed upon the said common to the rector of Kirby-cane, in which parish he lived, and to the rector of Stockton, where his other farm lay; and that he had two parcels of Dole lands in Gelston common, where he had a right to feed cattle, and cut alders; but could not come at those lands without driving over that part of the common called Micklefenn, which lay in the said parish of Ellingham.

On the 21st of July, 1709, the cause was heard; when the court was pleased to decree, that the defendant should account for the tithes of his cattle fed upon that part of Micklefenn common, which lay in the said parish of Ellingham; and also for the *modus* of 2d. an acre for his meadow land in that parish.

From this decree the defendant appealed; insisting, that tithes had never been paid, nor were any due to the respondent as rector of Ellingham, for the appellant's cattle fed on that part of the common called Micklefenn, which lay in the said parish; and therefore, the appellant ought not to have been decreed to account for such tithes; for, in that case, he would pay his tithes twice over, and such payment would create perpetual suits and controversies, as well between the parsons as the parishioners of the said several parishes.

And

A large common extends itself into several parishes, and by custom the owners of cattle, fed upon the common, pay tithes of such feeding to the parson of the parish where they respectively live, and not to the parson of that parish in which the cattle occasionally feed; held to be a good custom.

1709.

MICKLEBURGH

v.
CRISP.

And as to the *modus* of 2d. an acre, the appellant never contested or denied the payment of it, but on the contrary, was always ready and willing to pay it; and that therefore, in this respect, the bill ought to have been dismissed, with costs.

To this it was answered, that the appellant's cattle, for which the tithes were decreed, were dry, barren, and unprofitable cattle; and not by law titheable to the minister of the parish where the owner lived, for the time they were fed in the respondent's parish, but to the respondent as minister of the parish where they were fed; and therefore, the suggestion of paying double tithes, was groundless. That if the respondent should not have tithes for the feed of these cattle upon the lands within his parish, the herbage of all the pasture land therein might be eaten by the cattle of strangers, without his receiving any satisfaction for the same; and there would be a *non decimando* for the feed of the appellant's cattle, during the time they were fed in the respondent's parish, because for that time the minister of the parish where the appellant lived, could have no pretence of right to such tithes.

But after hearing counsel on this appeal, the question was put, whether the decree should be reversed? and being resolved in the affirmative, it was ordered and adjudged, that the decree of the court of Exchequer, in the appeal complained of, should be reversed; and, that the plaintiff's bill in the court of Exchequer, should be dismissed, without prejudice to his right to the *modus* of 2d. *per* acre, for the five acres of land in Ellingham.

H. 8 Anne. B. R. *Bishop v. Eagle*. [11 Mod. 263.]

When the proceedings in prohibition are for damages, then it must be alleged that the prohibition was delivered and a *venue* laid, but where it is to maintain the jurisdiction of the common law court, it is not necessary.

THE plaintiff declared upon a prohibition; and upon demurrer to the declaration,

Salkeld took exception to it, because the declaration set forth, that the defendant sued in the spiritual court, *post regiam prohibitionem ei prius inde in contrarium direct'*. but does not say "*deliberat.*;" and here appears no cause of action, since it does not set forth that the prohibition was delivered.

This matter was moved last term;

And this term the court was of opinion, HOLT, Ch. J. being absent, that when you proceed for damages, then it must be set forth, that the prohibition was delivered, and also a *venue* laid; but that in this case, which is only to maintain the jurisdiction of this court, it is not necessary.

M. 9 Anne. Scacc. *Wright v. Elderton*. [Dodd's MS. 218.]
1 Wood, 518.

1710.

Where a vicar had usually taken the tithes of turnips sown as a first crop, but not of those sown after the corn reaped, (which had not been paid to any one,) the court held, that the vicar should not have them, as he had no endowment or possession of them.

BILL for small tithes by the plaintiff, vicar of Stepney. Resolved that he having generally taken the tithe of turnips sown, but not having taken tithes of turnips sown after the corn reaped, nor those paid to any person, that the plaintiff should not have them, for he appears not to have any endowment or possession of them, and cited *Barry* and *Bridge's* case, impropiator of Fulham, decreed accordingly. Note, PRICE, B. *contra*, and shall be intended to be endowed of the whole, and not partial.—[Dodd.]

(one,) the court held, that the vicar should not have them, as he had no endowment or possession of them.

Middlesex, 23d July, 1709.

The court was of opinion that tithes are not due for turnips sown upon land as an after-crop, where corn has been the same year cut, and tithes paid for the same. A customary payment of six-pence for each milk cow kept by a parishioner, though milked out of the parish, decreed; and twenty pence for every sow that had pigs that had at any time been kept in the parish, although such sows pigged in another parish.

THE bill stated, that the plaintiff had been, for twenty years, lawful vicar of Stepney, in the county of Middlesex, and entitled to the tithes and profits of the said vicarage; that the plaintiff's predecessors, by ancient custom, constantly.

1710.
WRIGHT
v.
ELDERTON.

stantly did, and the plaintiff ought now to receive three-pence, at Easter, for every person above sixteen years of age within the said parish, to be paid by the master of the family where such persons should dwell; and the tithes of all herbs, fruits, roots, milk, and pigs; that the defendant had been a house-keeper in the parish for eight years past, and had, during that period, seven persons in his family above the age of sixteen; that he had occupied, during the said time, two gardens and one orchard, which produced roots, fruit, and herbs; that he had also sixteen acres of turnips, part of which he had pulled up and sold, and with the other part had fed his cattle; that he had also kept divers milch cows and pigs; the tithes whereof amounted to fifty-eight pounds, ten shillings, and six-pence.

The defendant contended, that the three-pence for every person in the said parish, as in the bill is mentioned, was not of right due; that a *modus* of four shillings an acre for each garden was due, in lieu of the tithes of garden-herbs and fruits; and six-pence for each cow, in lieu of milk; and that he never knew any tithes paid for pigs; that the tithe of turnips was due when sown as a first crop, and no other tithes paid for the same ground that year; but that when corn had been sown in any year in the said parish, and tithes paid for the same after the rate of four or five shillings an acre, according to the grain sown, and the same land was afterwards, in the same year, made to produce a crop of turnips, no tithes were payable for the same, nor had any been before demanded; it being very unreasonable that tithes should be paid twice for the ground. He admitted that he had lived eight years in the parish, and had seven persons in his family above sixteen years of age; but insisted, that the plaintiff was not entitled to three-pence for each of them. He said, that he had paid the plaintiff the rates he demanded for his tithes in the year 1702, for which he had a receipt; and insisted on the same in bar of the plaintiff's demands to that time. He set forth the number of cows which he had kept at Mile End, in the said parish, in the year 1703; and alleged, that he had offered, and was still ready to pay the usual *modus* for the same; but insisted, that the cows which he had kept on Red Lion farm being always milked in Whitechapel, he ought not to pay tithes, the farm-house being in the parish of Whitechapel, and he having paid tithes for them to the rector of that parish. He confessed, that in the year 1703 he had sown thirty-three acres of land with turnips, part whereof he had sold, and with the remainder he had fed his cows; but he said, that the greater part was sown that year with corn, for which he had paid tithes four or five shillings an acre; and therefore insisted, that he ought not to pay any further tithes for the same that year, and stated, that for such part as had not been so sown he had offered to pay tithes, and was still ready so to do; and he pleaded the tender of twenty pounds in satisfaction thereof.

The court ordered the defendant to pay tithes of his garden, at the rate of three shillings and six-pence a-year, that being the usual rate paid for the same; and for Easter offerings, at the rate of three-pence yearly for each person in his family above the age of sixteen years; and for tithes of all his milch cows, as well those kept on Red Lion farm as those in the parish of Stepney, at the rate of six-pence a cow yearly, although the same had been milked in the parish of Whitechapel; and also twenty-pence yearly for every sow that had pigs which were at any time kept in the parish of Stepney, although such sows pigged in the parish of Whitechapel, and also the tithes of turnips of the first crop not fed.

But as to the tithe of turnips sown after corn reaped, the barons were divided in their opinions, and took time to consider further of the same; and on the eighth of December, 1710, when the cause came on to be heard, the question was argued by counsel a second time.

The court was of opinion, that tithes are not due for turnips sown upon land as an after-crop, where corn had been the same year cut, and tithes paid for the same; and thereupon ordered that the bill, as to the tithes for such turnips, be dismissed.—[Decree Book.]

1710.

Tr. 9 Anne. Scacc. *Walker v. Webb.* [1 Wood, 519.]

Herefordshire, 10th June, 1710.

Where a vicar claimed tithes of hay, and all other privy tithes in a parish, an issue was directed, to try "Whether the vicar ought to have the tithe of hops in all the parish, or in any, and in what part thereof, except the borough and hospital lands:" and 2dly, "Whether he ought to have certain tithes arising upon and out of the demesne lands of the manor of Ledbury."

THE vicar of Ledbury, in the county of Hereford, claims the tithe of hay, and all other privy tithes arising therein.

The defendants, by their answer, said, that they knew not with what tithes the said vicarage was endowed, but that there were two halls or portionary parsonages or prebends of the said church, the one called the Upper Hall, and the other the Lower Hall; and that J. Benson and J. Clarke were presented to the said portionary parsonages, and were thereby entitled to the tithes of hay, corn, and fruit, in that part of the parish called the Forren or outpart of the said parish, of all titheable lands there that were not discharged of tithes, as several estates there were; but that there was a *modus decimandi*, payable, time out of mind, yearly, out of all the estates in the Forren, except such as were exempted from tithes, for all the tithe hay and fruit in such estates in the Forren; that such *modus* had been settled and established by a decree in Chancery about the year 1679; that the said vicarage had been endowed, and alternately presented to, by the parsons and portionaries for the time being, and was not endowed with any tithe of hops, hay, or fruit in the Forren, and but with tithe hay and fruit in the Burrough, there being no tithe hops paid in the Burrough; that about thirty years ago there had been a verdict at Hereford assizes for *J. Skipp* and *J. Elton*, farmers of the said portionaries, against *C. Townsend*, the then vicar, for tithe hops in the Forren, (1) that the mortuaries were payable to the said portionaries, and not to the vicar; that all or some of the demesne lands of the manor of Ledbury, and the manors of Upper Hall and Nether Hall, and the demesne lands and glebe, and some other lands in the said manors, were exempted from the payment of all or some small tithes; that there was a custom through the said parish to pay one penny only for every milch cow, in lieu of milk and cheese. They denied that, by immemorial custom, prescription, or otherwise, the vicar had been entitled to all, or had received any tithes of hay, hops, or fruit in the Forren; but said, that there was a custom to pay certain sums of money, by the owners or occupiers of lands, to the portionaries, or their farmers, or lessees, for all tithe hay and fruit in the Forren; but they knew not the particular sums, as the owners and occupiers paid different sums according to their respective estates. They admitted, that the plaintiff ought to have the tithes of calves, sheep, lambs, wool, pigs, geese, eggs, flax, hemp, and herbage, and all other small and privy tithes in the Forren, except from such lands as were exempted from the payment of tithes, and

(1) On the 6th June, Trinity Term, 30 Car. 2. Townsend, the then vicar of Ledbury, filed his bill in this court against the defendant Skipp, the tenant for lives in being of the glebe lands and tithes within the said parish or portionary called Overhall, whereof Dr. Dukeson had, for divers years, been incumbent, claiming all small tithes in the said parish or borough of Ledbury. The defendant denied that the tenant or occupier of the said portionary had ever, in the memory of man, paid any kind of tithe to the vicar, or made any sort of recompense for the same, for or in respect of the said glebe lands or tenements. He also said, that he was seised of divers lands and tenements in the said parish, with the tithes thereof, formerly the demesnes of the manor of Ledbury, which are tithe free. He confessed, that he was seised of other lands, which ought to pay the tithe of corn, grain, hay, fruit, hemp, flax, and hops, to the incumbent, and all other titheable matters to the vicar; that the tithes of corn, grain, hay, fruit, hops, hemp, and flax, had been immemorially due and paid to the incumbents of the portion-

aries; and that all other tithes, together with certain proportions of wheat and oats issuing out of the said portionaries, belonged to the vicar, save only for some burgages and farms for which no tithe had ever been paid to the vicar. The chief matter in dispute was, whether the vicar ought to have the tithe of hops throughout the parish of Ledbury, except the glebe of the portionaries, and the tithes of wood, herbage, and other small tithes of the demesne lands of the manor of Ledbury. The court directed two issues: First, "Whether or not the vicar ought to have the tithe of hops in all the parish, or in any and in what part thereof, except the borough and hospital lands;" which were not controverted.—Secondly, "Whether or not the vicar ought to have the tithes of wood, herbage, and other small tithes arising upon and out of the demesne lands of the manor of Ledbury in the possession of the defendant or his tenants." But it does not appear in the Exchequer-books that these issues were tried; or whether any proceedings were afterwards had in the matter.

except

except tithe hops to the portionaries; as also the *modus* for the hay and fruit; and a *modus* of one penny a cow only yearly, payable to the vicar in lieu of tithe milk and cheese. They denied that they had refused to pay to the plaintiff the tithes, mortuaries, or oblations that were due and used to be paid to the vicar, but by their answer offered to pay him all such as he was justly entitled to, except for what they had paid him, and except for hay, fruit, hops, milk, and cheese. And they set forth what particular lands they held in the said Burrough; and what lands in the said Forren; and what lands in each of the said places were discharged of the payment of tithes; as also the particulars and values which they respectively had; and what compositions had been made; and what money had been paid by them or their landlords for the tithes due from them respectively.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and on reading the defendant's answer, and the proofs taken in the cause, and the defendant Walker's answer to the cross-bill, and a decree of this court, dated the sixth of June, in the third year of Charles the Second, Townsend, clerk, plaintiff, and Skipp, defendant, and the *postea* returned thereon, and several exhibits proved in the cause, and on long debate,

It is ordered by the court, that the said defendants shall be, and are hereby dismissed of and from the said bill, as to the tithe of hops, and also as to the rest of the matters and things in the said bill contained.

EDW. WARD.
THO. BURY.

R. PRICE.
S. LOVELL.

1710.
WALKER
v.
WEBB.

H. 9 Anne. Scacc. *Spateman v. Know.* [1 Wood, 525.]

Kent, 19th February, 1710.

THE rector of Leybourne, in the county of Kent, claimed tithes of wood. The defendant confessed, that ten years ago he purchased from Mr. Clarke forty-nine acres of woodland, situated in Little Leybourne, otherwise Little Comp, in the Weald of Kent, distant three miles from Leybourne, and a distinct parish; and that he cut about twenty-five acres of the same, and made thereof core wood, brush wood, or spray, broom staves, hop poles, and bark, but said, that as the woods laid in the Weald of Kent, they were exempt from tithes.

The woodlands situated in Little Leybourne, in the county of Kent, are within the Weald, and tithe free.

An issue was directed to try, "Whether the said woodlands are within the Weald of Kent, or without the said weald;" and upon a full evidence given on both sides, a verdict passed for the defendant.

The court therefore dismissed the bill.

E. 10 Anne. Scacc. *Isaack v. Portbury.* [1 Wood, 525.]

Cornwall, 7th May, 1711.

THE inhabitants, owners, and occupiers of lands in the parish of Northill, in the county of Cornwall, filed their bill to establish the following *modus* payable to the rector in lieu of tithes. For the offerings of a man and his wife communicating, three-pence. For a widow or widower communicating, one penny halfpenny. For every other single person communicating, one penny. For every cow that has a calf, called a renewed cow, one penny,

1711.
The following *modus* and custom were confirmed and established:—For every cow that has a calf, called a renewed cow, in

1d. in discharge of milk; for every veere cow, one halfpenny, in discharge of tithes of such cow; for every milch ewe, one farthing, in discharge of milk of such ewe; for every colt foaled in the parish, one penny; for every hoghead of cider made of apples grown in the parish, two-pence, in lieu of tithes of such apples and cider; for every garden, one penny, in lieu of tithes of such garden, and the herbs, fruits, and roots grown therein; for every calf, where the parishioner has under the number of seven fallen in any one year, which shall be reared, one halfpenny, if killed, one penny; for every such lamb, one farthing; for every such pig, one farthing; for each goose and gosling under seven, one farthing; the tenth cock of hay, after putting the same into grass cocks before it be again cast abroad.

1711.

ISAACK

v.

PORTBURY.

in discharge of the tithe milk of such cow. For every veere cow, one half-penny, in discharge of the tithe of every such cow. For every milch ewe, one farthing, in lieu and discharge of the tithe of milk of such ewe. For every colt foaled in the said parish, one penny. For every hoghead of cider, made of apples grown in the said parish, two-pence, in lieu and satisfaction of the tithes of such apples and cider. For every garden, one penny, in lieu and satisfaction of the tithes payable to the rector for such garden, and the herbs, fruits, and roots grown therein. For every calf fallen in the said parish, where the parishioner has under the number of seven there fallen in any one year, and not more, which shall be reared, one halfpenny, and for every one that shall be killed, one penny, in lieu of the tithes of such calves so under the number of seven. For every lamb fallen in the said parish, where the parishioner has under the number of seven there fallen, and not more in one year, one farthing, in lieu of the tithes of such lambs so under the number of seven. For every pig fallen in the parish, if any person has under the number of seven there fallen in any one year and not more, one farthing, in lieu of the tithes of such pigs under the number of seven. For geese and goslings, if under the number of seven, for every one, one farthing: all which *modus*es and customary payments are payable at Easter, yearly. For grass grown in the parish, when cut and made into hay, the tenth pook or cock, after first putting the same into grass cocks, before the same be again cast abroad, for the tithe of such grass and hay. The rector ought to keep a bull and a boar for the use of the parishioners.

The defendant insisted upon tithes in kind of all the things titheable for which the said *modus*es are pretended to be payable.

The Court confirmed and established the said customs and *modus*es.

Tr. 10 Anne. Scacc. & Dom. Proc.

Nicholas v. Elliott. [Dodd's MS. 219. Bunb. 19.] 2 Eq. Ca. Ab. 734. 2 Bro. P. C. 31. Rayn. 119. 1 Wood, 523.

Fish in a pond, deer in a park, rabbits in an inclosed warren, &c. are not titheable without a custom.

Tithes of peas and beans sown in rows and banks, and managed in a garden-like fashion, which had been usually paid to the vicar when hoed and managed with the hand, shall be paid to him where the ground has been turned with a plough which does the work of a plough and spade; for it is not the nature of the grounds, or the varying of the manner of preparing them, that will alter the right of tithe.

UPON a case stated and argued, the court resolved,

1. That fish in a pond, caught and sold, are not titheable without a custom, as deer in a park, rabbits in an inclosed warren, &c. for they are wild in their nature, and are *quasi* in the realty, for they go to the heir, &c.

2. That beans and peas set by the spade, or the plough and spade, and hoed and managed in a garden, like manner belong to the vicar, though inventing a plough which does the work of a plough and spade, and managed with the hoe; for it is not the nature of the grounds or the varying the manner of preparing from the spade, or the spade and plough, to the plough only, will alter the right of the tithe, the peas and beans being still set or sown in rows and banks, and commonly with carrots sown between, and managed with the hand or hoe, in a garden fashion. *Stephens v. Martin* was cited, and *Greaves and Tongue*, Tr. 32 C. 2. Fish in water nets, and lobsters in —. [Dodd.]

MATTHEW NICHOLAS, clerk, vicar of Shalford, in Hilary term, 10 Anne, preferred his bill in the court of Exchequer against Elliot, the farmer of the impropriate rectory (among other things), for the tithes of peas and beans; and also preferred his bill in the same court afterwards against Austen, Esquire, the impropriator, and had a decree for the same, though it was insisted by the defendants, that the vicar was only intitled to the tithes of peas and beans (1) set and planted in rows and ranks, that have been hoed and weeded with the hand, where the ground has been turned with the spade, as well in open fields as in gardens; but not where they have been set in rows and ranks, and hoed and weeded with the hand, where the ground has been turned only with the plough: From this decree there was an appeal to the House of Lords, and it was there affirmed 24th January, 1717. [Bunbury.]

(1) *Quere*, If the quantity or place of sowing will alter the nature of the tithe. 3 Lev. 365. (B.)

Tr. 10

Tr. 10 Anne. Scacc. *White v. Keate*. [Dodd's MS. 220.]

1711.

THE plaintiff was vicar of a parish in Berkshire; the defendant produced a copy of a terrier out of the ecclesiastical court at Sarum in 1637, to prove that the lands and tithes in question were not in that terrier, although the parson had got them in a subsequent terrier, and the court refused to allow a copy to be proved out of the ecclesiastical court. *Quare*, for it has been done several times.

A copy of a terrier not allowed to be read.

M. 13 Anne. Scacc. *Lord Stamford v. Luke*. [1 Wood, 526.]

Cornwall, 25th October, 1711.

THE impropiator of the town and parish of Saint Ives, in the county of Cornwall, claimed, by immemorial custom, the tenth part of all fish taken within the said town, parish, and rectory, or the titheable places thereof, or at, in, or upon the sea, and brought into the said town, parish, or rectory for sale. The bill stated, that in and about the sea, within the said parish, there had, time immemorial, been used great fishing for pilchards, herrings, and other fish, by persons living within the said town, rectory, or parish of Saint Ives, for sale and otherwise; that such fish were usually brought by the said fishermen into the said town, rectory, or parish, and there unshipped and laid on land; and that, by custom immemorial, the tenth part of the same ought to be delivered to the rectors or impropiators; that, by the said custom, the fishermen bringing fish were obliged, upon the arrival of the vessels and fishing boats in the said town, parish, or rectory, and bringing the fish on land, to give notice to the rectors or impropiators, and after such notice given to set forth upon the shore the full tenth of the said fish.

A tenth part of all fish caught at sea, and brought into St. Ives for sale, is due to the impropiator of the rectory; and the fishermen are bound to give notice to the impropiator of the arrival of the fishing boats, and of the time of tithing, and to set forth upon the shore the full tenth part of the fish brought in.

The defendants admitted, that the plaintiff was owner of the rectory, and entitled to the tenth part of all fish taken in the said parish, or upon the sea, and brought into the said parish for sale or otherwise, or to some *modus* or composition in lieu thereof; but denied that they, or any other fishermen, inhabitants of the said parish, were, by any custom immemorial, obliged to give notice to the impropiators of the arrival of their fishing-boats to the shore, but that the plaintiff's agent had always made it his business to attend the arrival of such boats with pilchards and herrings and other fish, and to demand the tenth thereof, which was accordingly paid to him; and they described the particular manner of setting out such tithes. They said also, that several inhabitants of the said parish had, for several years past, taken, in Mounts Bay, several quantities of pilchards, in drift boats and nets, and cured them in cellars in the said Mounts Bay, six or seven miles distant from the said town and parish of Saint Ives; and that the customary payment for all such tithe fish taken without the said parish had been immemorially, and was still, to pay two shillings a hogshead in lieu thereof; that the agents for taking such tithe fish had themselves bought considerable quantities of such remote taken fish, and that they accounted with their employers after such rate *per* hogshead; that they never knew or heard of tithes in kind being paid for such remote taken fish, but that the same was compounded for as aforesaid. They also denied, that the fishermen taking such remote fish were obliged to give notice to the impropiator of the time and place of tithing the same; the hogsheads containing such remote taken fish being exposed publicly in the cellars, they remained for the said agent to number the same, and to charge every particular owner the rate aforesaid *per* hogshead.

The plaintiffs replied; the defendants rejoined; and several witnesses were examined on both sides; and upon opening the bill, and reading an order dated the seventeenth of May last, whereby the said defendants were to appear *gratis* at the hearing, and on reading the answer of the said defendants, they making default, and not attending with their counsel, it appeared to the court, that the tithe of fish was due by the custom and usages of the said parish and rectory; and that the fishermen were obliged to give notice to the impropiator,

his

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his rector, or agent, of the arrival of the vessels and fishing boats, and of the time of tithing; and after such notice to set forth upon the shore the full tenth or tithe of the said fish.

It is thereupon ordered and decreed, that the defendants shall satisfy the plaintiffs for the value of the tithes of all the pilchards and herrings by them caught and taken at sea and brought into the said town, parish, or rectory impropriate of Saint Ives, and the titheable places thereof, within the time in the bill mentioned; the deputy-remembrancer to take the account.

H. 10 Anne. Scacc.

Tillotson v. Challis and others. [1 Wood, 528.]

Cambridgeshire, 22d February, 1711.

The tithes of hemp, flax, and coleseed, in the parish of Elme, in Cambridgeshire, and Emneth, in Norfolk, belong to the rector, and not to the vicar; and the defendants insisting that they were not new improvements, but had been time out of mind sown in the parish, and that the tithes thereof belonged to the rector, and not to the vicar, a bill was dismissed.

THE plaintiff Jarvis, as lessee of Dr. Tillotson, rector of Elme, in the county of Cambridge, with the chapel of Emneth, in the county of Norfolk, annexed, claimed the tithes of coleseed, hemp, and flax; and stated, that the defendants Tivey, Marsh, and Ward, had, in the year 1710, sowed their lands with hemp, and flax, and coleseed, the tithes of which ought to have been paid in kind to the plaintiff Jarvis; but that the said defendants combining with the defendant Challis, the vicar, pretended that no tithes of the kind were due to the plaintiffs, they being in their nature small tithes, and as such payable to the vicar, who claimed the same, and had indemnified the other defendants.

The defendants Tivey, Ward, and Marsh said, that they had been acquainted with the custom of tithing in Elme and Emneth for twenty years, they having been employed by the vicars and the tenants of the rectory to collect the tithes; that they knew the first crop of flax that was sown there, the tithe whereof they believed was received by the rector, who had since continued to do so; that the tithes of coleseed were several times contested by the vicars and the lessees of the rectory, and that sometimes the one and sometimes the other received such tithe, as the humour of the parishioners prevailed; that the rector, for the most part, received the tithe of hemp; that the tithe of coleseed was payable in kind, but that the tithe of hemp and flax was under a *modus* of four shillings an acre, and that all the tithes were to be paid before the crops were removed off the premises.

The defendant Challis said, that he was, and had been vicar of Elme and Emneth since October, 1709; that he ought to receive all small tithes, and, amongst the rest, the tithes of coleseed, hemp, and flax, they being small tithes in their nature; that an immemorial usage, concerning the payment of coleseed and flax, could not be made out, the sowing of them being a late improvement; that the rectors and vicars had contested the tithe of coleseed, and that, although the rectors or their tenants had, for the most part, received the tithes of hemp and flax, it was through the inadvertency of the vicars; that he had received of the defendants Ward and Marshall, for the year 1710, the tithes of coleseed, hemp, and flax, and had given them a bond of indemnity.

The plaintiffs replied; the defendants rejoined; and witnesses were examined on both sides; and upon reading a register book belonging to the bishop of Ely, and an agreement or award made by the said bishop between the rector and vicar, and a decree of this court between Widdrington, D. D. against Barker, dated the seventeenth of June, in the twenty-seventh year of Charles the Second, (1) and on full debate of the matter,

The court declared, that in this cause the tithes of coleseed, hemp, and flax, within the said rectory and chapelry, did belong, and ought to be paid to the rector, and not to the vicar. (2)

(1) *Ante*, p. 504.

(2) Challis, the vicar, afterwards filed his bill against Jarvis, the lessee of Dr. Tillotson and others, for the tithes of hemp, flax, and coleseed. The defendants insisted that they were not new improvements, and had been,

time out of mind, sown in the parish in great quantities, and that the tithes thereof belonged to the rector, and not to the vicar; and the court, on reading the proofs, dismissed the bill. *Book of Decrees and Orders.*

E. 11 Anne. Scacc. *Brett v. Franklyn.* [1 Wood, 533.]

1712.

Kent, 22d May, 1712.

THE rector of Renking, in the county of Kent, claimed the tithes of a parcel of wood felled in 1708, in a wood called Bourne wood, in the parish of Reuking.

The defendants said, that they had bought of Sir P. Boteler some wood growing in Bourne wood, but that the plaintiff had no right to the tithes thereof, because the part of Bourne wood, within which the said wood was felled, was in the weald of Kent, and so by custom and usage, time out of mind, tithe free.

An issue was directed to try, before a special jury, of which no inhabitant of the weald should be a juror, "Whether that part of Bourne wood, which is in the parish of Reuking, be in the precinct called the weald of Kent, or not;" and the jury, after six of them had taken a view, gave a verdict for the defendants.

The court therefore dismissed the bill, with costs in law and equity.

The part of Bourne Wood which lies in the parish of Reuking, in the county of Kent, is within the weald of Kent, and tithe-free by custom and usage.

H. 11 Anne. Scacc.

Underwood v. Gibbon. [Bunb. 3. 1 Wood, 534.] 4 Gw. 1582.

RESOLVED by BURY, PRICE, and MOUNTAGUE, Barons, that the tithes for depasturing unprofitable cattle ought to be paid by the occupier of the ground, and not the agistor: and by Ld. Ch. B. BURY and PRICE *contra* MOUNTAGUE, that saddle horses shall pay no tithes, no more than cattle for the plough and pail, or cattle killed for the use of a man's own family, in respect of the profit that otherwise accrues to the parson from these.—[Bunb.]

Tithe of agistment is payable by the occupier of the ground and not the agistor.

Saddle-horses shall pay no tithe, or cattle for the plough or pail, or killed for the use of a man's own family. No tithes are due for after-pasture where tithe has been paid of the first crop.

THE bill stated, that Nathaniel Jeykill, being impropiator of the rectory impropriate and parish of Saint Gregory, in Sudbury, in the county of Suffolk, did, by his deed tripartite, dated the ninth of June, 1710, demise to the plaintiff all the tithes, of what nature soever, belonging to the said rectory and parish, and the titheable places thereof, to hold for three years, if he should so long live; and that O. Andrews, J. Craddock, and P. Barker, or one of them, being impropiators of the parish or chapelry of Saint Peter, in Sudbury aforesaid, did, by indenture dated the first of July, 1710, demise to the plaintiff all the tithes arising therein for three years; by virtue of which leases the said G. Underwood became entitled to all the tithes, of what nature, kind, or quality soever, arising in the said respective parishes and chapelries, and the titheable places thereof, from Christmas, 1709; that the defendant Gibbon, during that time, held a piece of ground, called Schoolhouse Field, lying therein, from which he had cut hay, and on which he had fed and depastured divers horses and dry cattle, and made great profit thereof; for all which he ought to have paid to the plaintiff the tithes of hay and tithe-herbage, or some composition for the same; and that the other defendants had respectively, during the time aforesaid, several titheable matters.

The defendants admitted, that N. Jeykill was impropiator of Saint Gregory's, and as such entitled to all tithes therein; and that he had made such lease to the plaintiff; but they knew not that the said Andrews and others were impropiators of Saint Peter's, or were entitled to any tithes there, or that they had made such lease. They said, that Saint Peter's was a chapel of ease annexed to the parish church of Saint Gregory; and that the tithes thereof belonged to the impropiator of St. Gregory. They also said, that they had kept upon two pieces of land, called King's Marsh and Portsman Croft, otherwise the Common, and upon certain other lands which were common to the freemen of Sudbury, after the first crop of corn and hay was carried off from the same by the occupiers, several horses, for which there were not any tithes due; that the said grounds, called King's Marsh and Portsman's Croft, were anciently given to, and for the use and benefit of the burgesses and community

community

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munity of Sudbury, by Sir Richard De Clare, the owner of the said borough and all tithes arising therein; that it had been customary, time out of mind, for the corporation of the said borough to set certain rates upon all cattle that had been depastured thereon; and that such rates, or the greater part of the monies thereby raised, had been paid and applied to and for the use of the poor of the borough of Sudbury; and that never any tithes were paid or demanded for the herbage of cattle kept there; and that they knew not whether the aforesaid pieces of land laid within the said parishes. They also insisted, that no tithes were due for the after-pasture of any the other lands in respect of the tithes paid for the first crop of the same.

The defendant Gibbon admitted, that he held and occupied a piece of ground, called the Schoolhouse Field, lying in the parish of Saint Gregory, and that he had cut grass thereon, and made the same into hay, and had fed his horses thereon, the tithes of which were worth ten shillings.

The defendant Starling said, that he, together with several other persons undertakers for the making the river Stour navigable, were joint purchasers of the ground called the Nonsuch, lying part in the parish of St. Gregory, and that they jointly held the same, and thereon kept horses, and mowed hay, for the joint use of all the proprietors of the said navigation; and therefore said, that he should not be sued alone for the tithes thereof. But he insisted, that no tithes ought to be paid, or are due for the same, for that the said ground did formerly belong to the dissolved monastery of Friars in Sudbury, and so was by the several descriptions and provision in the several acts of parliament made for the dissolution of monasteries, exempt from the payment of tithes, they never having paid any tithes before.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides.

It is ordered by the court, that the defendants do respectively account for their tithes had, kept, fed, or depastured upon the lands called the Nonsuch Field, except upon that part thereof which lies on the ——— side of the river Stour, and upon the Schoolhouse Field, the King's Marsh, and Portman's Croft, otherwise the Common; and that they shall respectively satisfy and pay to the plaintiff the values thereof; but that the defendants are not to account for any tithes for the after-pastures of any of the said grounds or fields whereon crops of corn or hay were had in the same year. The plaintiff to have his costs. (1)

(1) The plaintiff Underwood, as lessee of the church of St. Gregory and chapelry of St. Peter, in Sudbury, filed his bill in this court, in Hilary term, 10 Anne, against Drew and Hazel, for the tithes arising on two gardens and certain lands called Gregory's. The defendants insisted they were parcel of the college of St. Gregory in Sudbury; that they were held together with the said rectory, and that the revenues of them altogether were above £200 a-year; that they were surrendered tithes-free to Henry the Eighth, who had granted the said college and rectory and lands aforesaid to Sir Thomas Patton and his heirs, and from them they were, by divers meane conveyances, vested in the defendants; and that as no tithes had ever been paid, or even demanded for the said lands, the non-payment was evidence, as against a lay impropriator, of their having been legally discharged from tithes; and the court, on reading the depositions, took time to consider of the claimed exemption, but afterwards or-

dered the defendants to account with the plaintiff for the tithes of the lands pretended to be exonerated.—On the 10th June, 1714, the plaintiff Underwood also filed another bill against Sparrow, one of the defendants in the principal case, for the tithes of lands lying beyond Holgate and in Gulfield, otherwise called Gilfield, in the Rounds and in Coldness; and on reading an indenture, dated 22d February, in the twenty-seventh year of Henry the Eighth; a surrender of the abbey of Westminster to the Crown, dated the 16th January, in the thirty-first year of Henry the Eighth; a charter to the said abbey, dated the 11th May, in the second year of Queen Elizabeth; and a record of a prohibition, in the twenty-sixth year of Queen Elizabeth; a trial at law was directed, in an action of debt on the statute 2 & 3 Edw. 6. c. 13. and the verdict found, that Sparrow was not indebted to the plaintiff in any sum for the tithes subtracted.

[Decree Book.]

Tr. 12 Anne. Scacc. *Hason v. Yallop*. [1 Wood, 536.]

1713.

THE rector of Yelverton cum Alspington, in the county of Norfolk, claimed tithes of turnips, cows, and calves.

The defendant said, that her own cows, except one bullock, were fed with the turnips she had grown; and that as such turnips yielded but little profit to the occupiers, and are only sown to prepare the land for a better crop of grain the year following, and were pulled to feed the cows with, both of which were benefits to the minister, by improving the quantities of corn and milk, no tithes ought to be, or ever had been, paid for the same; that there was a *modus* of three halfpence for each cow, and three halfpence for each calf, in lieu of all tithes arising from such cow and calf.

Turnips pulled shall pay tithes though sown to prepare the land for a better crop of corn, and given to milch cows.

The court ordered the defendant to account for the tithes of turnips grown upon the several lands which were drawn by her, or by any other person or persons by her order or consent; and also to pay three halfpence for each cow, and three halfpence for each calf, for the lactage and profits arising from the said cow and calf, according to the *moduses* set forth by her answer.

Tr. 12 Anne. Scacc.

Bean v. Lee and others. [Dodd's MS. 223. 1 Wood, 537.] Rayn. 120. 2 Gw. 609.

THE plaintiff, vicar of Llyd, in Kent, brought his bill for small tithes, the defendant insisted upon a *modus*, that the occupiers of any marsh meadow or pasture lands have used to pay and ought to pay yearly for all their marsh meadow and pasture lands, by them occupied, to the vicar, in lieu and satisfaction of the tithes of hay, lambs, wool, calves, colts, pigs, eggs, honey, wax, fruit, agistment and all other small tithes arising upon the said lands, the yearly rate or sum of one shilling in the pound, and so in proportion for every greater or smaller sum than a pound, according to the yearly value of such lands as are let, or rented at a full or rack rent without fines, and according to the yearly value of such lands as are not let at a full rent without fine as aforesaid; and resolved, upon a case stated and debated, that the first was a void *modus* for the uncertainty and impossibility of the parson's knowing the value without annual and constant suits. See *Dodderidge* and *Startup*. These cases were cited, 11 Rep. 16. Hob. 11. 3 Mod. 73. Cro. Ja. 621. 671. 2 Leon. 117. 2 Keb. 280. 318. Latch. 210. Sid. 49. 3 Mod. 132. Calthorp, tithe of houses in London, and by custom. Godolph. 425. 1 Keb. 602. 1 Leo. pl. 127.—[Dodd.]

A custom to pay one shilling in the pound of the yearly rent of lands let at the full value; and so of the yearly value of lands not let in lieu of tithes, is bad.

THE vicar of Lidd, in the county of Kent, claimed the tithes of hay, lambs, wool, calves, pigs, geese, eggs, and all other vicarial tithes arising therein.

The defendants admitted the plaintiff's right to all tithes (except of corn and grain), or to some *modus* or customary payment in lieu thereof; and said, that no tithes of hay, lambs, wool, calves, pigs, eggs, agistment or other vicarial tithes, ever were or ought to be paid in kind to the vicar of the said parish; for that, time out of mind, there had been a custom, usage, or *modus decimandi* in the said parish, that all the occupiers of any marsh, meadow, or pasture land in the said parish, should pay, in lieu and satisfaction of the tithes of hay, lambs, wool, calves, colts, pigs, honey, eggs, wax, fruit, agistment, and all other small and vicarial tithes arising upon the said lands, the yearly rate or sum of one shilling in the pound, and so proportionably for every greater or lesser sum than a pound, according to the yearly rent of such of the said lands as were rented or let at a full or rack rent without fine, and according to the yearly value of such lands as were not let at a full rent without fine; which rent or customary payment had been constantly received by the vicar of the said parish for the time being, in full satisfaction and discharge of the said tithes.

The cause came on to be heard on the twenty-second of June last, and the further hearing was adjourned to this day; when upon reading the answers and several depositions, a doubt arose, whether the *modus* in question, as set

forth,

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AND OTHERS.

forth, was a good *modus* in law, or not; and the court ordered a case thereof to be made, and signed by counsel on both sides, in the words following:

The case. "The plaintiff, as vicar of Lidd, by his bill, demands the tithes in kind of hay, lambs, pigs, turkies, hens, geese, calves, milk, honey, wax, and agistments, &c. The defendants, by their answers, admit the plaintiff is vicar of the said parish, and is thereby entitled to all the tithes arising in the said parish (except the tithes of corn and grain), or to some rate, *modus*, or customary payment, in lieu thereof; and say they believe, and doubt not but to prove, that no tithes of hay, lambs, wool, calves, pigs, eggs, agistment, or any other small or vicarial tithes, were ever paid, or ought to be paid in kind to the vicar of the said parish for the time being; but that there is, and time out of mind has been, a custom, usage, or *modus decimandi* in the said parish, that all the occupiers of marsh, meadow, and pasture land in the said parish have used to pay yearly, for all the said marsh, meadow, and pasture lands by them respectively used and occupied in the said parish, to the vicar of the said parish for the time being, in lieu and satisfaction of the tithes of hay, lambs, wool, calves, colts, pigs, eggs, honey, wax, fruit, agistment, and all other small and vicarial tithes arising upon the said lands, the yearly rate or sum of one shilling in the pound, and so proportionably for every greater or lesser sum than a pound, according to the yearly rent of such of the said lands as are rented or letten at a full or rack rent without fine, and according to the yearly value of such lands as are not letten, or not letten at a full rent without fine as aforesaid."—The question is, whether this *modus*, as laid, be a good *modus* in law, or not?

Upon hearing counsel on both sides, and on full debate of the matter,

The court was unanimously of opinion, and did declare, that the *modus* in question, as laid and insisted on by the defendants in their answer, and stated by the case, is a void *modus* in law.

It is ordered by the court, that the said defendants shall severally account with, satisfy, and pay the plaintiff for the tithes of hay, lambs, wool, calves, pigs, geese, eggs, and all other vicarial tithes, which were yearly arising upon the defendant's lands and tenements within the said parish during the time in the bill mentioned; and it is referred to the deputy-remembrancer to take and report the said account.

EDW. WARD.
THO. BURY.

RO. PRICE.
WM. BANASTRE.
[Wood.]

Tr. 12 Anne. Scacc. *Naunton v. Clarke*. [1 Wood, 538.]

A *modus* of a buck and doe in lieu of all tithes of a park, whether the same be ploughed, sown, mowed, or agisted, held good.

THE impropiator of the parish of Letheringham, in the county of Suffolk, claimed the tithes of corn, hay, and other great tithes belonging thereto.

The defendant said, that the plaintiff was entitled to the tithes of the said parish, except the tithes arising on lands called Letheringham Park, and that he had usually received a composition in money for all such tithes, except as aforesaid, but that for two years past he had taken tithes in kind of all the defendant's corn lands in the said parish, except of the lands in Letheringham Park, and had not at any time demanded tithes in kind for any of the lands in the said park, or any thing in lieu thereof; that in the year 1700 he had hired great part of the lands called the Park Lands, tithe-free, and had so enjoyed the same until Michaelmas last; that the said lands contained about two hundred acres, which were anciently a park, and were still inclosed, and that no tithes were payable for the same, for any corn growing therein, but that an ancient *modus* of a buck and a doe in season, yearly, on demand, was payable to the impropiator, in lieu of all tithes thereof; that the same had been yearly accepted by the impropiator; that, until about twenty years past, the impropiator had sold such buck and doe for a small sum of money; and that, under such *modus*, the said park lands had immemorially been held free of all other tithes, though the same were ploughed, sown, mowed, or agisted; that on his hiring the said park, it was agreed, that ten brace of deer should be kept

in a part of the said park to answer the said *modus* yearly, if demanded, and which was accordingly done; but that the plaintiff had never demanded the same, or any money in lieu thereof, or any tithe in kind, or any satisfaction for the same; that he had duly paid for the tithes of his other lands in the said parish which were not part of the said Park Lands; and he insisted, that the Park Lands were tithe-free. He also averred, that from the year 1700 to 1705 there was a sufficient number of deer kept inclosed in the said park to answer the delivery of such buck and doe, but that the plaintiff, during all that time, had never demanded any; and that therefore he concluded, the plaintiff would have been satisfied with a payment in money for the same.

The plaintiff replied; the defendant rejoined; and witnesses were examined; and on debate of the matter,

The court, being satisfied that there was such a *modus* for the said park as was insisted on by the defendant's answer, ordered the defendant forthwith to pay to the plaintiff thirty pounds in full for the values of the said bucks and does for the time demanded by the bill, but without costs on either side.

J. A. REYNOLDS,
LAW. CARTER,

WM. THOMSON,
WM. FORTESCUE.

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v.
CLARKE.

Tr. 12 Anne. Scacc.

Bishop of *Norwich* and *Eachard* v. *Bucklea*. [Dodd's MS. 222.]
2 Gw. 610.

UPON a demurrer in the Exchequer to a tithe bill brought by the bishop and Eachard as sequestrator of the rectory of Boulge, in Suffolk. The bill charges that the bishop was bishop of the diocese, and that the rectory was within it, and had been vacant so long, that the bishop sequestered, and granted it to the other plaintiff, and resolved;

A sequestrator cannot maintain a bill for tithes, unless the bishop of the diocese be joined with him.

1. That a sequestrator cannot maintain a bill.
2. That the bishop and sequestrator joining may maintain a bill, and accordingly the demurrer was overruled.

M. 12 Anne. Scacc. *Smith* v. *Johnson*. [Bunb. 1.]

IF a man depasture unprofitable cattle in his ground, he shall pay tithes in proportion to the number of the cattle and the value of the land, generally at the rate of two shillings in the pound; and the same proportion is to be observed, if they are travelling cattle that come and go successively: cattle fed upon meadow ground after it is mowed, shall not pay tithes, unless by custom.

Agistment tithe for unprofitable cattle shall be paid in proportion to the number of the cattle and the value of the land, generally at the rate

Nov. 14, 1714, Sir Samuel Dodd made lord chief baron, and Sir James Mountague made a baron of the Exchequer.

of two shillings in the pound. So of travelling cattle. Cattle fed upon meadow ground after it is mowed, shall not pay tithes, unless by custom.

M. 12 Anne. Canc.

Roffe v. *Harding*. [8 Vin. Abr. 591. pl. 31.] 2 Gw. 610.
1 Rayn. 125.

BILL for a discovery of tithes of furze and payment thereof. The defendant, by answer, insists, that furze spent upon the premises is not titheable; and also that underwood and furze generally are not titheable in that parish, &c.

Plaintiff admits, that no tithes are due for underwood or furze spent upon the premises, but insists upon tithes of furze made into faggots, and sold by the defendant. That underwood or furze spent for firing, or fencing of the premises is not titheable, but underwood or furze sold is titheable, cites *Moor*, 909.

Tithe is payable for furze, made into faggots and sold, but not for furze burnt, or used upon the premises.

1713.
ROFFE
v.
HARDING.

In the proofs of the cause, there was some evidence of one penny a-year paid, called smoke-money, in lieu of tithes of furze; but that not being insisted upon, by the answer, but a general *non decimando* for underwood and furze; Lord Chancellor HARCOURT decreed defendant to account for tithes of furze made into faggots and sold, but not for furze burnt or used upon the premises, and defendant to pay costs.

H. 12 Anne. *Murray v. Skinner.* 1 Wood, 541.

Essex, 24th February, 1713.

No tithes are
due for oysters
or oyster lays.

THE vicar of Brightlingsea, in the county of Essex, stated by his bill, that he was entitled to receive all tithes in kind, as his predecessors, former vicars, had received, or some composition for the same; that, time out of mind, there had been, within the said parish, several quantities of land, wherein were kept and fed great quantities of oysters for sale, which turn to great account; that the said lands were therefore let at considerable rents; and that, by being so used, the tithes of the feed and herbage thereof were taken away; that the occupiers of such lands had immemorially paid to the vicar of the said parish, according to ancient custom, two shillings in the pound of the yearly rent of the said lands; and that the defendant Kingsborough, from the year 1708 to the present time, had occupied several parcels of land there, in which he had had great quantities of oysters, of which he refused to pay the tithe. The bill also stated, that the defendant Skinner had occupied land of the yearly value of two hundred and twenty pounds, and had kept and depastured thereon divers cows and other cattle, and that he had poultry, fruit, wood, and oyster lays, the tithes whereof, as also the two shillings in the pound for the oyster grounds, ought to have been paid to the plaintiff. The bill further stated, that the said defendants, combining with the defendant Brand, the impropiator of the great tithes and lord of the manor, to deprive the plaintiff of his tithes, pretended that the greater part of the lands held by Skinner was part of the glebe lands belonging to the rectory; and that within the memory of man no small tithes, nor any composition in lieu thereof, had been paid to the vicar, although they well knew, that by ancient endowment the same had been paid to the vicar, and that there was no special exemption of any part thereof. The bill therefore prayed a general discovery and relief.

The defendants Skinner and Kingsborough admitted the plaintiff to be entitled to vicarial tithes; that the ground stated in the bill was made use of for laying and keeping oysters for sale; and that it never was pasture, or fit for any other use than that of oyster lays; but they denied the custom of paying two shillings in the pound, or any other sum to the vicar, for the tithes of oyster lays or oysters; and insisted, that no tithes were due or payable for such oyster lays or oysters; and they set forth what oyster lays they held, and the values thereof.

The defendant Skinner set forth what lands he held, and the value of the same, and a particular account of all his titheable matters and things; and said, that he had agreed with the plaintiff for his small tithes from Michaelmas, 1708, to 1709; and that, before any *subpoena* was served, or demand made, and pursuant to the said agreement, he had tendered to the plaintiff six pounds, sixteen shillings, for his small tithes for the said year, but which he had refused to receive; and he insisted, that no small tithes, or any composition in lieu thereof, had been paid to the vicar for the parsonage farm; and that no tithes whatever were due therefrom, the same being part of the rectory; and that neither the plaintiff nor his predecessors was ever endowed of any tithes arising upon the glebe lands of the rectory which composed the parsonage farm. He also insisted, that the tithe of grass and hay within the said parish by right belonged to the impropiator, and not to the vicar.

The defendant Colt said, that J. Brand, deceased, was seised in fee of the rectory and the manor of Brightlingsea; and that no tithes for oysters or oyster lays, or any thing in lieu thereof, were due or payable to the plaintiff, as

vicar

vicar of the said parish, nor was there any custom or usage to pay two shillings in the pound, or any other sum to the plaintiff for the ground used for oysters or oyster lays; and insisted, that if there were any such custom in neighbouring parishes, such custom ought not to conclude the defendant Elizabeth Brand, the lady of the manor and owner of the rectory, or him, the defendant in reversion, for that their predecessors had enjoyed the said parsonage lands, with their appurtenances, freed from petty tithes; and that the vicarage was endowed only with ten marks to the vicar, with a competent dwelling-house, for the manor, theretofore part of the possessions of the abbot of Saint John's, Colchester, saving also to the said abbot and monk the tithes within the said parish they had before received; that the plaintiff is not, by the said endowment, entitled to demand any tithes of the glebe lands and oyster lays, or any thing in lieu thereof, or any more than the said annual pension of ten marks in lieu of his small tithes for the said manor and premises, and he insisted that the defendant Brand was entitled to all great tithes; that no tithes were due or payable to the plaintiff for any matter on the said glebe lands belonging to the rectory or impropriation; that the plaintiff or his predecessors never received any tithes for any matter arising upon the said glebe lands, or any satisfaction in lieu thereof; and that the farm called the Parsonage Farm, consisting of arable, pasture and marsh, about eighty acres, was all of it ancient glebe lands, and part of the rectory aforesaid, and not titheable to the plaintiff; and he denied that he had any titheable matters in the said parish since the plaintiff had been vicar.

The defendant Brand put in the same answer.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and on reading the answer of the defendant Skinner, whereby it appeared that he had agreed with the plaintiff for small tithes from Michaelmas, 1708, to Michaelmas, 1709, and tendered six pounds sixteen shillings to the plaintiff for the same before any *subpoena* was served, and had by his answer also tendered the same to the plaintiff, and that the defendants Brand and Colt had not any titheable matters or things in the parish, and reading the depositions of several witnesses, and on full debate,

The court was of opinion that no tithes, or sum of money in lieu of tithes, were due to the plaintiff for oysters and oyster lays, and ordered the said bill, as against the said defendants, to be dismissed with costs, and the defendant Skinner to pay to the plaintiff his tender as aforesaid.

EDW. WARD,
THO. BURY,

RO. PRICE,
WM. BANASTRE.

13 Anne. Scacc. *Shaw v. Topping*. 1 Wood, 545.

Northamptonshire, 11th May, 1714.

THE bill stated, that within the great level of the fens called the Earl of Bedford's Level, there were several great quantities of land overflowed with water, which, for several years past, had been recovered and drained therefrom, and become good arable, meadow, and pasture ground; that the said fens and drained grounds never did lie, nor were taken to be within the bounds or limits of any parish at any time before the draining thereof, but had always been reputed to be extra-parochial, nor had any tithes, or compositions for tithes of the said lands ever been paid to any church or chapel, or to any rector, vicar, or curate, or to any lessee thereof; that her Majesty and her predecessors, in right of the crown of England, or their lessees, ever since the draining of the fen lands, had received or been entitled to receive all tithes, both great and small, arising thereon, as extra parochial, and out of the boundary of any parish; that her now Majesty, being so entitled, did, the ninth of November, in the second year of her reign, by letters-patent under the seal of this court, grant and demise the tithes of the said fen lands to S. Hastings for thirty-one years, in trust for Dr. T. Vernon; that the said S. Hastings, by deed, assigned the said lease and tithes to the said T. Vernon, who, by deed dated

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March, Digitized by Google

1713.

MURRAY
v.
SKINNER.

1714.

Tithes of extra-parochial lands in the Bedford Level decreed to the grantees of the crown.

1714:
SHAW
v.
TOPPING.

March, 1712, surrendered to her said Majesty the said letters-patent, and all the said tithes, which being accepted and inrolled in this court, the interest became determined; that thereupon her Majesty, by letters-patent under the seal of this court, dated the twenty-ninth of March, 1712, granted and demised to the plaintiff, his executors, &c. for thirty-one years, the said extra-parochial tithes within the great level called the Earl of Bedford's Level, lying within the metes and bounds mentioned in the said letters-patent in the said bill, yielding to her Majesty and her successors the third part of the profits yearly during the said term; that thereby the plaintiff, ever since the date thereof, had become entitled to all the extra-parochial tithes arising on the said fra lands within the metes and bounds aforesaid; that there were several quantities of fen lands within the precincts of the said great level, commonly called Borough Fen, which did not lie within the precinct of any parish, but were extra-parochial, and therefore the tithes thereof, both great and small, ought to have been paid to the plaintiff; that the defendants had occupied, since the date of the said letters-patent, great quantities of arable, meadow, and pasture lands lying in the said fen, and had ploughed and sowed the same with several sorts of corn, grain, and seeds, and reaped and gathered the whole crops thereof, and converted the same to their own use, without setting out the tithes thereof, or making any satisfaction for the same, and which they had refused to do, pretending that the said land was not extra-parochial, or that some *modus* was payable for the same. The bill therefore prayed an account of the quantities and qualities of the defendant's tithes, and a satisfaction for the same.

The defendants said, that it might be true that such letters-patent of the extra-parochial tithes arising upon the lands in Bedford Level might be granted as in the bill was set forth; that within the precinct of the said great level there were great quantities of fen lands, commonly called Borough Fen, and that the lands lying in that fen were, and had been reputed extra-parochial, but that tithes in kind were not due for those lands; for that, time out of mind, a *modus* or customary payment of four-pence an acre, or proportionably after that rate, had been yearly paid and payable by the occupier of the said lands in Borough Fen for the tithes thereof to the crown, or to its lessees of the extra-parochial tithes within the said great level, and by them accepted in full discharge of all tithes arising upon the said lands; that no tithes in kind, or any other satisfaction for tithes at any time had been paid for their said lands, except two years since, when some of the defendants paid Dr. Vernon's, or the plaintiff's agent two shillings in the pound according to the rents of their several farms in the said Borough Fen, for the tithes of the said lands: and all the defendants set forth the quantity of land they held in the said fen, and the value of their tithes, and said, that they held the lands as tenants under the Earl of Torrington; and insisted, that they had tendered the four-pence an acre to the plaintiff, with his costs of suit.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and upon reading the several letters-patent, a lease set forth in the bill, and likewise a copy of letters-patent dated the thirteenth of November, in the thirteenth year of Charles the Second, whereby the same were granted to Sir C. Berkeley and Dr. B. Gascoigne, Kt. also an agreement dated the eleventh of December, 1674, made by the said Gascoigne to Sir John Shaw, Bart. deceased (the plaintiff's father), for the tithes of six hundred and fifty acres of land lying in Peterborough Great Fen, after the yearly rate of six-pence an acre, upon which are indorsed several receipts for several years, and upon reading several depositions taken in the cause, and on full debate,

It is ordered and decreed by the court, that the defendants do severally account with and satisfy the plaintiff for all the tithes, both great and small, arising upon the said several lands in Borough Fen respectively occupied by them during the time in the bill mentioned.

SAM. DODD,
THO. BURY,
RO. PRICE.

Tr. 13 Anne. *Sheris v. Baskerville*. 1 Wood, 549.

1714.

Berkshire, 14th June, 1714.

THE rector of Summingwell, in the county of Berks, claimed the tithes of a certain farm called Bagworth Farm; a great part of which is situated in the said parish, and the other part in the parish of Saint Nicholas; and stated, that the defendants Baskerville and Brookland were possessors and occupiers of the said farm, and that they, combining with the defendant Redrobe, rector of Saint Nicholas, had carried away their titheable matters without setting out the tithes of the same.

The tithes of lands in one parish may be due to the rector of another parish.

The defendants admitted that one moiety of all tithes arising upon the said farm had, time out of mind, been received by the plaintiff's predecessors as rectors of the said parish; but said that the defendant Redrobe, rector of Saint Nicholas, claimed all the tithes arising upon the said farm, and, by indenture dated the twentieth of December, in the seventh year of Queen Anne, had leased the same to the said defendants at six pounds a-year; and they denied that any part of the said farm lay in the parish of Summingwell.

The court directed these issues to try, "Whether any, and what part of Bagworth Farm lies within the parish of Summingwell and the titheable places thereof;" and "Whether the plaintiff, as rector of Summingwell, is entitled to any, and what part of the great tithes arising upon the said farm, or not;" and upon the trial, the jury found "that one moiety of the said farm, called Bagworth Farm, did lie in the parish of Summingwell, but that no part of the said farm laid in the titheable places thereof, and that none of the tithes arising upon Bagworth Farm did belong, or were due and payable to the plaintiff, as rector of Summingwell."

The court therefore ordered the bill to be dismissed, with costs to be taxed by the deputy-remembrancer, in doing which, he was to have regard to the costs touching the examination for proving in which of the parishes a moiety of the said farm did lie.

M. 1 Geo. Scacc. *Mason v. Watson*. [Decree Book.] 2 Gw. 611.

BILL for tithes. As to part of the demand, the defendant, by answer, tendered £10, with costs, to the time of the answer. At the hearing the court decreed a trial at law as to the other part, and reserved further directions. After the trial the court dismissed the whole bill, except as to the £10, which they decreed the defendant to pay to the time of the answer (inclusive) and no further; and that from the time of the tender the plaintiff should pay to the defendant the subsequent costs of suit, which subsequent costs were to be allowed to and deducted by the defendant out of the costs which should be taxed and allowed the plaintiff, so far as the same would extend, and the residue of the defendant's costs were to be paid by the plaintiff.

A defendant by answer tendered 10*l.* with costs. The court afterwards dismissed the bill, and ordered the plaintiff to pay costs to the defendant from the time of the tender.

H. 1 Geo. Scacc.

1715.

Keddington v. Bridgeman. [Bunb. 2. 2 Wood, 47.] 2 Gw. 611.

IT was held by Bury and PRICE, Barons, that a composition by way of retainer by parol can be good only for one year, being by way of contract, but a lease of tithes even for one year by parol would be void: MOUNTAGUE, B., seemed to be of opinion, that an agreement between the parson and his parishioner for years by parol would be good, though not for life, being only an agreement that he will not sue the parishioner for so many years for tithes.—[*Bunbury*.]

By Bury and PRICE. A composition by way of retainer of tithes by parol for one year, is good, but not by way of lease. MOUNTAGUE

thought that an agreement between parson and parishioner would be good by parol for years, though not for life.

To

1715.

KEDDINGTON

v.

BRIDGEMAN.

A parol agreement with a parishioner to retain his tithes for three years, is good.

To a bill by the lessee of the rector of Stradishall in Suffolk for tithes in kind, two of the defendants pleaded, in bar, an agreement made between them and the plaintiff's lessor, the rector, in June, 1711, that they should retain their tithes for three years, paying so much.

A question was made, whether the above agreement, by parol, being for three years, were good in law, so as to bind the rector and the plaintiff; and, upon debating thereof, many reported cases relating to the same, were cited, and the cause was ordered to stand over to the next day; on which day counsel on both sides were again heard; and after many arguments thereupon, it was ordered to stand further over, the court not being ready to give their opinion thereon; and on the cause coming on again, the court declared, that the agreement made with the above defendants for their tithes, for three years, is good and valid in law; and ordered them to pay accordingly.—[Decree Book.]

H. 1 Geo. Scacc. *Shaw, Bart. v. Styles.* [2 Wood, 4.]

Cambridgeshire and Suffolk, 24th February, 1715.

The lands called Redmore near the parish of Lakenheath, in the county of Suffolk, and Haltree, are within the limits of Bedford Level, and liable to pay tithes to the grantees of the crown of extra-parochial tithes.

THE bill stated, that within the great level of the fens called Bedford Level and Bullingbrook Fen there were great quantities of marsh or fen grounds, overflowed with water, which had been drained by act of parliament, and rendered good arable and pasture ground, upon and from whence great quantities of corn, grain, and hay, had been and were yearly sown, mowed, and reaped, and titheable cattle fed thereon; that great quantities of the said drained grounds were extra-parochial, and the tithes not payable to any church, chapel, or rectory, but were of right payable to the crown; that her late Majesty Queen Anne, by letters-patent, dated the ninth of March, in the eleventh year of her reign, granted all the extra-parochial tithes (except six hundred acres demised to W. Beecher) to the plaintiff for thirty-one years, whereby he was entitled to the said tithes, or to some composition for the same; that the defendants, at the time of the said grant, had been, and still were, owners and occupiers, of divers extra-parochial lands within the said fens, and had cut, carried, and inned, grain and hay to a great value, and had kept cattle and bred lambs, and had other titheable things, without setting out the tithes thereof, or making any compensation for the same; that at the time of the grant, and ever since, they had also occupied seven hundred acres, called Redmore, lying near the parish of Lakenheath, in the county of Suffolk, in Bedford Level, being extra-parochial, and had cut thereon oats, coleseed, and hay, and fed cattle, the tithes whereof amounted to a considerable sum. The bill therefore prayed to have a discovery of the lands they held; the corn, &c. they had carried away; and payment decreed of their said tithes.

The defendants said, that they believed that great quantities of the said fen grounds were extra-parochial; but that they never knew any tithes or duties to have been paid for the same; and they admitted, that her Majesty Queen Anne had made such grant to the plaintiff, as was stated in the bill.

The defendant Rolfe said, that he occupied two hundred and forty acres, called Redmore, and held the same of the defendant Styles; but he denied, that he knew or believed that any part thereof laid in Bedford Level, Bullingbrook Fen, or Munson's Level, or that they were ever overflowed, or drained, or recovered from the waters; but said, that they were part of the lands belonging to the abbot of Fotheringhay, and that they were damaged by the drains of the fen lands. He admitted, that the said lands were not within any parish or chapelry.

The defendant Styles said, that he had not, since the plaintiff's grant, occupied any lands in the level or fens; and he denied that the said parcels of land, or any part thereof, did lie in or were part of the fens drained by any act of parliament, but always were an estate in fee, and heretofore parcel of the possessions of the abbot of Fotheringhay, and as such exempt from the payment of tithes; that the lands, called Redmore, were not only not within any parish or chapelry, but not within any county, hundred, or wapentake belonging to which

which the works of draining do extend, but that Haltree, which the defendant Rolfe occupies, was within the said level or fens.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and on reading a grant of her late Majesty Queen Anne, dated the twenty-fourth of March, in the eleventh year of her reign, and several proofs taken in the cause, and the defendant's answer, and hearing what could be alleged,

The court declared their opinion to be, that the two several parcels of land in the answer mentioned, called Redmore and Haltree, are parcel, and do lie within the said level, called Bedford Level, and are titheable and ought to pay tithes to the plaintiff, by virtue of and under the said grant to him made by her said late Majesty.

It is therefore ordered by the court, that the defendant Rolfe do account with the plaintiff accordingly for his tithes due; and that it be referred to the deputy-remembrancer to take and state the said account.

BURY, B.

PRICE, B.

H. 1 Geo. Scacc. *Webb v. Gosden.* [2 Wood, 5.]

Surry, 23d February, 1715.

THE bill stated, that for seven years the plaintiff had been, and still was, lessee of all the great and predial tithes of Wonerth, in the county of Surry, by lease under Mrs. Duncombe; that the defendant, for the same time, had been owner and occupier of divers parcels of land, meadows and pastures, lying therein, and had wheat, oats, barley, peas, beans, hay, and other titheable matters, and had inned the same; that at the last hay harvest he had positively refused to let the plaintiff have the tithe-hay, according to the custom in the said parish. The bill therefore prayed a discovery of the quantities and values, and satisfaction for the same, and an injunction to stay the defendant's proceedings at law.

The custom of the parish of Wonerth, in the county of Surry, is, that the farmer shall make the mowing into grass cocks, and the rector make it into hay, on the land.

The defendant admitted the plaintiff to be lessee of the tithes in question, and denied, that at the last harvest he had refused to let the plaintiff have his tithe-hay; but that, on the contrary, he had, according to the custom in the parish, made the grass, when cut, into grass cocks, and set out the tithe thereof, and had sent the plaintiff word to come and see it fairly tithed. He also denied positively, that the custom was for the proprietors of the tithes of hay to make the tithes into hay on the lands of the owners or farmers; but that, on the contrary, it was to be taken and carried off the grounds, and to be made afterwards, or to be done with as the parson or lessee of the tithes should think fit.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon reading the several proofs in the cause,

It is ordered by the court, that the defendant do forthwith come to an account for the tithes in question; and it is referred to the deputy to take the said account; and that the injunction be continued until further order of the court.

In pursuance of the said order, the deputy, on the twenty-ninth of November, 1715, made his report, dated the nineteenth instant. Upon reading the said decree and report without exceptions, it is ordered, that the same be and is hereby ratified and confirmed; and that the said defendant do pay to the said plaintiff twenty shillings for the value of his tithe-hay reported due, with his costs to be taxed.

THO. BURY,
RO. PRICE,
JA. MONTAGU.

1715.

H. 1 Geo. Dom. Proc.

Turner v. Smith, Wray, and Watson. [1 Bro. Parl. Ca. 547.]
9 Vin. Abr. 55.

The tithe of a rectory which belonged to a dissolved abbey, was granted by the crown, the parson files his bill against the occupiers, bill dismissed.

BEFORE, and at the time of the dissolution of monasteries, the abbot of Coverham, in the county of York, was seised, in right of his abbey, of the rectory and parish-church of Coverham, and of all glebe-lands, tithes, oblations, obventions, and other profits thereunto belonging; and upon the dissolution, King Henry VIII. by virtue of the statute in that case made, became seised in right of his crown of the said abbey and rectory, and all other the rights and possessions thereof.

Queen Elizabeth, by letters-patent under the great seal, dated the 19th of June, in the 4th year of her reign, granted to Thomas Allen and Thomas Freeman, and their heirs, the said rectory, and all houses, buildings, barns, glebe-lands, tithes, oblations, obventions, profits, commodities, and appurtenances whatsoever thereunto belonging; excepting and reserving only to her Majesty, her heirs and successors, the advowson of the church of Coverham; to hold of her said Majesty, her heirs and successors, as of her manor of East Greenwich, in the county of Kent, by fealty only, in fee socage, and not in *capite*.

Since the dissolution of this abbey, no tithes, either great or small, arising within the parish of Coverham, were ever paid to any incumbent of that parish, but were constantly accounted for to the crown, or its farmers or lessees, until the above grant by Queen Elizabeth; and afterwards, the tithes were answered to the grantees, or those claiming under them; and such owners of the rectory had usually paid to the minister for the time being, who had officiated as curate of the parish, a stipend of £8 *per ann.* and which by other charitable donations was augmented to £20 *per ann.*

In the year 1708, the appellant was presented by Queen Anne to this rectory and vicarage; and inducted thereto accordingly; but soon afterwards, pretending to be entitled to all the tithes of the parish, he summoned the respondents and some other of the inhabitants, before two neighbouring justices of the peace for the north riding of the said county of York, in order to recover certain species of small tithes; but meeting with no success or encouragement in this mode of prosecution, he brought his action at law against one John Geldart, an inhabitant of the parish, for not setting out his tithes; and which action being tried at York summer assizes, 1712, the judge, on producing an authentic copy of the above grant, was fully satisfied that the plaintiff had no title to the said tithes, but that the same belonged to those claiming under that grant; and thereupon the plaintiff was nonsuited.

But still persisting in his claim, he, in Michaelmas term following, exhibited his bill in the court of Exchequer, against the respondents and others, for an account and satisfaction of their tithes; to which bill, they, by their answer, insisted upon several *moduses*, which they had all along paid to the owners of the said rectory; and that what tithes had become due for any other lands held by them respectively, within the said parish, had been paid and satisfied, or compounded for to the said owners, or their farmers, to whom the same of right belonged.

On the hearing of this cause in Trinity term, 1714, the court ordered the plaintiff's bill to stand dismissed; but without costs, in respect of his being a pauper.

From this decree, the plaintiff, however, thought proper to appeal; insisting, that he was both rector and vicar of the parish of Coverham, and as such, was entitled, of common right, to all the tithes, both great and small, arising within the said parish.

On the other side it was contended, that the appellant was only a nominal rector of the parish, and therefore had no pretence or title to the said tithes; neither had he, or any of his predecessors, ever received or enjoyed the same; nor did the appellant, in his said appeal, assign any error in the said decree.

Accordingly, after hearing counsel on this appeal, it was ordered and adjudged,

judged, that the same should be dismissed; and that the dismissal of the appellant's bill, therein complained of, should be affirmed. (1)

(1) By an order of the House, on the 3d of March, 1697, it was ordered, "That no person whatsoever do presume, as counsel, to sign any appeal, to be brought into this House for the future, unless such person hath been of counsel in the same cause, in the courts below, or shall attend as counsel at the bar of this House, when the said appeal shall come on to be heard. And, it is further ordered, that this order shall be added to the roll of standing orders, and affixed on the doors of this House, and of the courts in Westminster Hall."

Notice having been taken at the hearing of the above appeal, that the same was signed by William Hancock and Nathaniel Haggatt, as counsel, who did not attend at the bar to plead for the appellant, nor were they concerned in the cause in the court of Exchequer; and the above standing order being read, it was ordered, that the gentleman usher of the black rod, his deputy or deputies, should forthwith attach the bodies of the said William Hancock and Nathaniel Haggatt, and bring them in safe custody to the bar of the House, to answer for their offence.

Accordingly, on the 23d of March, 1715,

Mr. Hancock having rendered himself into the custody of black rod, was brought to the bar of the House, and there, on his knees, receiving a reprimand from the lord chancellor for his said offence, was discharged out of custody, paying his fees.—But Mr. Haggatt, having made an affidavit, that he was eighty-one years of age and upwards, and lived at Reading in the county of Berks; that he neither signed, or consented to the signing of any such appeal, nor ever heard thereof; nor was ever any ways concerned therein, as counsel or otherwise; nor did he know the said John Turner, the appellant: On reading this affidavit, and also a certificate of James Brewer, of Reading aforesaid, doctor in physic, that he believed the said Nathaniel Haggatt to be very infirm, and incapable of travelling from the place of his abode, without apparent danger of his life; it was, on Monday the ninth of April, 1716, ordered, that the said John Turner should attend the House, on Wednesday then next, in order to be examined touching this matter.—But, I do not find that Turner ever attended, or that any further notice was taken of this last order.

1715.

TURNER

SMITH, WEAT,
AND WATSON.

Tr. 1 Geo. Scacc. *Shapter v. Michell.* [2 Wood, 19.]

Cornwall, 15th July, 1715.

THIS cause came on to be heard on the twenty-third of February last. The scope of the bill was to demand of the defendants the third part of the tithes of hay, and all the tithes of wool, lamb, hops, calves, pigs, agistment of dry and unprofitable cattle, and other small tithes arising, &c. upon the defendant's lands in the parish of St. Gorran, in the county of Cornwall, from Michaelmas, 1710; the plaintiff entitling himself to those tithes as vicar and incumbent of the said parish.

The defendants admitted the plaintiff to be vicar of the said parish, and entitled, according to ancient and immemorial custom, to a pecuniary satisfaction in lieu of his third part of the tithe of hay, and of all the tithes of lambs, hops, and other small tithes; but they insisted that neither the plaintiff nor any of his predecessors were entitled to the said tithes in kind; that they had never compounded with the plaintiff for their said tithes, but that, for several years, they had paid and were still ready to pay to the plaintiff, for his part of their tithe hay, and for the small tithes, according to an ancient custom which prevailed in the said parish, and which had been uniformly agreed to and adopted by the plaintiff and his predecessors, time out of mind; that the said custom was, that every person holding any messuages, lands, tenements, meadows, gardens, hop gardens, or orchards within the parish, of the quantity of one acre or more, and being also seised of the inheritance thereof, or possessed thereof for a term of years determinable upon one life or lives, had, time out of mind, paid yearly to the vicar, by quarterly payments, in lieu of the vicar's part of the tithe hay, and of the tithes of all other titheable matters arising on the same payable to the vicar there, five-pence, in money only, and no more, for every acre of such land, and proportionably for every greater quantity of ground; and that every person holding at rack rent any messuages, lands, tenements, meadows, gardens, hop gardens, or orchards within the said parish, was, by the custom aforesaid, to pay yearly by quarterly payments, to the vicar of the said parish, in lieu of the tithes aforesaid, nine-pence in the pound, and no more, according to the rent payable to the landlord thereof, and proportionably for any less rack rent, than a pound; and also that every person holding a messuage, garden, hop

A custom that all freeholders shall pay five-pence, and all leaseholders nine-pence, an acre quarterly in lieu of tithes, and that those who do not hold more than one acre, shall pay tithes in kind, is unreasonable and void in law.

garden,

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garden, or other ground within the said parish, which was not one acre, was to compound with the vicar for the small tithes thereof, or else to pay him tithes in kind.

The plaintiff replied, the defendant rejoined, and witnesses were examined, and the cause coming on to be heard as aforesaid, the plaintiff's counsel strongly contended that the said pretended usages and customs were unreasonable and not sufficient in law to bar the plaintiff of his tithes in kind.

The court thereupon ordered a case to be made and agreed to by counsel on both sides; which case was accordingly drawn out, as before set forth in the bill and answer *verbatim*, in which it was admitted the other third parts of the tithe hay were payable to the impropiators in kind, and that the question was, whether the *modus*, as set forth in the answer, were good in law, or not?

The cause now came on to be heard upon the said case, and the barons having been attended therewith; and on full debate of the matter and consideration had thereon,

The court were unanimously of opinion and declared, that the customs and *moduses*, set forth in the answers, were unreasonable and contrary to law, and that therefore the plaintiff ought not to be thereby debarred of receiving his tithes demanded by the bill, in kind.

It is thereupon ordered and decreed, that the defendants do satisfy and account with the plaintiff for the third part of the tithe hay, and also for all the tithes of wool, lambs, hops and all other small and minute tithes arising, happening, and renewing, upon their respective lands within the said parish of St. Gorran, during the time in the bill set forth; and it is referred to the deputy-remembrancer to take and report the same.

SAM. DODD,
THO. BURY,

RO. PRICE,
JAS. MONTAGU.

Tr. 1 Geo. Scacc. *Babbage v. Rookewood*. [2 Wood, 19.]

Suffolk, 20th June, 1715.

A custom that the parson should take the underwood growing upon one acre in lieu of the tithes of four woods, held good.

THE bill stated, that R. Rushbrooke, clerk, rector of Staningfield, in the county of Suffolk, by deed, dated the twenty-eighth of March, 1711, demised to the plaintiff the parsonage-house, glebe and tithes for twenty-one years, in case he should so long live; that, by virtue thereof, the plaintiff became entitled to have and enjoy the said glebe and tithes; that the defendant had in his possession one acre of wood ground, being the glebe belonging to the said rectory, and had taken wood growing thereon; that the said defendant also occupied sixty acres of ploughed ground, and several acres of meadow and pasture, and had carried away the corn and grain growing thereon, without setting out the tithes, either for the said arable lands or for his meadow and pasture grounds; that in the last two years he had cut twenty acres of wood in Rycroft Wood, within the said parish, and had converted the same to his own use, on a pretence that there was a *modus* payable for the same in lieu of the tithes.

The defendant admitted that Rushbrooke might be rector of the said parish, and that he had made such lease as in the bill was mentioned, and said, that there was an acre of wood, parcel of or adjoining to Haywood, which was, and for all his memory had been, called the 'tithe acre,' or 'composition acre,' and that he believed the underwood thereof, for all the time in the bill mentioned, had been cut and taken by the rectors of the said parish; but he denied that the said acre ever had been or was glebe, or that the soil or timber ever was part of the rectory or glebe, and insisted, that the same belonged to him and his ancestors; that, as owner of the soil, he had taken and felled the timber; and that the underwood growing thereon belonged to the rector or his lessee, in lieu of tithe-underwood for the rest of the wood, called Haywood, and of the underwood growing upon Hussey Wood, Hall Wood, and Rycroft Wood, for which he insisted no tithes ought to be paid, and that the underwood of the said acre always had been and was taken in lieu of tithes for the rest of the said woods. He confessed, that in the said years, he had used

several acres of arable, meadow, and pasture ground, and had cut divers quantities of corn and grass, and had other titheable matters and things for which no tithes were set out or ought to be paid; for that by agreement, dated the fourth of August, 1696, the said Rushbrooke had let to him to farm all the tithes of the farm called Coldham Hall in Staningfield, for so many years as he should keep the said farm in his own hands, for six pounds a-year; that he still held the same, and was willing to pay the said monies to Rushbrooke, or his lessee, for the said four years pursuant to the said agreement. He denied, that he ever pretended that there was any *modus* for tithing within the said parish, other than for the aforesaid four woods, and, insisting on the said agreement, denied that he had any other lands in his possession than Coldham Hall Farm, nor any other titheable matters than those which he had set forth in his answer. He confessed that he had cut about four acres of underwood in each year, in part of Rycroft Wood, which underwood he insisted did not grow in the said parish, but in the parish of Hawstead, the tithes of which he had paid to the parson there.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon reading the lease under which he claimed, made to the plaintiff as in the bill stated, and the agreement from Rushbrooke to the defendant, for the payment of six pounds a-year, which sum had been tendered by the defendant and refused to be received by the plaintiff, and after full debate of the matter;

It is ordered by the court, that the bill be dismissed with costs, to be taxed by the deputy remembrancer of the court, to whom it is hereby referred to tax the same, the defendant thereout allowing to the plaintiff the sum of six pounds a-year, for the tithes of the said farm, for the two years before filing the bill, according to the said agreement.

SAM. DODD,
THO. BURY,

RO. PRICE,
JA. MONTAGUE.

Tr. 1 Geo. Scacc.

Hodgson v. Smith. [2 Wood, 21. MS. Hargr. No. 70. Bunb. 279.]
2 Gw. 743.

Kent, 14th July, 1715.

THE bill stated, that the governors of Sir John Hoskin's hospital, by indenture, dated the twenty-sixth of May, 1710, demised, granted, and to farm let to the plaintiff all their tithes of corn, grain, hay, fother, hemp, lambs, wool, pigs, together with all manner of other tithes of the said governors in right of the hospital, arising in Wellen, otherwise Welling, and Wickham, otherwise East Wickham, in the county of Kent, to hold to him, his executors and administrators, for forty years; that, by virtue of the said lease, the plaintiff became entitled to all the said tithes, and to all manner of other tithes of the said governors in right of their said hospital arising in Wellen otherwise Wickham aforesaid; that the defendants had been severally occupiers of arable land for four years past, and had ploughed and sowed the same with barley, oats, tares, &c. and carried away the same without setting out the tithes thereof; that they also had ewes and other sheep, which had lambs and wool, and several other titheable matters and things. The bill therefore prayed to be relieved in the premises.

The defendant stated, that at Michaelmas, 1713, he held a farm and lands, part of which lay within the chapelry of Wickham, and the rest in the parish of Plumstead; that by reason of the scarcity of meadow in Wickham, the inhabitants there used to sow tares, and cut the same green for fother, never intending the same for seed, and that he sowed some tares for that use, and fothered his cattle therewith; that the tithes of all hay, clover, and such fother grass, belongs of right to the vicar of Plumstead, who supplies the cure of the chapel of Wickham, to whose vicarage the chapel belongs, and the tithes of hay, clover, grass, wool, lambs, and all other small tithes whatsoever arising within the said chapelry of East Wickham, and parish of Plumstead, did

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ROCKWOOD.

Tithes of tares cut green and used for fodder for cattle decreed.
By three of the barons, contra PRICE, tares, whether green or ripe, are a great tithe.

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did belong to, and time out of mind had been held by the vicars there; and he set forth all the small tithes he had within the said chapelry, which he said he had paid to the vicar, and that what corn tithes he had the plaintiff had taken, excepting only the tithes of the said tares.

The defendant Webb set forth that the present vicar of Plumstead let all the vicarial tithes of East Wickham to the parishioners and inhabitants there, who usually sowed peas and tares for fother, which they cut green for their cattle, and that the said vicar claimed and had always enjoyed the tithes of all hay, fother, and all other tithes, except corn tithes, arising within the said chapelry; that the lessees of the hospital always had the great tithes in the chapelry, but not the tithes of hay and clover, and that he had agreed with the vicar for all the tithe demanded by the bill, for all the tithes of hay, grass, clover, and all other tithes except corn; and he set forth the titheable matters he had.

The defendants insisted that East Wickham was a chapelry annexed to the parish of Plumstead, and that the other tithes belonged to the vicar of the said parish, with whom they had compounded, and not to the plaintiff, or to the governors of the hospital, or to their lessees.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and the cause came on to be heard on the fourteenth day of June last; and upon reading the said lease, and the proofs in the cause, it was then ordered that the cause should stand over, that, in the mean time, the court might consider, whether the tithes of tares, cut green for fother, did belong to the plaintiff, or to the vicar of Plumstead; and the cause now coming on this day,

The court declared their opinion, that the tithes of the defendant's said tares, cut green and used for fother, belonged to the plaintiff, and not to the vicar of Plumstead.

It is thereupon ordered and decreed, that the defendants shall account with and satisfy the plaintiff for the value of the tithes of the tares by them cut green and used for fother, which the defendants respectively had within Welling and East Wickham, in 1714, with costs, except for the examination relating to the small tithes, for which the defendants are to have costs, and it is hereby referred to the deputy-remembrancer to take the said account, and to tax the said costs.

Pursuant to which order the deputy-remembrancer made his report, dated the fifteenth of December last, and upon reading the said order and report, there not being any exceptions taken thereto, the court ratified and confirmed the same, and ordered that the defendant Smith do forthwith pay to the plaintiff the two pounds five shillings, so reported due for the value of nine acres of tares by him cut green in 1714, and that the defendant Webb do pay two shillings and six-pence for his tithes of an acre and an half of tares cut green as aforesaid.—[*Decree Book.*]

It was resolved by the three barons, *contra* PRICE, that tares, whether green or ripe, are a great tithe, and belonged to the rector.—[*Bunbury.*]

John Hodgson, Lessee of the Governors of Sir John Hopkin's Hospital, v. Smith.

Plaintiff as impropiator demands tithes of corn, grain, hay, fother, &c. in Welling in Kent. Defendant sowed tares and cut them green and used them as fother or hay amongst his cattle, and insisted that the tithe of hay, clover, and such fother grass did of right belong to the vicar.

The cause was heard the twenty-third of June, when adjourned over to the sittings, and that in the mean time, the court would consider whether the tithes of tares cut green for fother, did belong to the plaintiff or the vicar. Fourteenth of July, the court declared their opinion that the tithes of defendant's tares cut green and used for fother did belong to the plaintiff and not to the vicar, and accordingly directed an account.

H. 1715. An account having been taken, report confirmed, and payment decreed. The court declaring that it was their opinion that the tithes of the defendant's tares, cut green and used for fother, did belong to the plaintiff, who

who was entitled to the corn tithes, and not to the vicar who was entitled to the hay tithe.—[*Hargrave.*] (1)

(1) This is copied from a paper inserted at the end of No. 70. in the *Hargrave* collection, and is anonymous. *Rayner*, however, gives it as from *Dodd's MSS.*

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&
SMITH.

T. 1 Geo. Scacc. *Spooner v. Head.* [2 Wood, 26.]

Suffolk, 16th July, 1715.

THE bill stated, that the plaintiff, for nineteen years past, had been rector of the parish of Aldham, in the county of Suffolk; and was entitled to the tithes therein, or to some satisfaction for the same; that the defendants had been for several years past inhabitants and had titheable things therein; that all the defendants occupied meadow and pasture, and held several coppice woods and wood grounds, and had yearly felled great quantities of titheable underwood, and had kept several dry and unprofitable cattle, and made great profit of them, and had other titheable things of considerable value, but did not set forth their tithes, pretending some *modus*. The bill therefore prayed, they might set forth what woods, underwoods, coppices, and land, they had; the value thereof; the wood they had cut; the quantities, and values; and make satisfaction for the same.

A custom that the rector of Aldham, in Suffolk, is to take all the wood growing on a piece of woodland, containing an acre and a half, in lieu of the tithes of wood felled on ancient wood grounds in the said parish, is good.

The defendants confessed the plaintiff to be rector as aforesaid; and they set forth the quantities and values of the woods they held and had felled; and said, that they had compounded with the plaintiff's lessee for the tithes of them, and other tithes due.

The defendant Head said, that the woods he occupied had been anciently, and time out of mind, wood ground; and that no tithes were payable for the same; for that there was, and had been, a certain close of wood ground containing one acre and a half, parcel of the manor of Aldham lying in Aldham parish, next to a certain great wood, called Smallbrook Wood, towards the east on the one part, and a close of pasture, called Park Field, towards the south, on the other part; and that the plaintiff, and all his predecessors, rectors of the said parish, time out of mind, had been accustomed to cut down in the said close of wood all the wood growing there, as often as they pleased, in full satisfaction and discharge of all tithes of wood growing upon the ancient wood grounds within the said parish.

The plaintiff replied, and thereby waived all the rest of his demands, save only a satisfaction for the values of the tithes of wood.

The defendants rejoined, and witnesses were examined on both sides; and upon reading a copy of a record out of the common pleas, which was proved in court pursuant to order; and on hearing what could be alleged on both sides;

The court directed an issue to try, whether the acre and a half of woodland mentioned by the defendant Head, in his answer to have been had and taken in full satisfaction and discharge of all tithes of wood growing upon the ancient wood grounds in the said parish, be in lieu and satisfaction of all tithe-wood within the said parish of Aldham, or not?

On the twelfth of February, 1716, the said issue was ordered to be taken *pro confesso*, unless cause were shewn to the contrary; and now on the first of July, 1717, the cause coming on for further directions.

The court, upon reading the said orders, and no counsel attending for the plaintiff, ordered the bill to be dismissed, with costs, to be taxed by the deputy for the defendants.

M. 2 Geo. Scacc. *Sworder v. Bush.* [2 Wood, 29.]

Hertfordshire, 14th November, 1715.

THE bill stated, that the defendant, for one year past, had ploughed and sowed, in a common field called Tassfield, within the rectory and parish of Little Hadham, in the county of Hertford, twenty acres of land, with wheat,

Where it appeared from the bill of the plaintiff that he claimed tithes

barley, under a parol lease, the bill was dismissed, with costs.

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barley, and other grain, and reaped and carried away the same, without setting out the tithes thereof, or making satisfaction to the plaintiffs for the same.

The plaintiffs claimed the tithes under a parol lease thereof made to them by W. Stanley, D.D. then rector of the parish.

The defendant denied that he had ploughed any more ground in Tassfield than one acre and a half, which he sowed with wheat, and one acre more in an enclosure adjoining to Tassfield, which he had likewise sowed with wheat; and he insisted, that he had caused the full tithe of all the said wheat to be duly set out and left in the field; and that he had given notice to the plaintiff to fetch the same away; and that he ought not to make satisfaction for what was lost by the plaintiff's own default.

The plaintiffs replied; the defendant rejoined; and witnesses were examined on both sides; and the cause was set down, at the defendant's request, to be heard this day, when

The defendant's counsel insisted, that it appeared of the plaintiffs' own shewing, by their bill, that they claim by a parol lease; which, being in a case of tithes, is void in law; so that the plaintiffs cannot be relieved upon their bill.

And, after debate of the matter,

It is ordered and adjudged by the court, that the bill be dismissed with costs.

TWO. BURY, RO. PRICE, J. MONTAGUE.

M. 2 Geo. Scacc. *Johnson v. Lawson*. [2 Wood, 31.]

Northumberland, 5th December, 1715.

Tithes decreed where the defendants alleged a custom that the corn tithes were to be lodged by the farmers in their barns, and there threshed, &c. and the straw left for their use.

THE bill stated, that the Bishop of Carlisle, being seised of a moiety of the corn tithes, in the parish of St. Nicholas, in Newcastle-upon-Tyne, did, by lease dated the twenty-fifth of July, 1712, demise the same to the plaintiff, J. Johnson, for twenty-one years, at ten guineas a-year; that the dean and chapter of Carlisle, being seised of the other moiety of the said tithes, did, by lease dated the twenty-third of the said July, demise the same to the plaintiff, J. Johnson, for the like term, at eleven pounds a-year; that the said J. Johnson held and enjoyed the said tithes till July, 1714, when, for a valuable consideration, he conveyed the tithes of the township of Cramlington, part of the said parish, to the other plaintiffs, whereby they also became entitled to, and ought to have had and received, the corn tithes arising in the said township; that the defendants, in 1714, held several lands and tenements within the said township, on which they had corn and grain, the tithes of which they ought to have paid in kind, or made some satisfaction for the same, but which they refused to do under several pretences. The bill, therefore, prayed an account and satisfaction for the said tithes, and that the plaintiffs might have a way to carry their tithes off the lands.

The defendants, Hall and others, by their answer confessed, that during the said year they, as tenants to the defendant Lawson, held and occupied arable land in the said township, on which they had growing corn and grain, the tithes of which they believed the plaintiffs were entitled to in kind, and which they said they had fully set forth. And all the defendants confessed, that they had refused to let the plaintiff have a way to carry the same from off the lands, it being the custom within the said township of Cramlington, that the proprietors or farmers of the said corn tithes in Cramlington, on notice given to the occupiers of lands there, at proper times of tithing, did tithe the several sorts of corn and grain then standing; and when it was seasonable to lead away the same, the owner or tenant of the land from whence they were to be taken, provided one, or as many draughts as were necessary, and a man to each draught; and the owners or farmers of the tithes provided another man to each draught, which they loaded with the tithe corn, and which was led to the yard or garth of the tenant of the lands whence it was taken, and there was inned and stacked, and the tenant of the land covered it with his own straw; and that when it was to be threshed, the owner or farmer of the tithes had the use of the tenant's barn to thresh it in, and of his winding cloths and sieves

sieves for dressing it, and the straw was left to the said tenant of the lands; who claimed it as his due, and enjoyed it accordingly; and they insisted that the corn tithes within the said township were never paid in any other manner than according to the said custom.

The plaintiffs replied; the defendants rejoined; and witnesses were examined on both sides; and upon reading the defendants' answer,

It is ordered by the court, that the defendants do account with and pay to the plaintiffs for the value of the tithe-corn and grain which grew on their lands in the said township of Cramlington, in 1714; which account is to be taken by the deputy-remembrancer, who is to report the same.

And it is further ordered, that the defendants do set out and appoint a good and convenient way for the said plaintiffs, and the owners and farmers for the time being, of the corn-tithes within the said township, their servants and agents to fetch and carry away the tithes of the corn and grain which shall for the future arise and grow due from and upon their said lands within the said township of Cramlington.

In pursuance of the said order, the deputy-remembrancer made his report, dated the eighth day of March last; and upon reading the said order and report without exceptions,

It is ordered by the court, on the seventh of May, 1716, that the said report be ratified and confirmed, and that the said defendants do severally pay to the said plaintiff the several sums so reported due.

THO. BURY, RO. PRICE, JA. MONTAGUE.

M. 2 Geo. Scacc. *Newton v. Bird*. [2 Wood, 33.]

Surry, 6th December, 1715.

THE plaintiff Newton and his wife filed their bill against John Bird, clerk, vicar of Riegate, stating, that Edward the Sixth, in right of his crown, and by virtue of one or more acts of parliament for the dissolution of religious houses and the vesting of their estates in the Crown, was seised in fee of and in the rectory and church of Riegate, in the county of Surry, and the advowson, donation, and right of patronage of the vicarage of the said church, with the appurtenances, late belonging to the monastery or priory of Saint Mary Overy, in the said county; and that he, by his letters-patent, dated the seventeenth of December, in the sixth year of his reign, in consideration of four hundred and fifty-eight pounds, four shillings, paid to Sir Edward Peckham, to his Majesty's use, by J. Skinner, did grant to J. Skinner the said rectory and church of Riegate, and the advowson and right of patronage of the said vicarage, with the appurtenances, and also all the tithes of corn, grain, wood, hay, and all other tithes, of whatsoever sort, kind, or nature, growing, &c. in the parish, fields, and hamlets of Riegate, and elsewhere, in the said county, to the said rectory and church thencefore belonging, or accepted or reputed as part, parcel, or member thereof, in as large and ample a manner as the last or any former prior or priors of St. Mary Overy had held and enjoyed the same, to hold to him, his heirs and assigns for ever; that, by virtue thereof, the said J. Skinner entered, and was seised of the said rectory and premises, and the same, by several descents and mesne conveyances, came to and were vested in Roger James, who became seised thereof; that he and his tenants enjoyed the said messuages and lands so settled, tithe free, and also took and enjoyed all the tithes of corn, grain, hay, peas, beans, hops, flax, turnips, and other roots, and all other tithes arising on that part of the said parish so vested in him; that after his death, the said rectory, tithes, and premises, became and were legally vested in the plaintiffs, who ought to enjoy the same tithe free; and not pay any tithes to the said vicar, but ought to receive the tithes appertaining to the said rectory, as their predecessors, the former owners of the said rectory, had done; that the defendant was, about five years ago, presented to the said vicarage, and had demanded from the landholders of the said parish,

Where the rector was entitled generally to tithes of corn, grain, hay, peas and beans, it was held that the vicar was entitled to tithes of peas and beans gathered green and sold in the pods, and of corn, grain, peas and beans in gardens and orchards, and to the hay of part of the lands in the parish, which the vicar had always received and enjoyed.

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and from the several tenants and occupiers of the messuages and lands belonging to the said rectory, the tithe or tenth part of their corn, grain, and hay, and their small tithes; but that the same did of right belong to the rectory. The bill therefore prayed, that the defendant might set forth what tithes and titheable matters were by him pretended to belong to the vicarage, and what tithes and dues, belonging to the rectory, he had received; and that the plaintiffs might be quieted in the enjoyment of their just rights.

The defendant said, that he believed that there were such letters-patent of the rectory, as mentioned in the bill; but to whom the said rectory was granted he knew not; but that Roger James the elder, by mesne conveyances, descent, or otherwise, was legally entitled to, and possessed of the said rectory and premises; and that he and his predecessors, owners of the said rectory, did and ought to take and enjoy the tithes of all corn, grain, hay, peas, and beans arising in the said parish belonging to the rectory, except of such peas and beans as were podded and gathered from the stems and stalks by gardeners and others, and by them vended and uttered green in the pods, and excepting such corn, grain, peas, and beans, as were planted in gardens and orchards, which always belonged to and were received by the vicars, and except the tithe of hay growing on lands in the west end of the parish, called the Moores, which had been always enjoyed by the vicar as his right, and also the tithe of hay and grass growing on a close of about two acres, lying near a farm called Colley; all which excepted tithes he said he had received since he became vicar, and insisted on his right to the same. He also stated an agreement between his predecessors and the improprators for the tithe of hops, and that in lieu thereof they had yielded and allowed to him the duties for burials in the chancel, and also forty shillings a year for all offerings and dues; and denied that it was binding upon him; and he insisted upon the tithes of hops, wool, flax, turnips, all other roots, herbage, agistment of unprofitable cattle, and all other vicarial, small, and predial tithes, profits, commodities, and advantages, as of right belonging to the vicar, and payable to him. He also insisted, that the plaintiff's messuages and lands belonging to the rectory, when in the occupation of tenants or lessees, were not except from, but liable to, the payment of tithes; and, claiming right thereto, averred, that they had not been paid to him since he had been vicar.

The plaintiffs replied; the defendant rejoined; and witnesses were examined; and upon reading the proofs; the endowment of the vicarage of Riegate, made in the twenty-sixth year of Henry the Eighth; the agreement made between the plaintiff's ancestor and R. James and A. Cranston the late vicar; and on long debate of the matter by counsel on both sides,

The court declared, that the tithes of peas and beans set and sown in the fields belonged to the plaintiffs, as owners of the rectory.

As to the right to the tithes of turnips, carrots, and other roots sown in the fields, the court directed a trial at law to be brought by the plaintiffs against the defendant, wherein the issue to be tried should be, "Whether the tithes of turnips, carrots, and other roots sown in the fields, and the tithe of hops, do belong to the vicar of Riegate, or not?"

And as to the tithe of the lands called the Moores, alleged to have been enjoyed by the vicars of the parish, and of the close containing about two acres near Colley Farm, and other the matters in the bill mentioned, the bill was dismissed.

But the consideration of costs was reserved to the court till the further bearing of the cause upon the equity reserved.

On the fourteenth of June, 1716, the decree of the sixth of December, 1715, and the *postea* was read, and the bill as to the tithe of hops was dismissed; but as to all the other things, the tithes of peas and beans sown in the fields and gathered green or otherwise having been before decreed, the court declared that the tithes belonged to the rector, and ordered the same accordingly; but without costs. The defendant to have his costs for the trial at law respecting the tithes of hops.

H. 2 Geo. Scacc. *Swatman v. Bonner.* [2 Wood, 35.]

1716.

Suffolk, 6th February, 1715.

THE bill stated, that the plaintiff, for four years past, had been farmer or occupier of the parsonage or impropriated vicarage and tithes of the several parishes within the borough of Dunwich, in the county of Suffolk, and the liberties and titheable places thereof, by an agreement made with Sir R. Kemp, Bart. the present impropiator thereof, at eighty pounds a year; that he was thereby obliged to provide an able minister, and to allow him thirteen pounds a year to perform all divine services there; and that therefore he became entitled to take of the inhabitants all and all manner of tithes, great and small, payable to the impropiator; that the defendants, during the said term, occupied and farmed divers messuages, lands, tenements, meadows, and pasture grounds, within the borough, from whence they derived great quantities of corn, turnips, hay, hemp, flax, and other matters, for which tithes ought to have been paid; that they had fed and brought up cows, calves, sheep, lambs, pigs, geese, and other fowls, the tithes whereof were due to the plaintiff, but which they had refused to set out, or to make any satisfaction for the same. The bill therefore prayed a discovery of the quantities, qualities, and values, and a recompense for the same.

A custom alleged to pay 5s. for each boat, in lieu of tithe of all fish caught therein.

The defendant Bonner said, it might be true that the plaintiff was farmer or occupier of the said tithes by agreement, and entitled to the tithes as stated in the bill; and he stated, that he had a house and about a rood of ground in the said town of three pounds, ten shillings a year, and had paid all tithes due, to the year 1712, for which he had the plaintiff's receipts to the end of the year 1711; that in the year 1712 he had used two fishing-boats, whereby he caught several lasts of sprats and some of white herrings; and that there was a custom to pay to the impropiator five shillings a boat, in lieu of all tithe fish caught therein, which tithe he had paid to the plaintiff for the whole of the year 1712; that in the said year he had growing in the said borough four acres of turnips, (two whereof he sold at forty shillings,) which were not drawn, but fed upon the ground with milch cattle, and the other two acres he fed with his own milch cattle; for which turnips the plaintiff demanded eight shillings, and also four-pence for Easter offerings, which he was ready to pay to him; and he denied, that he had any titheable matters, or any cattle or other things fed in the Town Marsh for or in respect of any messuages, lands, or tenements in Dunwich aforesaid for the said year, other than already set forth.

The plaintiff replied; the defendant rejoined; and several witnesses were examined on the part of the plaintiff; and upon opening the bill, and reading an affidavit of the service of the *subpœna* to hear judgment, and on reading the answer, and no counsel appearing for the defendant,

It is ordered by the court, that the defendant do account with the plaintiff for the value of all manner of great and small tithes by him had and arising within the said borough and the titheable places thereof, and for all fish by him had and taken during the time in the bill mentioned; and it is referred to the deputy-remembrancer to take the account, unless cause be shewn to the contrary; the said defendant first paying five pounds costs before he can be heard.

H. 2 Geo. Scacc.

Benson v. Watkins. [Bunb. 10.] 2 Wood, 56. 2 Gw. 612.

BILL by an impropriate rector for tithes; defendant insists upon several *modus*es, viz. five shillings per acre for wheat and rye; four shillings per acre for summer corn; three shillings per acre for meadow, &c. The court disallowed these *modus*es, and decreed the defendant to account, they being too rank, and too near the value of the land, especially when these *modus*es were supposed to commence when the land was at a much less value, and the money

Moduses of 5s. per acre for winter corn, and 4s. per acre for summer corn, and 3s. per acre for meadow, at too rank.

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BENSON

v.

WATKINS.

A *modus* is time out of mind, and a composition only a late agreement.

at a much greater. It was said in this case, that the only difference between a *modus* and a composition is, that the first is time out of mind, and the last only a late agreement. All the garden ground in England shall pay tithes for different crops; turnips, when they are pulled ought to pay tithes, though never so often sowed, and though upon the same land. Tithes of aftermath shall be paid, but not tithes of after-pasture, unless by custom. But *quære de les points darrein*. (1)

(1) Mr. Gwillim observes that it does not appear from the Decree Book, that these two points could have been agitated.

Tr. 2 Geo. Scacc.

Ayde v. Flower. [Bunb. 7. 2 Wood, 76.] 2 Gw. 619.

It was objected that a vicar ought to shew an endowment of tithe of herbage, or that he had usually received it; but as an endowment of all small tithes was afterwards produced, the point was not determined.

No tithe is due for the herbage of unprofitable cattle fed upon land mowed, of which tithe has been paid. The *Valor Beneficiorum* taken in the reign of Henry VIII. is not conclusive.

An objection, that a witness has the inheritance of lands in the parish (in the hands of a tenant) only goes to his credit.

A VICAR preferred his bill for tithe-herbage and small tithes; it was objected for the defendant, that tithes for the depasturing of barren and unprofitable cattle may be due of common right, but not to the vicar; therefore it lies upon him to shew that he was endowed of it, or at least that it had been usually received by the vicar, which would be an evidence of an endowment: as to the tithe of meadow ground that has been mowed, of which the vicar has had the tithe, and after it is depastured by unprofitable cattle, there is no tithe due for that. Note; The copy of the *Valor Beneficiorum* (which was taken by commission in the reign of Henry VIII.) was produced, and it did not appear that this demand of the plaintiff was mentioned there among the other small tithes. Lord Chief Baron BURY and MOUNTAGUE *contra* PRICE, that the bill should be dismissed.

N. B. It was objected to an evidence, that he had the inheritance of lands within the parish, (though he was not an inhabitant, and the lands were in the hands of a tenant,) and therefore his evidence would be to discharge the inheritance of the lands of the tithes; which would be such an advantage to him as to render him not indifferent: but notwithstanding this objection, which goes only to the credit of a witness, he was admitted to be read.

Mr. FORTESCUE ALAND being made a baron, this cause was reheard July 17, 1717, and then the plaintiff produced the endowment of the vicar by the dean and chapter of York, whereby the vicar is endowed *de omnibus et omnimodis minutis decimis quibuscunque*: and as to the *Valor Beneficiorum*, it was said that there were other tithes not mentioned in that book, which the defendants themselves admit belonged to the vicar; and by the opinion of the four barons, the defendants were decreed to account with costs.—[*Bunbury*.]

THE bill stated, that ever since June, 1710, the plaintiff had been vicar of Sturton, in the county of Nottingham, and was entitled to all small tithes, and particularly to the tithes of barren, dry, and unprofitable cattle, bred, fed, or depastured within the said parish, and to all monies payable for, or in respect, or in lieu thereof, or for or in respect of the herbage by them eaten; that the defendant during the said time had occupied several acres of pasture and meadow ground, in inclosures, the yearly pasturage tithes of which were worth ten pounds, and that he had stocked and enjoyed a common of pasture for forty great beasts in two large pastures, called Cow Pasture and Horse Pasture, the pasturage of which was worth ten pounds, and the tithe twenty shillings; that he had also eighty beast gates in two great meadows or pasture grounds, called the Upper Ing and the Out Ing, each of which gates was worth five shillings a year; that the whole was worth twenty pounds, and the pasturage thereof forty shillings; that he also did yearly keep and depasture in the said closes, commons and gates, a number of barren, dry and unprofitable cattle, viz. yearling calves, two year old calves, three year old barren heifers, three year old steers, oxen, bullocks and barren fattened cows, and also colts, horses, mares and

and geldings, not bred or kept either for the plough or the pail, or used or employed for those purposes within the said parish, the tithes whereof were worth eighteen pounds, and for which the plaintiff ought to have been answered two shillings in the pound, according to the yearly value of the said closes and gates, or at least of the grass eaten by such unprofitable cattle; but that the defendant conceals, and refuses to pay for the same. The bill therefore prayed that the defendant might account for the tithes aforesaid for four years, or make him some recompense for the same.

The defendant admitted the plaintiff to be vicar of Sturton; and said that there was an augmentation of forty pounds a year reserved and made payable to the vicar by the dean and chapter of York's lease of the parsonage and tithes of Sturton aforesaid, by means whereof the plaintiff had a sufficient maintenance; that he knew not whether the vicar was endowed with, or entitled to, all small tithes; but he admitted that he had, during his time, received the tithes of lamb and wool, and other small tithes; one penny for every strop milch cow; two-pence for every new bared milch cow with the calf; and one penny for every foal. He denied that the vicars of the said parish had ever received any manner of tithe, *modus* or satisfaction for any barren, dry and unprofitable cattle, or of the herbage by them eaten, save only what the present vicar had, within three years last past, prevailed on some of the parishioners to pay. He owned that he had been tenant, for the four years in the bill mentioned, of twelve closes of meadow and pasture, two-thirds whereof, one year with another, had been mowed, and the other third depastured; that the cow pasture and horse pasture are commons belonging to the houses in the said parish, for all manner of cattle *sans nombre*, at all time in the year, excepting between May day and Midsummer day, in which time the cow pasture is kept only for horned great cattle; and he insisted that there never had been any tithe paid for the herbage of unprofitable cattle, save as above; and that the small tithes of lamb and wool, &c. had been usually paid to the vicar in full satisfaction of all tithes. He averred that the Upper Ing and the Out Ing are yearly mowed for hay, and the tithe paid in kind to the lessee of the parsonage; that after the hay is got it is eaten in common by all the inhabitants, having common right, whether they have meadow there or not; that he rents thirty-six acres therein; and he insisted that he ought not to pay any tithes for the pasturage of the aftermath, as that would be paying two distinct tithes in one year for one and the same thing. He set forth the quantity of land he held, and the number of cattle he possessed; but said that he knew not the exact value of them for each year, but believed that the number of his profitable cattle exceeded the number of his unprofitable cattle, but that they had been so promiscuously kept he could not compute the value of the grass and herbage eaten by his unprofitable cattle; but he said that they had been more frequently kept with hay and winter food than depastured on pasture ground; and he insisted that as there never had been any such tithe demanded till within three years past, it ought not of right to be paid.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and on reading the answer, and the counterpart of the lease from the dean and chapter of York, impropiators of Sturton, dated the second of December, in the thirty-second year of Charles the Second; also an ancient book from the register of the dean and chapter of York of the first presentation and endowment to the vicarage of Sturton in the Clay, in which presentation and endowment the said town of Sturton is called by the name of Straton, otherwise Stretton in the Clay, and which is dated the thirtieth of June, 1460; also a book from the first fruits office, entitled *Valor Beneficium*; and also on reading several depositions taken in the cause; and on full debate of the matter;

The court declared that tithes in kind are due, and ought to be paid to the vicar of Sturton, for all dry, barren and unprofitable cattle, bred, fed or depastured within the said parish of Sturton, other than on the after-grass of such grounds within the said parish as are occupied by persons inhabiting within the said parish, and annually laid up for hay, and whereof tithe-hay in kind

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AYDE

v.

FLOWER.

is or ought to be paid to the impropiators of Sturton aforesaid, their lessee or under-tenants.

It is thereupon ordered by the court, that the defendant shall account with, and pay to, the plaintiff, all the tithes due and in arrear for his dry, barren and unprofitable cattle, bred, fed or depastured upon any grounds within the parish, other than in the aftermath or aftergrass of such grounds which he has annually meadowed there, and whereof tithe-hay has, or ought to have been, paid in kind to the impropiators or their tenants for the time demanded by the bill; and it is referred to the deputy-remembrancer to take the said account. And it is further ordered, that the defendant shall pay to the plaintiff his costs of this suit, to be taxed by the said deputy-remembrancer.

Pursuant to which order the said deputy made his report, dated the sixth of May instant; and on reading the decree and report, and no exceptions being filed thereto,

It is ordered by the court, on the fifteenth of May, 1718, that the report be, and the same is hereby, ratified and confirmed; and that the defendant do forthwith pay to the said plaintiff the sum of four pounds, so reported due for the tithes of dry, barren and unprofitable cattle, bred, fed or depastured upon the grounds within the said parish of Sturton for the time demanded by the bill, with his subsequent costs, to be taxed by the said deputy-remembrancer.

THE COURT FULL.—[*Decree Book.*]

Tr. 2 Geo. Scacc. *Hucks v. Phelps.* [Bunb. 8.]

If a *modus* be pleaded in the spiritual court, and refused, a prohibition goes. A man may libel there for a *modus*,

IT was said, that if a man libel in the spiritual court for tithes in kind, and the defendant in that court plead a *modus*, and the spiritual court refuse that plea, a prohibition shall go: a man may libel below for a *modus*, or for tithes due by custom; but if the *modus* or custom be denied, the spiritual court cannot proceed.

there for a *modus*, or for tithes due by custom; but if the *modus* or custom be denied, prohibition will lie.

Tr. 2 Geo. Scacc. *Panchard v. Free.* [2 Wood, 43.]

Suffolk, 6th July, 1716.

The defendant standing out all process, the bill being read three times, it is taken *pro confesso*.

THE plaintiff, as rector of the parish and parish-church of Hasketon, in the county of Suffolk, stated, that for thirty years past he had been rector of the said parish, and entitled to receive all the great and small tithes, and all the offerings and duties arising within the places belonging to the said parish; that by virtue of a lease from E. Jenny, impropiator of the tithes, both great and small, arising from the lands belonging to the manor of Thorpe Hall, whether in the said parish of Hasketon, or in any other adjacent parish, he had a good right to take all the tithes arising from the lands and places within the said manor; that the defendant, about Michaelmas, 1698, entered on and occupied, as he then did, certain lands holden of the said manor, which of right ought to pay, and beyond time memorial had paid, the tithes, either in specie or by agreement, to such persons as were the lessees of the said improprated tithes; that the defendant, since such his occupation of the said lands, renewed several sorts of grain, and depastured the same with cows and horses and other cattle, for which he ought to have paid yearly the tithes thereof to the plaintiff; that the defendant, in the year 1707, entered upon and occupied certain arable and pasture lands and meadows, all which said places were lying within the said parish and the titheable places thereof; that during the said time he had yearly growing wheat, barley, and other sorts of grain, and had turnips, which he pulled and carried away to his cattle, and had grass, which he made into hay, and had several other species of tithes of great value, which ought to have been paid to the plaintiff in kind, or some rate or composition for the same, but which he refused to do. The bill therefore prayed that the plain-

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tiff might have a full discovery, and an account of all the defendant's said tithes.

The plaintiff prayed process against the defendant; but he stood out all process of contempt; and the bill being read to him a third time, he refused to appear, and to name an attorney; and whereas, by an order of court made the twenty-first of May, 1715, it was ordered that the said bill should be taken *pro confesso*; and that it should be referred to the deputy to take the account.

In pursuance of which order the deputy made his report, dated the nineteenth of June last.

And now upon reading the said order and report, and no counsel appearing for the defendant,

It is ordered by the court, that the said report be ratified and confirmed, with costs; and that the said defendant do pay to the said plaintiff nineteen pounds, five shillings, reported due for his said tithes.

THO. BURY.

RO. PRICE.

JA. MONTAGUE.

Tr. 2 Geo. Scacc. *Dobson v. Norton.* [2 Wood, 46.]

Sussex, 30th June, 1716.

THE bill stated that the plaintiff, as rector of Husterpoint, in the county of Sussex, was entitled to all tithes, oblations, offerings and duties arising therein; that the defendant, from the year 1712, had been an inhabitant and occupier of arable land, meadow and pasture ground, and had sowed the arable with oats and barley, and reaped and carried away the oats yearly, without setting out the tithes thereof, or making any compensation for the same; that when the plaintiff went to take the tithes away, as set out in loose cocks, the defendant refused to permit him to take the loose corn which lay at the bottom of the said cocks; and that thereby he lost about a third of his tithes; that the defendant also depastured a number of cows, and other profitable cattle, from which he had calves and milk, and had many sheep, from which he had wool, but had refused to set out the tithes thereof, or to make any compensation for the same; that he also kept to agistment or pasturage, oxen and other unprofitable cattle, and also kept poultry, the tithes whereof were due to the plaintiff; that he was also entitled to Easter offerings, and other dues, all of which the defendant had refused to pay. The bill therefore prayed a discovery of his titheable matters, and why the defendant had refused to let him take away the loose corn, and that he might account for the same.

The defendant, by his answer, admitted that the plaintiff was rector, and entitled to all great and small tithes, and said that from Michaelmas, 1712, he had occupied several lands, and, in 1713, had sowed several acres with oats, wheat and barley, and had reaped the same, and set out the tithes thereof, which the plaintiff had carried away, except the loose corn as aforesaid, which he was not entitled to by custom. He also said that he held divers lands, fertile as well barren, in the said parish, and in the adjacent parishes; and that he had caused the tithes of his milk, and other tithes, to be set out, which the plaintiff might have had; but he denied that any Easter offerings were due.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon reading several proofs taken in the cause on both sides,

It is ordered by the court, that the defendant do come to account with the plaintiff, for and touching the tithes of milk, which the court declared ought to be paid every tenth meal, and not the tenth of every milking; and also for the tithes of the herbage and agistment of the defendant's barren and unprofitable cattle; and also for the tithes of the oats suggested by the defendant's answer to have grown upon barren land; and also for the value of the loose barley and oats at the bottom of the tithe cocks, which the defendant obstructed the plaintiff in taking and carrying away; and also for Easter offerings for the defendant and his family, for and during the time in the bill required; the plain-

1716.
PANCHARD
v.
FREE.
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Tithe milk ought to be paid every tenth meal, and not the tenth of every milking.

The loose corn at the bottom of the tithe cocks belongs to the parson.

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DONSON  
v.  
NORTON.

tiff to have his costs taxed out of the costs; the defendant to be allowed such costs as he hath been put to by reason of the examination of witnesses, touching the tithes of wheat, hay, wool, and eggs, as are demanded in the bill.

Tr. 2 Geo. Scacc. *Wolridge v. Henna* and others. [2 Wood, 50.]  
Cornwall, 29th June, 1716.

Tithes in kind  
decreed of fish  
caught at sea,  
and brought into  
the parish of  
Mevagissey.

**T**HE plaintiff, as vicar of the vicarage and parish church of Mevagissey, in the county of Cornwall, stated, that about the month of December, 1709, he was instituted and inducted therein, and by virtue thereof, or of some ancient endowment, usage, or custom, time out of mind used, ought, of right, to have had and received all the tithes of hay, wool, lamb, hops, fish, and other small tithes, oblations, offerings, and vicarial duties; that, by custom and usage immemorial, he and his predecessors, vicars of the said church, have been endowed with, and ought to enjoy, the tithe of all pilchards caught at sea, or brought into and cured in the said parish, and of all other fish caught or brought into the said parish, by way of merchandize, or for sale, or otherwise; that the defendants being all of them fishermen of the said parish, had for several years used therein boats, nets, and seines for catching of pilchards and other fish; that each of them in the said years caught great quantities of pilchards, &c. which were brought into and cured in the said parish, the tithes whereof were worth one hundred pounds; that, from December, 1710, the defendants had not paid or compounded with the plaintiff for any tithe-fish, or other small tithes, and that they endeavour to deprive the plaintiff of the same. The bill therefore prayed a full discovery of their boats, &c. pilchards, &c. and an account for the same.

The defendants said, that they believed the plaintiff was duly instituted, &c. into the said parish, and that he is still incumbent there, but that they have heard, that, since his induction thereto, he hath been instituted and inducted into the rectory of the parish of St. Just, in Roseland, and that both the said churches being benefices with cure of souls, his institution into Mevagissey is void, and all his pretensions to tithes since that time unfounded; but they admitted, that the plaintiff is lawfully entitled, if legal vicar, to all the tithes of hay, wool, hops, lambs, and other small tithes, obventions, offerings, and vicarial duties, the tithes of fish only excepted, for that neither the plaintiff nor any of his predecessors ever had any right to the tithe of fish, or ought to have the tithe of pilchards, or of any other fish caught at sea, or brought into the said parish by way of merchandize, nor had he ever received the tithes of pilchards, or other fish in specie, nor had the same been compounded for; that if however the plaintiff had any right to such tithes, they believed, that the vicars for the time being never were entitled to have any tithe in specie, and if they were entitled to any thing, it was to a *modus* only of sixteen shillings and eight-pence, and no more, for every seine, consisting of two boats and nets, which was due from the owners of such seines, but that nothing was ever paid or demanded as due from the labourers, or for their share, being one half, or for the pillage fish, which was what lay under the seine, and what remained after sweeping, which the men took as their perquisite, nor for any strangled fish, or fish caught by the head in the nets; that, since the plaintiff's incumbency, they have had no concern in the seine fishery, but have been concerned in the pilchard fishery, with drift nets, and that for all the pilchards caught by the head and strangled, no tithe; or any thing in lien thereof, is payable to the vicar. They confessed, that the plaintiff and his predecessors had been paid a trifle for every net, for quietness sake, but not as their due, and that they, the defendants, had paid three shillings and six-pence, and two shillings and six-pence for every net, which sums the plaintiff had accepted in full of all his demands, until last winter's fishing season, before the commencement of this suit, and that they are willing to pay the said sums; and the defendants in some measure set forth their quantities and values.

The plaintiff replied; the defendants rejoined; and witnesses were examined

on both sides; and on reading a decree, dated the ninth of December, in the thirty-second year of Charles the Second, in this court, between W. Gwavas, Esq. plaintiff, and John Teage, and others, defendants; (1) also another decree in this court, dated the twenty-first of June, in the twenty-first year of Charles the Second, between John Saintawhyn, Esq. plaintiff, and R. Slade and others, defendants; (2) and on reading the proofs taken in the cause, and on mature and deliberate debate of the matter,

It is ordered by the court, that the defendants shall respectively account with the plaintiff for their several and respective tithes in kind of all pilchards, and other fish whatsoever, caught at sea and brought into the said parish, according to the values thereof, and all other tithes and offerings whatsoever, due from them respectively, according to the proofs in the cause, or as the defendants have confessed in their respective answers; and it is referred to the deputy to take the said account.

On the fourth of July, 1717, in pursuance of the above order, the deputy made his report, and upon reading the said decree and report, without exceptions;

It is ordered by the court, that the report be ratified and confirmed, and that the said defendants shall respectively pay to the said plaintiff, the several sums reported due from them, amounting in the whole to eight pounds, thirteen shillings, and four-pence halfpenny.

THO. BURY, JAS. MONTAGU,  
RO. PRICE, J. FORTESCUE ALAND.

(1) *Antè.*

(2) *Antè.*

H. 3 Geo. Scacc. *Underwood v. Gibbon.* [2 Wood, 58.] (1) Bunb. 3.  
Suffolk, 31st January, 1716.

**T**HE plaintiff, as son and administrator of his father, filed his bill, setting forth, that the intestate, being lessee of the tithes arising within the parish of Saint Gregory, in Sudbury, under N. Jekyll, impropiator of the said parish church, and under O. Andrews and others, impropiators of the said parish church or chapel of St. Peter, did, in Hilary term, in the eleventh year of Queen Anne, exhibit his bill against the said defendants, charging the defendant Gibbon to have occupied lands within the said parishes, or one of them, for one year, and to have sown the same with wheat, rye, barley, or other grain, and that he had also grass growing thereon, which he had made into hay, and had carried the same away without setting out the tithes thereof; and that he had kept several cows and sheep, from which he had calves, lambs, milk, and wool; and had kept and depastured several horses and dry cattle, and had other titheable matters and things, for which tithes were due to the plaintiff; 'the bill also charged the other defendants with having the like titheable matters; and prayed an account and satisfaction for the said tithes.

The defendants Gibbon and Sparrow said, that for the said year they did keep and depasture, upon a piece of ground called King's Marsh, and a piece of ground, sometimes called Portman's Croft, and now called the Common, in or near the borough of Sudbury, sometimes one or two saddle horses a-piece, and never more at a time; that the defendant Voice, during that time, kept one saddle horse in the said grounds; and that the tithe for each horse was not yearly worth more than one shilling: and they insisted, that tithes were not due and payable to the plaintiff for the same, in case he can make out a title to the same; for that the grounds called King's Marsh and Portman's Croft, otherwise the Common, were anciently granted for the use and benefit of the burgesses and commonalty of the borough of Sudbury, by Richard de Clare, earl of Gloucester and Hereford, who was owner of the borough and of all tithes arising therein; that it had been usual for the said corporation to set certain rates on the cattle depastured on the said grounds, and to apply the

The plaintiff, as lessee of the tithes of St. Gregory's and St. Peter's, in Sudbury, in the county of Suffolk, claims the tithes of agistment of saddle horses in the common called King's Marsh and Portman's Croft.

(1) See *antè.*

1716.

UNDERWOOD

v.

GIBBON.

money thereby raised to the use of the poor of the said borough, who were not able to keep any cattle thereon; and they insisted, that tithes were not due to the plaintiff for the said grounds; and also, that they did not lie within the parishes, but that they were extra-parochial, and not lying in any parish, as were several other lands, in or near the town of Sudbury. They also said, that there were other grounds in the parish of St. Gregory, wherein the freemen of the borough of Sudbury had right of common to depasture their cattle after the first crop of grass is cut, and after the corn has been carried off; and that, in respect that the tithes of such first crops of grass and corn were paid to the impropriators of Saint Gregory's, the freemen of the said borough had been and ought to be discharged from the payment of tithe-herbage for the grounds last mentioned.

The defendants Gibbon and Voice denied, that they had, during the said time, any cows, sheep, calves, lambs, or other titheable matters and things.

The defendant Sparrow confessed, that during the said time he had occupied divers lands in Saint Gregory's parish, and had corn, grass, and fruit, and said, that he had compounded for the tithes thereof, and that he had the plaintiff's receipt for the same.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and the cause came on to be heard the fourteenth day of July, 1715, when, upon reading the proofs, it was ordered that a case should be made; but soon after the making of such case, the plaintiff's father died, and the plaintiff filed his bill of revivor, and the proceedings being revived by order of the court, a case was made and agreed upon by counsel on both sides, in the following words, viz.

The case. "The plaintiff exhibits his bill, as lessee of the impropriate rectory of Saint Gregory, and of the parish church or chapel of Saint Peter's, in Sudbury, (thereby entitling himself to all manner of tithes within those parishes,) against the defendants for tithes, and, amongst other things, for the tithes of the agistment and pasturage of horses, and other barren cattle; to which the defendants Gibbon and Sparrow by their answers severally answer and confess, that they and each of them, between Christmas, 1711, and Michaelmas following, kept and depastured upon certain lands called King's Marsh, and upon a piece of ground formerly called Portman's Croft, otherwise the Common, sometimes one and sometimes two saddle horses a-piece; and the defendant Voice doth likewise admit, that within the time aforesaid, he did keep and depasture on the said grounds, one saddle horse, and no more; and the several defendants insist that no tithes are due for depasturing the said horses, for that the said lands were anciently given by Richard de Clare, Earl of Gloucester and Hereford, who was owner of the borough of Sudbury, and all tithes arising therein, for the use and benefit of the burgesses and commonalty of Sudbury, and that the corporation have usually set certain rates upon all cattle kept there, and that the monies raised by such rates have been paid and applied to, and for the use of such of the poor freemen of the said borough, as were not able to keep any cattle thereon, and that the defendants, and every of them, have paid such rates for the same." The question is, Whether tithes for the agistment and pasturage of the defendants' horses upon King's Marsh and Portman's Croft, confessed by the defendants, are due and payable by them?

The cause came on again the fifth of July last, and after long debate thereon, the court then ordered the cause to stand over for the opinion of the court; and the same standing over accordingly to receive the judgment of the court this day,

The court declared, that no tithes were due or payable by the defendants for their saddle horses, agisted and depastured upon King's Marsh, and Portman's Croft, in the pleadings and in the said case mentioned.

It is thereupon ordered and adjudged, that the said bill be, and is hereby, absolutely dismissed out of this court, with costs, to be taxed for the said defendants, by the deputy of his majesty's remembrancer.

THO. BURY.

RO. PRICE.

JA. MONTAGUE.

Tr. 3 Geo. Scacc.

*Reynel v. Rogers.* [Bunb. 15. 2 Wood, 75.] 2 Gw. 612.

**R**EYNEL preferred his bill against Rogers for tithe of hops; the defendant insists upon a composition; plaintiff says he gave notice to determine the composition; but the composition appearing to be for all small tithes, and the notice to determine only as to hops: the bill was dismissed, because you cannot determine a composition as to part, and let it continue as to the rest. (1) [Bunbury.]

A composition for tithes cannot be determined as to part, and continued as to the rest.

THE bill stated, that the plaintiff was, and had been ever since the year 1696 lawful vicar and incumbent of the parish and parish-church of Horsham, in the county of Sussex, and had carefully performed the cure there, and as such was entitled to all manner of tithes in kind, except the tithes of corn, and to all offerings, oblations, and obventions, yearly arising within the said parish and the titheable places thereof, or to some satisfaction for the same; that the defendant, from Michaelmas, 1714, had enjoyed therein several parcels of land, consisting of meadows, pastures, orchards, and gardens, on which he had hay, hops, and fruit, and several other titheable matters, the tithes of which he ought to have paid to the plaintiff in kind, or made him some recompense for the same; but which he had refused to do. The bill therefore prayed an account and satisfaction for the same.

The defendant said, that he believed the plaintiff was vicar of the said parish, and as such entitled to all manner of tithes, but not in kind; for that about the twentieth of July, 1709, he and his parishioners came to an agreement that the said vicar, in consideration of his being discharged from paying anything to the poor rate, would accept of the old composition for their respective tithes arising therein as long as he continued vicar thereof; that he was discharged from the said poor's rate; and that the said composition, according to the defendant's proportion thereof, amounted to two pounds, five shillings a-year, in lieu and in full satisfaction for all tithes; that the plaintiff had acquiesced under the said agreement until August, 1715, about which time he gave the defendant notice that he would take his tithes in kind, which was about three weeks before the hop harvest; and he hoped, that the plaintiff should be obliged to accept the said composition.

The plaintiff amended his bill, and stated, that there was no such agreement; and the defendant put in his answer, and insisted that there was such an agreement.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and the cause came on to be heard on the first of December last, when, on reading several depositions taken on both sides, and the said agreement, dated the twentieth of July, 1709, for three years; and on the defendant's counsel insisting, that the plaintiff had continued the said agreement after the expiration thereof till and for the said year 1715; and that the plaintiff had not given the defendant sufficient notice that he would take his tithe-hops in kind for that year; it was then ordered by the court, that the plaintiff's bill should stand dismissed. But upon petition it was ordered, on the sixth day of December, that the cause should be reheard as to tithe-hops, upon payment of five pounds costs: which costs being paid, and upon reading the answer to the amended bill,

It is ordered by the court, that the said bill be, and the same is hereby dismissed, with costs to be taxed.

THO. BURY, JA. MONTAGUE,  
RO. PRICE, J. FORTESCUE ALAND.—[Decree Book].

(1) It was said by Baron PRICE, it is time enough to give notice to determine an agreement for a composition before the reaping of

corn, and picking hops, but not after. Feb. 19, 1717.

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Tr. 3 Geo. Scacc. *White v. Keate* and others. [2 Wood, 66.]

Berkshire, 4th June, 1717.

A vicar entitled to tithes of corn, grain, and hay, on all ancient inclosures in a parish.

A *modus* of a garden penny in lieu of the tithes of garden stuff allowed;

Also of 3d. for a new milch cow, and 2d. for a farr milch cow; and the left shoulder of every calf fallen or killed, but if sold, the tenth penny of the value it sold for.

THE bill stated, that the plaintiff, for twenty-eight years past, had been vicar of the parish of Hagbourne, in the county of Berks, and was entitled to receive from all the parishioners all tithes, both great and small, belonging to the said vicarage; that the plaintiff and his predecessors, by virtue of some ancient endowment, or by custom, time out of mind, ought to have all manner of tithes of corn, grain, and hay, on all ancient inclosures, and particularly from certain inclosed lands, called Hagbourne Down, Hagbourne Park, and Church Mead, lying in the said parish; all the tithes for feeding barren cattle; the tithes of milk arising from all milch cows fed on the said ancient inclosures; and the tithes of wood and underwood growing on the said inclosures or in the hedge-rows; that all the said tithes had been, for many years, duly set out and paid to the plaintiff and to his predecessors, or some compensation made to them or him for the same; that they had also received all small tithes of calves, pigs, pigeons, fruit, and other small tithes (except wool and lamb), arising in the said parish; that the defendants Asridge and Langford had, for twenty-eight years last past, been, and still were, occupiers or tenants of Hagbourne Down; that they had yearly cut and carried away much corn, grain, and hay, the tithes of all which yearly belonged to the plaintiff, and were yearly worth five pounds; that they had yearly fed thereon barren cattle and milch cows, and cut thereon wood, the tithes of which belonged to the plaintiff, and were yearly worth three pounds; that when the defendant Asridge first became owner or tenant of Hagbourne Down, one J. Keate, deceased, was tenant or proprietor of the rectory of the said parish, and so continued until he died in 1702, from which time the defendant Keate, his widow, continued proprietor thereof; that she and her said husband, pretending to be entitled to the tithes arising on the said Hagbourne Down, in right of the said rectory, had prevailed upon the other defendants to pay them the aforesaid tithes; that the plaintiff, in the year 1708, filed his bill against the said defendant M. Keate and Hyde, for the recovery of tithe-hay on Hagbourne Park and Church Mead, and for the feeding of the said grounds; that they put in their answer thereto; that the cause was heard, and the defendants decreed to account for the tithes thereof, which they did to that time; that the defendant, Mary Keate, had, since the said decree, fed the said grounds with milch cows and other cattle, and had refused to pay the tithes thereof, pretending, that no tithe-milk was due, but a *modus* of three-pence a cow; that if any such *modus* existed, it extended only to such milch cows as were fed in the commonable places in the said parish, and not to those that were fed on the inclosures and the said other grounds; that the defendant Mary Keate since the said decree had been occupier or proprietor of several orchards, and particularly of a new orchard, from which she had much fruit, beans, peas, grain, turnips, and pigeons, the tithes of all which belonged to the plaintiff, and were yearly worth four pounds; which she refused to pay, pretending, that the tithes were due to the impropiator, and not to the vicar. The bill therefore prayed, that the said defendants might account for all the tithes they had in the said years; that the plaintiff's right to them might be established by the decree of this court; and that the defendant Mary Keate might admit assets, and set forth an inventory of her husband's personal estate.

The defendant Keate admitted the plaintiff to be vicar of the parish, and as such entitled to all the vicarial tithes; and said, that she and her late husband were, and that she still was possessed of the rectory of the said parish, by virtue of a lease from Lord Craven, and as such entitled to the rest of the tithes arising in the said parish; and she insisted, that no tithe in kind was payable for milk or calves in the said parish to the plaintiff, but that a certain *modus* was, and for time immemorial had been paid to the vicar there, viz. three-pence for every milch cow fed in the said parish, in lieu of tithe-milk; and for every farr milch cow, two-pence; which payments were yearly made at Lammas; that

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that the left shoulder of every calf fallen and killed was paid in the said parish; but if sold, the tenth penny of the value which the calf sold for; and if weaned, three half-pence at Lammas was payable to the vicar, in lieu of tithe-calves; and she said, that this *modus* was in question by the plaintiff's former bill, and was fully proved; and she also insisted, that the said *modus* was general throughout all the said parish, and not limited to any particular places; and that no tithe-milk or calf was paid there wherever the cows depastured there. She also said, that the tithes of corn, grain, hay, and wood, growing on Hagbourne Down always belonged to and was paid to the farmer of the said rectory, and never to the vicar, save by mistake. She admitted such decree and pleadings as stated in the bill, and that the plaintiff was entitled to all small tithes, except wool and lamb, and tithes of milk and calf, for which the said *modus* was payable; and that a garden penny was payable, in lieu of the tithes of garden stuff. She also said, that she never was occupier of Hagbourne Down, but was of Church Mead and Hagbourne Park since the said decree, and had fed the same with milch cows, for which she had paid the plaintiff the said *modus*, which he had accepted, except for the years 1713, and 1714, for which said years she tendered him eleven-pence halfpenny and one shilling and two-pence halfpenny, which he refused to accept; and therefore she set forth her titheable matters for the said two years. She also insisted, that no tithe-hay was payable for hay cut in any of her orchards, for that they being taken out of the common the tithe thereof belonged to the impropriator. She said, that she had paid to the plaintiff a garden penny, which, by the custom of the said parish, was payable for the tithes of gardens. She also said, that since the said decree she had fed no other cattle but milch cows on Hagbourne Park and Church Mead; and, since this suit, only with horses for tillage, for which no tithe was payable, nor for any young breeding up for the pail, nor for sheep, the tithe-wool and lamb being payable to the rectory. She also averred, that the several tenders were made before the commencement of the suit, and that she was ready to pay the same for the said tithes.

The other two defendants admitted the plaintiff to be vicar, and as such entitled to all manner of tithes, both great and small, arising out of all ancient inclosures within the said parish (except wool and lamb).

The defendant Langford said, that he had known Hagbourne Down for sixty years, and that it was during that time inclosed and used as pasture; that for most of that time the plaintiff's predecessor claimed all the tithes arising from the said down, except wool and lamb; that they were paid to him or compounded for, and he believed they were worth four pounds *per annum*; and that the plaintiff was paid them, as his predecessor had been, without any hesitation or denial; but that soon afterwards the defendant's late husband, who was then impropriator or tenant thereof, set up a title to the tithes of Hagbourne Down; that soon after such dispute, the defendant Asridge took a lease of the said down, and not willing to contest the same had paid the defendant Keate four pounds a-year for the tithes of wool and lambs; that he held it three years, and that then the defendant Langford took it. He said, that whilst he was tenant thereof it was meadow and pasture ground; that he fed part of it with cows, and paid money in lieu of the tithe of milk in kind, but that he knew not how much, the same being valued among his privy tithes, but believed that it was one pound one shilling a-year. He insisted, that he had paid the plaintiff for all tithes yearly according to agreement; and that he had agreed with the defendant Keate for the tithes of wool and lambs.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and upon reading the depositions, and on debate of the matter, a trial at law was directed upon this issue, "whether the plaintiff, vicar of Hagbourne, or the impropriator, is entitled to the tithes of corn and hay arising on Hagbourne Down?"

And it was ordered, that the defendant do account for all small tithes and titheable matters demanded by the bill (except wool and lamb), arising in the parish of Hagbourne during all the time in the bill demanded; the deputy to take the said account, and the costs to be reserved.

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A trial was accordingly had, on the twenty-ninth of July last, and a verdict was given for the defendant, as appeared by the *postea*.

After pronouncing the said decree, the defendant Keate presented a petition for a rehearing, setting forth, that she was aggrieved by so much of the decree, whereby an account was generally directed to be taken of all the small tithes and titheable matters demanded by the bill (except wool and lamb) arising in the said parish of Hagbourne during the time in the bill, for that no notice was taken in such decree of the *moduses* as to the tithes of milk, calves, and gardens, before mentioned; and she hoped, that she should be enabled to shew that the said *moduses* ought to be established, and that the account of the small tithes demanded by the bill ought to be taken according thereto from the time whereto the plaintiff was satisfied under the first decree, and only in respect of the particular closes, and not over the whole parish; and that the plaintiff should be examined upon interrogatories of what he had received, and the master should state to the court respecting the tenders, &c.

On the twelfth day of February, the defendant obtained the order for rehearing as to the matters above-mentioned, on payment of five pounds costs, which were paid; and upon reading the said petition and order, and the decree, and the former bill and answer in the pleadings mentioned; and also an order of the fifteenth of July, 1711; an account of tithes; and a receipt dated the twentieth of October, 1712; and on reading several proofs on both sides in this and the former cause, and hearing what could be alleged on both sides;

It is ordered by the court, that the defendant M. Keate be relieved upon her petition for rehearing; and that the several *moduses* mentioned in her said petition be established; and that the defendant do account for the tithes of milk, calves, and gardens in the pleadings mentioned, according to the said several *moduses*; and it is referred to the deputy to take the said account, and to certify the tenders made, and what the plaintiff has received.

As to the matters for which the issue was directed and tried, the plaintiff moved for a new trial; and the *postea* being read, and Mr. Baron FORTESCUE certifying to the court that the judge was very well satisfied with the verdict, and that it was a fair and just one,

It is further ordered, on the twenty-fifth of February, 1717, that the said bill, as to such part thereof on which the said issue was directed, and trial had, shall stand, and be, and is hereby absolutely dismissed, with costs both at law and in equity, to be taxed by the deputy-remembrancer of this court.

On the thirteenth of July, 1720, in pursuance of the said order, the deputy made his report, dated the thirtieth of June last, *ex parte* for the defendants, the plaintiff declining to bring in his charge; and upon reading the decree and report, and no counsel attending for the plaintiff, and no exceptions being taken thereto,

It is ordered by the court that the said report be ratified and confirmed; and that the defendant do forthwith pay to the said plaintiff one pound, two shillings, and four-pence three farthings, so reported due to the plaintiff; and that the bill do stand dismissed with costs, to be taxed by the deputy-remembrancer of this court, to be paid by the plaintiff to the defendant Mary Keate.

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M. 4 Geo. Scacc. *Offley v. Whitehall*. [Bunb. 17.]

If a *modus* be insisted upon in the spiritual court, it has no jurisdiction unless the *modus* be admitted; but even in case of a *modus*, if the spiritual court proceed to sentence, it is then too late for a prohibition, though it is never too late *pro defectu jurisdictionis*.

THIS distinction was taken, that if a man libel in the spiritual court for tithes in kind, and the defendant below suggest, and insist upon a *modus*, there the spiritual court has no jurisdiction to try the *modus*, their method of trial of prescription being different from ours; but if a man libel for a *modus*, and the defendant admit a *modus*, the spiritual court may proceed in that cause: but even in the first case, if they permit them to proceed to sentence, they come then too late for a prohibition, being it is *pro defectu triationis* only; but you are never too late when it is *pro defectu jurisdictionis*.

M. 4



M. 4 Geo. Scacc. *Anon.* [Bunb. 17.]

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**I**F a bill be preferred for a matter or sum beneath the dignity of the court, it may be dismissed as well upon motion as by demurrer. *Per PRICE, B. Nov. 15, 1717.*(1)

Where a bill is preferred for something beneath the dignity of the court, it may be dismissed upon motion, as well as demurrer; but if there be fraud, or it be a complicated matter, the bill will be retained.

(1) Where there is a fraud, or it is a complicated matter, the bill will be retained, though the sum be never so small.

M. 4 Geo. B. C. *Powell v. Bull* and others. [Comy. 265.]

**I**N an action of trespass upon not guilty pleaded, a case was stated before Lord Ch. J. KING, at the assizes at Chelmsford in Essex, and afterwards argued in court, by which it was stated, that the plaintiff was rector of St. Botolph's in Colchester. That by stat. 9 & 10 W. 3. intituled, "An Act for erecting Hospitals and Workhouses within the Town of Colchester, in the county of Essex, for the better maintaining the Poor thereof," it was enacted, that after the twenty-fourth of June, 1698, there shall be a corporation in the town of Colchester, consisting of the mayor and aldermen, and forty-eight other persons to be chosen out of the four wards in the town, viz. twelve out of each ward, by votes of inhabitants paying or rated at one penny per week, or more, towards the poors rate according to the usual way of rating in the said town. That they shall hold courts or assemblies on the second Tuesday of every second month, for the ends in the said act mentioned. That the corporation at every such court may make rules, &c. for the governing the said corporation and the poor of the said town, to erect hospitals, workhouses, to provide necessaries to set on work the poor, &c., send to the house of correction, &c. put out apprentices, &c. That for the better carrying on so charitable a work, the said courts may ascertain what sum is needful for the maintenance and employment of the poor, so as it does not exceed what was paid to the poor in any of the three last years; and so as the poor of all the parishes in the said town unable to work be provided for thereout, to the intent no other levy or assessment be made for the poor of the said town; and may proportion out, rate, and assess the said sum or sums of money on the respective inhabitants or occupiers of lands, houses, tenements, tithes impropriate, appropriation of tithes, and all persons using stocks and personal estates in the said town or liberty of the same, in equal proportions, according to their respective value, to be levied by distress and sale, &c.

A rectory is included in the word tenement.

That the plaintiff was assessed according to the said statute for his tithes, parcel of the said rectory, and that by a warrant, &c. the defendant took the goods in the declaration for such said assessment; and if the tithes, parcel of the said rectory, might be assessed, was the question.

And it was agreed that an ecclesiastical person was bound by acts of parliament if the words extend to him, and therefore he is chargeable by 43 Eliz. c. 2. as an inhabitant, for the statute says, Every inhabitant, parson, vicar, or other, &c. So to send his teams to the highway. 1 Vent. 273. 2 Lev. 139. Lut. 1563. So in 2 Inst. it was agreed, that an ecclesiastical person would be within 27 Hen. 8. 24. by which it was enacted, that purveyors might provide victuals, &c. within liberties or without, if he had not been within the proviso of the same statute, viz. Provided the statute in such cases provided be observed; and therefore ecclesiastical persons being exempt from a purveyance by Magna Charta, 9 Hen. 3. 21. and other acts, are within the proviso, otherwise they would have been liable to the purveyor, 2 Inst. 3. And the sole matter insisted on was, that tithes were not liable to be assessed within any words of this act, and it was insisted that the plaintiff could not be charged to the poors rate of Colchester, if he was not within the words of this new act; though he was chargeable by the statute 43 El. c. 2. in which he was expressly named; but by the words of this act the plaintiff was not rateable to the poor for his tithes; perhaps as inhabitant, he might be assessed for his personal estate;

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estate; but this act, being introductive of a new law, shall be taken strictly, and therefore, if the words do not expressly describe him, they shall not be extended to him. A parson was not chargeable to temporal charges by the common law; and therefore an act of parliament, if the words and intent are not plain and manifest, shall not extend to charge him; but this act only charges the occupiers of lands, houses, tenements, tithes impropriate, and appropriation of tithes; the plaintiff cannot be charged as an occupier of tithes impropriate, for these words mean only the patentees of the King, where tithes are in lay persons; and appropriation of tithes was where tithes were appropriated to a religious house; or perhaps a portion of tithes in another parish, which belonged to the parson of St. Botolph's, might be assessed in that parish, from whence the portion of the tithes issued or arose, but could not be charged here in the parish of St. Botolph; to which the court agreed. Then the words "houses and lands" do not extend to tithes, nor the word "tenement," which import only what may be held by some service.

To which it was answered and resolved by the whole court, that the word tenement extends to a rectory, for that may be held in *Frankalmoine*, and the word "tenement" extends not only to that which may be held by some service, but comprehends all that a man may be seised of *ut de libero tenemento*, Co. Lit. 6. a. and that a rector has the frank-tenement of his rectory appears by Co. Lit. Sect. 647.

Judgment for defendant.

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A vicar is chargeable to the poor's rate for his tithes.

H. 4 Geo. B. R. *Rex v. Turner*. [1 Strange, 77.]

THE defendant being assessed towards the poor's rate for his tithes as vicar, appealed to the sessions, where he is absolutely discharged. *Et per Curiam*: As vicar he is chargeable by 43 Eliz. and the sessions has only power to moderate, but not discharge. And the order of sessions was quashed.

Costs in prohibition are to be given from the first motion, and not from the time of declaring only.

H. 4 Geo. Scacc. Sir Harry Haughton v. Starkey. [1 Strange, 82.]

AFTER judgment for the plaintiff in prohibition, the question was, what costs ought to be allowed, the statutes of 8 and 9 W. 3. c. 11. giving costs in suits upon prohibitions; and whether they should be computed from the first motion, or only from the declaration, was the doubt. Upon search it was found to be the course of all the courts, to tax only from the time of declaring, except in two instances, *Eads v. Jackson*, B. R. 2 Geo. and *Brown v. Turner et al'*, in C. B. where they were allowed from the first motion. And of this opinion were all the judges, as Baron Fortescue informed me. And all the officers were directed for the future to allow the costs of the first motion. And afterwards, Hil. 12 Geo. B. R. *inter Sweetnam et Archer*, it was stated in the same manner, and agreed to be the uniform practice ever since; and Pas. 1 Geo. 2. between Sir Thomas Bury and Cross, the same doubt was raised by a new Master, and the court ordered costs from the first motion.

A modus for pasture of one shilling in the pound value is void; and so of

H. 4 Geo. Scacc. *Smith v. Roocliiff*. [Bunb. 20.]

THE Barons were of opinion, that a modus of one shilling in the pound for pasture, according to the value of the land, was a void modus; as is also a modus of one shilling in the pound according to the value of the rent.

The tithes of peas and beans set, drilled, sown, or planted

H. 4 Geo. Dom. Proc. *Austen v. Nicholas*. [2 Br. P. C. 31.] 2 Wood, 10. 12 Vin. Abr. 94. 120. 2 Gw. 615.

IN 1703, the respondent was inducted into the vicarage of Shalford and chapelry of Bramley, and thereby became entitled to all tithes, duties, and profits, belonging to the same.

The appellants Robert and Elizabeth Austen were seised in fee of the impropriation, and the great tithes of corn, grain, and hay; and the other appellants were their tenants.

The plaintiff, as vicar, was endowed of all the small tithes, and had for a long time received a composition of three shillings and four-pence an acre, in lieu of the tithes of beans and peas, set and planted in rows and ranks, that had been hoed and weeded with the hand, where the ground had been turned up with the spade, although in the open fields; but, where the beans and peas had been set in rows and ranks, and hoed and weeded with the hand, where the ground had been turned up only with the plough; the tithes of such beans and peas had been gathered in kind, by the impropriator, or his farmers.

Until about thirty years before the commencement of this suit, the ground in the parish was usually prepared for beans, peas, and roots, with plough and spade together; and, while this method continued, the impropriator never set up any right to these tithes, so that the same were enjoyed by the vicar; but the farmers and occupiers of some small parcels of lands (not considerable about twenty years ago) having contrived a tin or iron plate to be annexed to the plough, the use of the spade was omitted; and thereupon the impropriators or their tenants first set up a pretence, that thereby the tithes of beans and peas became great tithes, and took the same accordingly.

In Hilary term, 10 Anne, the respondent brought his bill in the Exchequer against one Elliott, a farmer of the great tithes, for the tithes of such plough-set beans and peas; and the court decreed Elliott to account for the same.

The plaintiff soon after brought another bill in the same court, against the defendants, for the small tithes arising from the glebe land, and to confirm the former decree; but pending this suit, Elliott brought his action of trover against the plaintiff, for taking tithes of peas which were set in rows and ranks, and weeded and hoed upon ground turned up with the plough, and upon the trial of that action (wherein the value of the tithes being agreed on, the only question was, whether the tithes belonged to the impropriator or the vicar?) the plaintiff in the action obtained a verdict.

After this verdict, the cause against the defendants came on to be heard, on the 19th of May, 1715; when the barons having admitted their decree against Elliott(1) to be read (though he was not party to this suit, nor were the defendants parties to that) and rejected the evidence, verdict, and judgment, in the action of trover; affirmed their former decree, and ordered the defendants to account with the plaintiff for the said small tithes.

From which decree the defendants appealed, insisting, that there were in this case two contradictory determinations of the same question; the one in a court of equity, the other at common law: that the determination at common law ought to stand; for that every man's freehold and inheritance ought to be tried and determined at common law; or at least, that no decree ought to have been made without a second trial: that the court of Exchequer, by allowing the former decree to be read as an authority in the like case, though not under the denomination of evidence, did in effect found a decree against the appellants, on a proceeding which ought not by law any way to affect their right; that by these means all the tithes of wheat, barley, &c. might be turned into small tithes; forasmuch as wheat and barley were in many places sown in furrows after the plough, and oftentimes hoed and weeded with the hand; that the vicarage was never endowed with small tithes arising upon the glebe lands, nor had the vicar ever any possession of such tithes; that this was a new case, and would, in consequence, affect all the impropriators in England; for that this sort of husbandry of planting peas in rows and ranks after the plough, and weeding and hoeing the same, was found to be a great improvement of the crop: that the vicar having a right to peas planted in gardens, where the spade only was used to turn the ground (the same sort of husbandry being used in the open

(1) A decree between other parties may be read as a precedent, though not as evidence.—[Viner.]

An inquisition not admitted to be read as evidence, there being no commission to warrant it.—[Viner.]

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in rows, in a garden-like manner, are small tithes, and the use of a plough, instead of a spade, after a new improvement, makes no difference.

A decree between other parties may be read as a precedent but not as evidence.

An inquisition without a commission not allowed as evidence.

fields);

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fields); and there being an old custom in the parish to pay 3s. 4d. an acre for ground turned with the spade, and planted with any sort of roots, the vicar had accordingly received such composition of 3s. 4d. as well for peas as roots; and it did not appear, by any proof, that the vicar ever collected tithes in kind of peas, planted after the spade; but that, on the contrary, only 3s. 4d. an acre had all along been paid him, for all trenched ground planted, whether with peas or roots.

On the other side it was contended, that though vicars sometimes (for ease of themselves and the parishioners) agreed to take a composition, yet it did not destroy the right they had to the tithes, either in kind, or according to a *modus*; but the old right continued, to take the tithes according to the ancient method of payment, when the time for which the composition was made was determined: that the vicar had, for time immemorial, received the tithes of beans and peas planted and managed in garden-like manner, as well after the plough as after the spade: that the court of Exchequer only read the decree against Elliott by way of precedent, and regarded it as such, as well as other cases cited out of the law-books: that it was impossible the tithes of wheat, barley, &c. should ever be turned into small tithes, by means of this decree; for without a prescription, no claim could be made of such tithes by a vicar, let the ground be prepared or turned, or the seed sown or set, in what manner soever; that where the vicar did so prescribe, the disusing a single instrument, and still continuing the same crops and manner of husbandry, could not deprive him of that prescription; besides the respondent claimed tithes of no other corn or grain set in rows or ranks, or otherwise sown in fields, but only of peas and beans; which plantation took its rise from the garden culture of such crops: that upon hearing the cause, the appellants could not make it appear that the lands for which they insisted on an exemption of all small tithes, were glebe lands; or, that as such, or by any other means, they were legally discharged of tithes to the vicar; and therefore, the court decreed them to pay tithes of such lands: that this was no new case, there being precedents of the like nature in the court of Exchequer: that without a prescription the vicar could not claim; and with it, he was entitled to the improvement; but, if omitting an instrument in husbandry could defeat the prescription, then the right of all prescription was at end.

Accordingly, after hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed; and the decree therein complained of affirmed.

H. 4 Geo. Scacc. *Bate v. Sprakling*. [Bunb. 20.] 2 Gw. 618.

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No tithes of  
hop-poles.Tithe-milk  
ought to be  
every tenth  
meal.

IT was decreed by the court, that no tithe should be paid of hop-poles: that tithe-milk ought to be every tenth meal; and that in all cases where you do not make out some custom, you must pay according to the canon. (1)

Mr. *Ward* quoted the case of *Chitty v. Reeves*, in Scacc. Term Trin. 3 Jac. 1687, wherein it was resolved, that (2) tithes of hops are not to be paid till after they are picked, and before they are dried, every tenth measure.

(1) *Quere*, as to this.

(2) The tithing of hops was settled in the

cause of *Bliss v. Chandler*, Term S. Mich. Nov. 10, 1740.

H. 4 Geo. Scacc. *Anon.* [Bunb. 22.] 2 Gw. 618.

*Quere*, Whether notice of abridgment of a plaintiff's demand upon the commission, be as well as if abridged by the replication.

IF there be a general demand of tithes, and a general replication put in; if the plaintiff upon the commission give notice, that he will proceed only as to such and such particular matters, it is as well as if the demand had been abridged in the replication; but *quere*.

H. 4

H. 4 Geo. Scacc. *Shaw v. Brumpton*. [2 Wood, 82.]

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Lincolnshire, 18th February, 1718.

**T**HE bill stated, that the plaintiff had been, for several years past, rector of the parish and parish-church of Wyberton, in the county of Lincoln, and was entitled to all manner of tithes arising therein, and in the titheable places thereof; that the inhabitants there had a right of common for all manner of cattle without number, at all times in the year, in a common fen adjoining to Wyberton, as the inhabitants of other parishes adjacent to the said fens had; that where an inhabitant of Wyberton keeps sheep upon the said common fen in the winter, and sells them after Candlemas day, and before the shearing day following, there were due to the rector, by ancient custom used in the said parish, three-pence for every sheep so sold, in lieu of the tithes of such sheep; that the defendant Brumpton was, and for divers years past had been, an inhabitant, and had held a farm there, and as such had a right of common in the said common fen; that about Michaelmas, 1713, the plaintiff made an agreement with him to take eight pounds a-year for his tithes, and at Michaelmas, 1715, gave him notice that for the future he would take his tithes in kind; that about the same time, or about the Candlemas following, the defendant, in order to defraud the plaintiff of his tithes, took a lodging for himself only in an adjacent town, called Skirbeck Quarter, whose inhabitants had likewise a right of common in the said fen; that he continued to keep his house and farm at Wyberton, where his family and all his servants lived; that they looked after his stock there and on the said fen; and that he was the reputed housekeeper there, and as such rated to all parish rates in Wyberton; that since Michaelmas, 1715, he had sown several acres of his said farm with wheat, barley, oats, peas, and other grain, which he had cut and carried away without setting out the tithes thereof, or making any satisfaction for the same; that he also had several sheep, from which he had wool and lambs, the tithes of all which ought to have been paid to the plaintiff, but which he, the defendant, had refused to do, on the pretence that he was not an inhabitant and housekeeper there, and that none but resident housekeepers ought to pay the tithes of wool and lambs in kind to the plaintiff; but that persons who occupied lands in Wyberton who were not actually resident there ought to pay only ten-pence an acre in lieu of the tithes thereof; the contrary of which was the truth; and that the other defendants combined partly in the same manner to defraud him of his tithes. The bill therefore prayed to be relieved in the premises.

The defendants appeared, and put in their answers nearly to the same purport as in the bill alleged.

The plaintiff replied; the defendants rejoined; and witnesses were examined; and on reading the proofs in the cause,

It is ordered by the court, that the defendants shall account generally with the plaintiff for the tithes of the titheable matters and things demanded by the bill, as well for the tithes of those titheable matters they respectively had and kept within the said parish as upon the said common fen; and it is referred to the deputy to take the said account.

Pursuant to which order, the deputy made his report on the twenty-ninth of May last; and on reading the same without exceptions,

It is ordered, on the sixteenth of June, 1718, that the said report be confirmed, and that the said defendants do pay to the plaintiff the several sums reported due to him for the tithes of the wool and lamb which they had in the said parish, and upon the common fen, and clipped in the said parish of Wyberton.

E. 4 Geo. B. R. *Drake v. Taylor*. [1 Stra. 87.]

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**T**HE vicar libels for tithes of turnips, and lays his title to them by prescription and endowment. The defendant pleads that there is a rectory impropriate, and that time out of mind the rector has taken tithes of turnips.

Where the question is, whether the rector or

And

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vicar be entitled to tithes, no prohibition lies, for in the spiritual court 50 years make a prescription, and therefore evidence that would entitle the vicar to a sentence there upon the endowment, would not entitle him in the temporal court.

And last term he moved for a prohibition *pro defectu triationis*, and obtained a rule nisi. And now *Reynolds*, Serjeant, came to shew cause against a prohibition, for that turnips are a late improvement in Norfolk (where the matter arises), and quoted 2 Roll. Abr. 310. Z. 5. 1. 2. And where the matter is originally of ecclesiastical conusance unmixt with any temporal ingredient, no prohibition lies. The vicar is *prima facie* entitled to nothing, unless he shews a right either by prescription or endowment. These endowments are of an ecclesiastical nature, and so is the extent of them. For anciently and until the statutes of 15 R. 2. c. 6. and 4 H. 4. c. 12. the ordinary endowed the vicarage at his discretion. In 2 Brownl. 36. it is said and agreed, that if there be a parsonage inappropriate, and a vicarage endowed, and there be any difference between them, it shall be tried and determined by the ordinary. *In Scaccario et in C. B.* this prohibition has been denied.

*Yorke, contra.* That rule which has been laid down, will not be insisted upon now a-days, for the clergy will not pretend to be exempted from the temporal jurisdiction merely because they are ecclesiastics, but in this case both parties are not ecclesiastics, for the libel is against the parishioner, and it lays a custom which is denied and must be tried, and that has always been good ground for a prohibition. We do not pray it for defect of jurisdiction, but want of trial of the prescription, which is what the vicar grounds himself upon in making his title to the tithes; and the question is not upon the endowment, though I admit the prescription supposes an endowment.

CH. J. Though both parties are not ecclesiastics, yet the thing in controversy belongs either to one ecclesiastic or another, for either the rector is entitled to the tithes or the vicar, and what matter is it to the parishioner who has them? for he can only pay them to one. This is properly a dispute what belongs to the vicar upon the endowment, and that evidence which will entitle him to a sentence below, will not enable him to recover here, and therefore I am against a prohibition. To which Powys, J. and EYRE, J. agreed. *Et per PRATT, J.* If we should grant a prohibition in order to try the custom, and it should be found against the custom, yet that will not determine the question upon the endowment; and therefore we ought not to draw them out of that court, which may properly determine the whole matter. And besides in the spiritual court fifty years make a prescription, though it will not here. The rule for a prohibition was discharged.

Tr. 4 Geo. B. R. *Rex v. Shingle.* [1 Stra. 100.]

THE 43 Eliz. c. 2. charges lands, tenements, tithes, &c. to the poor's rate. By a private statute for erecting workhouses in Colchester the poor are provided for in another manner, and the occupiers of lands and tenements are made chargeable: and after a rate an appeal is given to the sessions. The defendant was parson, and rated for his tithes, and appeals; and because the word "tithes" was not in the act of parliament, which the sessions looked upon as an absolute repeal of the 43 Eliz. *quoad* Colchester, therefore they discharge him. *Et per Curiam:* He ought not to be exempted but by express words, being liable before. Here he is an occupier of a tenement, for tithes are a tenement. 1 Vent. 173. 2 Lev. 139. Lutw. 1563. 1 Inst. 6. Dy. 83. Litt. § 647. 32 H. 8. c. 7. Co. Litt. 159. Cro. Jac. 301. 2 Inst. 625. Wherefore the order of sessions was quashed. *Powell v. Bull*, C. B. this question determined in the same manner.

Tr. 4 Geo. Scacc. *Woodcock v. Smith.* [Bunb. 25.]

Proof of admission, institution, and induction, and reading the articles, not required in equity.

ALTHOUGH at law they hold a parson or vicar to the proof of his admission, institution and induction, and reading the articles, yet *per totam Curiam*, We never do in equity.

Tr. 4 Geo. Scacc. *Baily v. Peasly*. [Bunb. 26.] 2 Gw. 623.

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**B**ILL for tithes, the defendant stood out till a sequestration, and the bill was taken *pro confesso*: It was moved for the defendant, that upon paying the costs, the value of the tithes might be ascertained, and reduced either by the taxation of the Master, or by the oath of the plaintiff himself, as was done in the case of *Crosmen v. Goodrick*, Hil. Term, 2 and 3 Jac. 2. But *nota*, there was a consent in that case; and the court now would make no other rule, but that the plaintiff should shew cause why he should not consent to give his oath to the value.

Where the bill is taken *pro confesso*, the court will only give a rule to shew cause why the plaintiff should not swear to the value.

Tr. 4 Geo. Scacc. *Benning v. Dowce*. [Bunb. 26.] 2 Gw. 622.

**T**HIS was a bill for tithes, the defendant insisted that the lands where, &c. were part of the Homestall which is part of the Bishop of London's palace, and therefore exempt from payment of tithes, but did not lay it personally in the bishop; and this was allowed by Lord Ch. B. Bury and Baron Price against PAGE, to be well enough, because this exemption goes along with the lands; although it would have been better laid by way of formal prescription as at law; that the bishop for himself and his tenants have, time out of mind, &c. And as to lands belonging to a monastery, they must set forth how the prescription is; but where the land itself is exempt, it is discharged, in whatever hands it comes; and by the opinion of two barons against one (*absente MOUNTAGUE*), the bill was dismissed.

Where the land itself is exempt from tithes it is discharged into whatever hands it comes.

M. 5 Geo. Scacc. *Abthorpe et al v. Jennings*. [Bunb. 27.]

**M**R. Bootle moved for an injunction on a *dedimus*, and that it should extend to stay proceedings in the Bishop of Ely's court (until answer), where the defendant, as rector of Gambligay, in Cambridgeshire, libelled against the plaintiffs, his parishioners, for all sorts of tithes; and upon alleging that there were several *modus*es, the proof of which would arise out of the answer, the motion was granted. (*Quod nota*.) But the rule was discharged Nov. 28, following.

Injunction granted to a bishop's court in a suit for tithes, until answer.

M. 5 Geo. Scacc. *Anon*. [Bunb. 28.] 2 Gw. 618.

**I**F to a bill for tithes the defendant does not shew a tender before, or make it in the answer, the plaintiff is entitled to an account, although the value be never so small; if there has been a tender before, and a tender is also made by the answer, the defendant saves his costs; if the tender is only by the answer, he must account with costs.

A tender must be made before, as well as by the answer, to save the defendant his costs.

M. 5 Geo. Scacc. *Jones v. Cawthorne; et è contra*. [2 Wood, 97.]

Cambridgeshire, 15th December, 1718.

**T**HE bill stated that in January, 1714, the plaintiff was legally instituted and inducted into the parish church and rectory of Downham, in the Isle of Ely, and county of Cambridge; that he had ever since duly served the cure; and that by virtue of his said induction he was legally entitled to all the great and small tithes arising therein, and in the titheable places thereof; to the Easter offerings, and other dues belonging to the said rectory; and to the gate of six cows on certain lands, called Downham Park, over all the said lands, at all times of the year; that by the custom of the parish the tithes of rabbits and turkeys were due to the rector there; that all the defendants (except the Bishop of Ely and Sir J. Shaw), from Lady day, 1716, had occupied divers lands, meadows, fresh marshes, fen grounds and orchards, particularly within the level called Bedford Level, which is within the titheable places of the parish,

*Moduses* of one penny each for hearths and gardens allowed; of one penny for a foal not sold within the year; if sold, the tenth penny.

Depositions ordered to be suppressed at the hearing.

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and for which they ought to have paid tithes in kind to the plaintiff; that the defendants had on the said grounds wheat, barley and rye, for which they ought to have paid tithes in kind; that they had kept on the said fen grounds milch cows which had calves, and also several sheep, from which they had wool and lambs; that they had several colts, which had been foaled from mares kept by them; that they also had pigs, swine, honey, poultry and fruit, and had agisted cattle on the said grounds, and also had pigeons and other titheable matters in the said parish, of all which they ought to have paid tithes to the plaintiff, but which they had refused under several pretences to do. The bill therefore prayed a discovery of the several titheable matters and things, and an account and satisfaction for the same.

The defendant Cawthorne, and the other occupiers, said that the plaintiff was rector of the parish, and entitled to all tithes arising therein, and to Easter offerings; that they were severally occupiers of divers lands lying therein, part whereof did lie in Bedford Level; that time out of mind there had been, and then were, several rates and customs for paying tithes in the said parish at Easter, viz. for every new milch cow, two-pence; for an old milch cow, three halfpence; for every calf, six-pence; for a foal not sold within the year, one penny; if sold within the year, the tenth penny for which the same was sold; for Easter offerings for every married man and his wife, two-pence a-piece; for every single person above sixteen years old, two-pence; for hearths and gardens, one penny; for every pig, one shilling and six-pence; for tithe milk, the morning's milk of every Monday, to be brought home by the parishioners on Whitsunday, the rector adorning the church with boughs, and strewing the church with flags or rushes; that of the ground they occupied in Fodder Fen, no tithe was due for the grass or hay thereof; for that the said Fodder Fen had been and was part of the ancient demesnes of the said manor of Downham, whereof the Bishop of Ely for the time being, and his predecessors, had been, and were, seised in fee in right of the bishopric, and which fen had always been free from the payment of tithes; and that they, as tenants to the said bishop, had not paid any tithes arising there; that for several years past, for preventing all differences about their tithes of grass and hay, they, and several landholders in the said parish, had paid two-pence an acre for all their hay and grass ground in the said parish, in lieu of the tithes of grass and hay arising from those parts which were not tithe free; and they insisted upon the said rates and customary payments, and to be discharged from the payment of any tithes for the grass and hay of Fodder Fen; all which *modus*es they submitted to pay, and denied that tithes in kind were payable for the titheable matters comprehended under the said *modus*es; and they also denied that they did pretend, or had ever pretended, that the lands held by them were extra-parochial.

The defendant Thompson said, that before the plaintiff's induction, and ever since, he had been lessee of the Bishop of Ely, of several acres of pasture and of fen land, in Downham, called the Friths, which, until the year 1650, was an ancient park, called Downham Park, and, until that year, impaled and replenished with deer, and that it had, time out of mind, been parcel of the demesnes of the manor of Downham; and he denied that the plaintiff was entitled to any great or small tithes, but only to the gate of six cows on the said premises, in lieu of all tithes arising therefrom; and said that the rectors of Downham had constantly enjoyed the said gate in lieu of tithes, until 1650, when the premises were disparked; that, until that time, the bishops of Ely, and their lessees and tenants thereof, had, time out of mind, used to be discharged from all manner of tithes arising from the said premises, and that the said six cow gates in the said premises were enjoyed by the rectors of Downham, in full and complete satisfaction of the tithes thereof; that soon after the disparking of the lands, the Bishop of Ely, for the time being, or his lessee of the said premises, came to an agreement with the rector of Downham, to pay him ten pounds a-year, in lieu of the said six cow gates; and that he was willing to pay the same, and had tendered the same to the said plaintiff: and he set forth an account of his titheable matters and things demanded by the bill, and the values thereof.



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The defendant M. Carter said, that he was not an inhabitant of the said parish, and admitted that, for sixteen years past, he had occupied several acres of fen ground lying in Bedford Level; but he denied that any part thereof laid within the bounds of the said parish, and averred that they had been, time out of mind, esteemed extra-parochial, and that the tithes of such lands did belong to the crown and its patentees; that since he occupied the said lands, he had either paid tithes in kind, or some *modus* in lieu thereof, to such person as had a title thereto by such letters-patent; that, for three years past, he had paid the defendant Sir J. Shaw a yearly *modus* of two-pence an acre, in lieu of the tithes of those lands, which came to four pounds *per annum*, and believed that Sir J. Shaw, as patentee under the crown, had a right to receive the same: and he set forth an account of what titheable matters he had.

The defendant Shaw set forth, that Queen Anne, being seised in fee of the tithes of two thousand and sixty-four acres of land, lying in Byall Fen, in Bedford Level, did, by her letters-patent, dated the ninth of March, in the eleventh year of her reign, grant the tithes of those lands to him for thirty-one years; and he insisted that all the lands were extra-parochial, and no part of them within the titheable places of the parish of Downham; and that he was entitled to the tithes thereof, as lessee of the crown.

The Bishop of Ely said, that he was seised in right of his bishopric of the manor of Downham, of the demesnes of which, Downham Park was parcel, and submitted his interests to the judgment of the court, and said, that upon search made among the ancient writings belonging to the bishopric, several rolls were found relating to the demesnes of the manor of Downham.

To the answers of the defendants Cawthorne and the other occupiers, the plaintiff replied specially, and therein waived the demands of his bill as against them, for the tithes of their corn, grain, geese, eggs, hemp, flax, coleseed, honey, turnips, saffron and orchards; and admitted their said customary payments for offerings, and one penny for hearths and gardens, as in the answer stated, which he offered to accept from them with his costs; but he therein averred, justified and maintained his said bill, as to all other the demands therein contained: as to the answers of the other defendants he replied generally, and the defendants rejoined.

The defendants, who were the occupiers, for themselves and all the inhabitants of Downham, filed their cross-bill against the plaintiff Jones, to establish the several *moduses* set forth in their answers, and to perpetuate the testimony of their witnesses, and insisted that Fodder Fen was tithe free.

Jones answered, and admitted the customary payments for Easter offerings, and for hearths and gardens; but insisted upon his right to tithes in kind for Fodder Fen, and upon his right, as rector of the parish, to tithes in kind, as to all other matters, in manner as aforesaid.

The plaintiffs in the cross-bill joined issue, and divers witnesses were examined in the original cause on both sides.

The cause came on to be heard on the twenty-third day of November last, and upon reading the proofs in the cause, and a terrier of the glebe lands and other things belonging to the rectory of Downham, in the year 1638, with a schedule annexed,

It was ordered by the court, that the depositions of John Adams, taken upon his second examination on the plaintiff Jones's side, to the first and thirty-eighth interrogatory, against Cawthorne and others; and likewise that the deposition of Benjamin Cawthorne, taken upon the first, second, third, fourth and fifth interrogatories, against the plaintiff Jones, should stand suppressed; and that the *moduses* of two-pence for a new milch cow, and three halfpence for an old milch cow, and the Whitsuntide milk, insisted on by the defendants to be in lieu of tithe milk, should be set aside and discharged as void; and that the defendants should account for the value of the tithe milk; and as to the *modus*, insisted by the defendants, in their answers, for pigs, the defendants waived the same.

Upon further hearing this fifteenth day of December, 1718, as to the *modus* insisted

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insisted on by the defendants, in their answers for calves, the defendants waived the same.

And upon further reading of the proofs, and the defendant's answers, and a composition of a former bishop of Ely, made the ninth of March, 1421; and an adjudication, made the fourteenth of August, 1666, by commissioners constituted by act of parliament; and an institution to the rectory of Downham, in the year 1273, in book M.; and accounts of the *Sacrista Eliensis*, in the nineteenth year of Edward the Third, and the seventh and eighth of Henry the Fourth, in a bundle marked O. O.; and a receipt marked E.; and two tithe books of Mr. Clopton, a former rector of the said parish, marked K. and C.; and several bailiff's accounts of Downham, given in to the former bishops of Ely, in the second, third, seventh, eighth and ninth year of Henry the Sixth; and the eighteenth, twentieth and twenty-first year of Edward the Third, in a bundle marked N. N.; by which ancient evidences it appeared that tithes in kind, or money in lieu thereof, had been anciently paid for the titheable matters and things kept in the said park; and upon reading a presentment of the jury of the manor of Downham, made the fourth of May, in the seventh year of Queen Elizabeth; and upon full debate of the matter,

The court declared that the plaintiff Jones is entitled to the tithes in kind of the things titheable arising and kept in Fodder Fen, the Park and the Frith.

And as to the *modus* for foals, insisted on by the defendants in their answer, the court directed this issue to be tried, "Whether there was such a *modus* extending to the whole parish?" but the plaintiff, being present in court, waived the trial, and submitted to accept of the *modus*.

As to the lands in Byall Fen, in the possession of the defendant M. Carter, the tithes whereof are claimed by the other defendant Shaw, by virtue of the lease from the crown, as being extra-parochial, the court ordered this issue to be tried, the plaintiff Jones to be plaintiff at law, "Whether the four hundred and eighty acres in Byall Fen, in the possession of the defendant M. Carter, or any and what part thereof, be in the parish of Downham, or not?"

And it is further ordered by the court, that the defendant Thompson shall account with the plaintiff for the value of his tithes in kind of the titheable matters and things which he had and kept in the Park, the Frith, and elsewhere in the said parish, for the time demanded by the bill; but that for the tithes of his foals, gardens, hearth penny, and Easter offerings, he is to account according to the said customary payments.

And it is further ordered, that the defendants Cawthorne and others shall account with the plaintiff Jones for their Easter offerings, and customary payments for their hearths, gardens and foals, in manner as they have set forth in their answer, and for the values of the tithes in kind of all other titheable matters and things they respectively had and kept in the said parish and titheable places thereof, for the time demanded by the bill, other than and except for the values of the tithes of such titheable matters and things as the plaintiff Jones, in and by his special replication, has waived; and it is referred to the deputy-remembrancer to take the account.

And it is further ordered, that the plaintiff Jones's bill, as to the defendant the bishop of Ely, be dismissed; and that the defendant's cross-bill be likewise dismissed this court, but without prejudice as to the *modus* of foals.

In pursuance of the said order, the deputy made his report the fourteenth of May last, of what was due from the defendants Cawthorne and others, for their tithes, and upon reading the said decree and report without exceptions,

It is ordered by the court, on the first of June, 1719, that the said report be confirmed, and that the defendants do respectively pay to the plaintiff the several sums reported due to him, for the values of the tithes of the several titheable matters and things which they respectively had and kept in the said parish.

In pursuance of the said decree, a trial was had upon the issue directed against the defendants Carter and Shaw; and by a subsequent order, made the twentieth of May last, the plaintiff Jones neglecting to try the same, it was ordered, that the said issue should be taken *pro confesso*, if he did not try the same;

same; and the said plaintiff still neglecting to try the same, the said cause now, on the twentieth of February, 1720, came on for further directions at the request of the defendants; and the plaintiff being duly served with subpoena to hear judgment, and no counsel appearing for him,

It is ordered by the court, that the original bill, and all matters and things therein contained, against the said defendants Shaw and Carter, be absolutely dismissed with costs, to be taxed by the deputy-remembrancer of this court.

THO. BURY.  
RO. PRICE.

JA. MONTAGUE.  
F. PAGE.

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M. 5 Geo. Scacc. *Geale v. Winter*. [2 Wood, 103. Bunb. 40.]

Somersetshire, 20th November, 1718.

**T**HE plaintiff filed his bill against the defendants, and in particular against the defendant Winter, as under-tenant to the defendant Healy, who held the impropriate rectory of Bishop's Lidiard, in the county of Somerset, by lease from the defendants the dean and chapter of Wells, setting forth, that the plaintiff, as vicar of the vicarage and parish church, was entitled to all tithe-hay, to all sorts of grass or seeds, and to all small tithes yearly arising within the said parish.

The defendant Winter said, that he had several small tithes that were due to the plaintiff, which he had offered to pay him; but he denied that the plaintiff, as vicar of the said parish, was entitled to the tithes of hay arising from all sorts of grass or seeds therein, except the tithe of hay yearly arising out of the seven meadows mentioned in the defendant's answer.

The other defendants put in their answers, and submitted themselves to such judgment as the court should make upon the determination of the cause.

The plaintiff replied to the answers of the defendants Winter and Healy; and the defendants rejoined; and witnesses were examined; and upon reading the several depositions, and a survey taken in the month of May, 1650, touching the manor and rectory of Bishop's Lidiard, and on debate of the matter, the court directed an issue to try, "Whether any, and what, tithes of hay yearly arising within the said parish of Bishop's Lidiard, do belong to the plaintiff as vicar, over and above the tithe-hay arising from the seven meadows mentioned in the defendant Winter's answer, viz. Rattle Meadow, Broad Mead, Common Mead, Small Mead, Saunder's Mead, and Thomas Farden's Meadow; or any, and what, sum or sums of money in lieu of such tithe-hay?"

A trial was accordingly had, and a verdict found for the plaintiff; but on the twenty-third of April, 1719, the defendants moved for a new trial, and the lord chief baron reported the evidence of the trial, whereby it appeared that the jury found that the tithes of hay yearly arising within the parish of Bishop's Lidiard, or a reasonable sum of money for a composition in lieu thereof, over and above the tithes of hay arising out of the said seven meadows, did, and do of right, belong to the plaintiff, as vicar of the said vicarage and parish church of Bishop's Lidiard.

The court, after refusing the new trial, declared, that all tithe-hay within the parish, or some *modus*, composition, or other satisfaction, in lieu of such tithe-hay, do of right belong to the plaintiff, as vicar of the said vicarage and parish church of Bishop's Lidiard; and thereupon ordered, that the defendant Winter do account before the deputy-remembrancer for the tithes of hay, according to the verdict, for the time mentioned in the bill; and for all the other tithes demanded by the bill, which he, as lessee of the impropriate rectory of Bishop's Lidiard, had received from the rest of the inhabitants of the said parish.

In pursuance of the said decree the deputy made his report, dated the twenty-second of March last: but before any further proceedings the defendant Winter died, and the said proceeding being properly revived, the cause came on for further directions upon the report; and upon reading the same, and no exceptions taken thereto, and no counsel attending for the defendant,

It is ordered by the court, that the report be ratified and confirmed, and that the

An issue directed to try whether the vicar of a parish was entitled to any, and what, tithes of hay except upon seven meadows.

A decree is never nisi when the cause comes on, upon the equity reserved, after the *postea* returned, but always absolute.

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the said defendant do forthwith pay to the plaintiff the eighty-one pounds, four shillings, and one penny, reported due for his said tithes, together with his costs, to be taxed by the deputy-remembrancer of this court.

THO. BURY.

JA. MONTAGUE.

RO. PRICE.

F. PAGE.—[*Decree Book.*]

It was said in this case, that when a cause comes on after the *postea* returned upon the equity reserved, the decree is never *nisi*, but always absolute.—[*Banbury.*]

H. 5 Geo. Scacc.

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*Hanking v. Gay et al.* [Bunb. 37.] 2 Wood, 94. 2 Gw. 619.

A general allegation of discharge is sufficient in an answer.

It was insisted by defendant that constant non-payment, coupled with being parcel of one of the greater monasteries dissolved by 31 H. 8. was sufficient evidence of exemption; but as the proof was not full as to non-payment, and the defendant did not say the lands were discharged in the abbot's hands, but merely that they were in his hands, the court decreed for the plaintiff.

**B**ILL for tithes; defendants in their answer insisted that the lands where, &c. were formerly belonging to the abbot of Crowland, and therefore exempt; but do not say that they were discharged when parcel of the abbey lands, though not one of the orders which was discharged. (*Nota*; This was one of the greater monasteries dissolved by the stat. 31 Hen. 8.) And the defendants insisted that constant non-payment was a sufficient evidence of an exemption, especially being coupled with being parcel of one of the greater monasteries. And in the case of *Collard v. Newton*, Hil. Term, 1681, the defendant there insisted that the lands, &c. were discharged by bull, order, prescription, or some other way, and allowed to be good. But the court unanimously decreed for the plaintiff in the present case, for that the proof was not full as to non-payment; and also though the defendant says the lands were in the abbot's hands, yet he does not say they were discharged in his hands: and the stat. 31 Hen. 8. extends only to such.

H. 5 Geo. Scacc.

*Lord Arundel's Case.* [12 Vin. Abr. 255. pl. 3.] Rayn. 1094.  
2 Gw. 620.

Account books, &c. of a preceding vicar, evidence for his successor.

**B**OOKS of account, memorandums, &c. of a preceding vicar, may be made use of, as evidence for his successor, to support his demands in case of tithes, &c. By BURY, Ch. B. and Baron PRICE.

H. 5 Geo. Scacc.

*Gregory v. Lutterell.* [12 Vin. Abr. 255. pl. 3. 2 Wood, 114.]  
Rayn. 1094. 2 Gw. 620.

A paper read to prove a composition, though no direct proof that the defendant claimed under the person who signed it, but afterwards held that it was not sufficient to support plaintiff's demand, for the uncertainty.

**A**PAPER, 1639, signed, &c. to prove a composition for rabbits on Brampton Burrows, by the predecessor of the present vicar, &c. was read by the barons (*PAGE hesitante*), though no direct proof that the defendant claimed, under the person that signed it, the warren (that is, burrows), &c.; it appearing that it was of an ancient date, that the estates mentioned in it were as defendant now had; and there being proof of the hand-writing of one of the witnesses, &c.; but afterwards held, that it was not sufficient to support plaintiff's demand for the uncertainty, as that there might be a warren at another place, or a piece of ground so called, or the composition might be for other tithes arising out of the warren.—[*Viner.*]

THE bill stated, that about Easter, 1698, the plaintiff was instituted, &c. into the vicarage of Braunton, in the county of Devon, and entitled to all small tithes and offerings in the said parish; that the defendant, Luttrell, had ever since held and enjoyed the Barton of Saunton Court, the Borough Close, several tenements adjoining, and a rabbit warren, called Braunton Burrows; that

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he was under composition for all his small tithes, except the warren, and had paid the plaintiff in full to Lady day, 1713, from which time he was accountable to the plaintiff for all his small tithes; that from that time he had depastured on his said Barton and lands, yearly, a number of dry, barren and young cattle, and had sold every year twenty fat oxen and other bullocks, and had much milk, many calves, much wool, many lambs, and several colts; that he had kept several mares and horses of his own, and had taken in others; that he also had a quantity of hay; that he also had apples, which he converted into cider, and sold; that he had also sold fish from his fishery; and had various other kind of tithes, worth twelve pounds a-year, exclusive of the tithes of the warren, and the Easter dues and offerings for his family; that he was also indebted ten shillings to the plaintiff for breaking the ground and making graves in the chancel of Braunton church; that the said warren was stocked with rabbits, and that he had sold at least three thousand every year; that the plaintiff desired him to account for and pay the tithes, and offered to accept two shillings a-year for every cow he had kept, one shilling for every calf, the like for every colt fallen, one penny for all gardens, and the like for all fuel burnt on the Barton, provided he would account for the rest; but that he pretended that rabbits were *feræ naturæ*, and that therefore no tithes were due for the warren; whereas his father and his ancestors had paid tithes for the warren, or compounded for it. The bill therefore prayed an account for the tithes of the Barton and the Warren, and for breaking the ground in the chancel.

The defendant Luttrell admitted the plaintiff to be vicar, and that he, the defendant, had been possessed of the said barton and of the warren as in the bill was stated. He also admitted, that he was under composition for all his tithes (save for the warren), and that he had paid the same to Lady day, 1713; and he insisted, that he had paid for or tendered the said plaintiff his tithes ever since; but that nothing was ever paid or due for the said warren, the rabbits being *feræ naturæ*. He also admitted, that he had let out the warren to tenants; but he denied that he was bound to discharge the tithes of it; and he then set forth what beasts and cattle he had; and insisted, that he was under composition for his small tithes (except the warren); and that he was but to pay five pounds a-year. He also insisted, that he had offered to pay the plaintiff for the other tithes in his answer mentioned, and for his Easter dues, for gardens, for the fuel burnt in the house, and for eggs; but that he never sent for the same. He also alleged, that he had no certain fishery or wear for which tithes were ever paid, nor had he sold more fish than to the worth of six shillings and eight-pence; and he denied that his tithes were worth more than five pounds a-year, exclusive of the warren. He said, that he knew nothing of the customary fee of ten shillings for breaking the ground in the chancel, though he had buried eleven persons there.

The said defendant put in a further answer, and the other defendants also answered, and set forth their titheable matters and things; and said, that they never knew any tithes paid for rabbits.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and upon reading certain articles of agreement or composition for tithes, dated the third of March, 1639, between the defendant's father and the then vicar of the vicarage; and also the defendant's answer; and several proofs taken in the cause;

It is this day ordered by the court, that the said bill, and all matters and things therein contained, as to and against the defendants Lamprey and Williams, shall stand dismissed, with costs to be taxed by the deputy-remembrancer.

And it is further ordered, that the defendant Luttrell shall and do forthwith come to an account with the plaintiff before the said deputy-remembrancer for and concerning all the tithes and titheable matters by the said bill charged, and a discovery prayed (save only and except as to the tithes and duties for rabbits and fish, and for the defendant Luttrell's use of the chancel of the said parish-church.

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And it is further ordered, that as for such excepted matters the said bill as to and against him shall also stand and be absolutely dismissed out of this court. The costs to be reserved as to the defendant Luttrell. [Decree Book.]

H. 5 Geo. Scacc.

Lloyd v. Small. [2 Wood, 110.] 3 Burn's Ecc. 2 Gw. 619.

Essex, 23d February, 1719.

*Moduses* for the small tithes of farms set aside, it appearing that the value of them in kind did not amount to more.

THE plaintiff, as vicar of the vicarage and parish church of Epping, in the county of Essex, stated, that he and his predecessors had, time out of mind, been entitled to all the tithes of grass, hay, wood, wool, lamb, and all other tithes and duties arising in the said parish, except the tithes of corn and grain; and charged, that the defendants, being inhabitants therein, did, for one year past, occupy several farms and lands lying within the said parish, and that they had kept thereon divers milch cows, sheep, and cattle, from which tithes had arisen and grown due to him; and that they had several other titheable matters as in the bill charged, for which they ought to have paid tithes in kind; but which they had refused to pay, pretending, that there was some *modus* or customary payment in lieu thereof. The bill therefore prayed an account, and satisfaction for the same.

The defendants confessed, that the plaintiff was lawful vicar; but they denied, that he or his predecessors were entitled to any tithes or dues, other than those set forth in their answers.

The defendant Small confessed, that during the said year he had held the farm called Bury Farm, consisting of several quantities of arable, meadow, and pasture ground; and insisted, that there was a *modus* of eight pounds a-year payable in lieu of the tithes thereof. He also confessed, that he held the farm called Cobb's Fields, consisting of arable, pasture, and meadow ground; and insisted, that there was a yearly *modus* of one pound, ten shillings, payable in lieu of the tithes thereof.

The defendant Chandler confessed, that he held a farm, called Parvell's Farm, consisting of arable, pasture, and meadow lands, for which there was a yearly *modus* of four pounds payable.

The defendant Parry confessed, that in the said year he held a farm in the said parish, called Redsdale Farm, consisting of the same land, for which there was a *modus* of one pound, six shillings, payable yearly.

And all the defendants set forth what titheable matters and things they had in the said year; and admitted, that they had not set forth their tithes in kind; but insisted, that the plaintiff was not entitled thereto, but only to the several sums of money which they said were, time out of mind, paid to the former vicars, and no other, in full of all vicarial tithes, and which sums they averred the vicar had received.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and on debate of the matter,

The court was of opinion, that the said several sums of money insisted on by the several defendants to be paid by them respectively as *moduses* for the vicarial tithes of their respective farms are not good and legal *moduses*. (1)

It is thereupon ordered by the court, that the defendants shall severally account with and satisfy the plaintiff for the value of the tithes of the several titheable matters and things which had arisen upon the several farms and lands by them respectively held and occupied within the said parish during the time in the bill mentioned. And it is referred to the deputy-remembrancer to take the said account.

(1) It is said, that it appeared by the defendant's answer that the small tithes in kind demanded by the bill did not amount to more

in that year than the pretended *moduses*; and therefore the *moduses* were set aside. 3 Burn's E. L. 412, 413.

E. 5 Geo. Scacc. *Watson v. Lindsel*. [Banb. 40.]

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**T**HIS *modus* was insisted upon by the defendant for tithe-milk, that he paid the tenth meal from the first of May inclusive, twice every tenth day at the church porch, until the first of August exclusive; but this cause going off upon another point, no opinion was given as to the validity of the *modus*. It was said in this cause, that it is a good objection to a witness, that he is an inhabitant of the parish where the *modus* is insisted upon; and if he is not in the occupation of any lands titheable, it lies upon the other side to shew it.

It is, *prima facie*, an objection to a witness that he is an inhabitant of the parish where the *modus* is insisted on, and it lies on the other

side to shew he enjoys no titheable lands.

E. 5 Geo. Scacc.

The Earl of Scarborough *v. Hunter et al*. [Banb. 43.] 2 Wood, 110.  
2 Gw. 621.

**A** BILL was preferred by the Earl of Scarborough for the tithe of fish due by custom,<sup>(1)</sup> which custom was laid for all fish taken at sea, and brought to land and sold within the parish of Hort, of which the plaintiff was the impropriate rector; secondly, for all fish sold at sea, and the vessel came back to the parish; thirdly, for fish taken by the inhabitants, and sold at another port: although the plaintiff did not prove his custom as laid in the bill, yet by three barons against the chief baron, an issue was directed to try, whether there was such a custom as laid in the bill, or whether any and what custom; though it was said, there never was any instance, where either the plaintiff or defendant insisted upon a *modus*, or custom, and did not prove it, that ever it went to a trial at law, it being essential to a *modus*, or custom, that it be certain. It was also objected, that the custom was illegal as it was laid; for if it is a personal tithe, as insisted upon, (and as the court seemed to think,) then a double tithe may be payable, not only in another port where the fish is sold, but also where the fisher inhabits; to which three barons against the lord chief baron said, it was a good custom; for one tithe may be paid by custom, and one of common right.

Issue directed to try a custom, though no proof of it made, as laid in the bill. A double tithe may be payable, for one tithe may be due by custom, and another of common right.

(1) The custom was alleged to be, that 12d. in the pound of the clear profit should be paid for all fish brought into Hartlepool and there sold, and the 20th part of the clear profits of all the fish caught and sold at sea,

&c. by the fishermen of that parish; and the court proposing that such payments should be taken without costs on either side, the account was by consent taken accordingly.

Tr. 5 Geo. B. R.

*Asgill v. Hunt*. [10 Mod. 439.] 1 Stra. 187. Fortesc. 347.

**P**ROCESS in spiritual court for calling a woman "whore," in London. After sentence, the court of King's Bench was moved for a prohibition.

But the prohibition was refused.

The court said, that it was a known rule laid down in books, that where it appears upon the face of the libel, that the matter is of temporal and not spiritual consuance, there a prohibition may be granted after sentence; but not where it does not appear; for there it must be taken advantage of before sentence. Now here the offence in the libel is certainly a matter of spiritual consuance; and though it appears in the libel, that the words were spoken in London, yet that would not take away the jurisdiction of the spiritual court, were it not for a particular custom, by virtue of which those words are punishable in London: but this being a particular custom, the court can no more judicially take notice of it, than they can of any other custom of the city of London; and if a cause be removed out of the city courts by *habeas corpus*, the custom must be returned, or no *procedendo* can ever be granted.

A prohibition lies to an inferior court, after sentence given, where it appears upon the face of the proceedings that the matter was not within the jurisdiction of the court.

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Tr. 5 Geo. B. R. Dr. *Bows v. Jurat.* [10 Mod. 440.]

*Quere*, whether a prohibition lies to the spiritual court to stay a suit for Easter offerings, on a suggestion in the libel of a custom to pay them, where sentence was given against the defendant by default.

Although a defendant make no defence in the spiritual court, yet it is the practice there to require proofs of the plaintiff's case.

**D**R. BOWS, vicar of New Romney, brought a libel in the spiritual court against the defendant, one of his parishioners, for Easter offerings; suggesting that they had, time out of mind, used to be paid in that parish.

The defendant made no defence at all in the spiritual court; but after sentence against him, moves the court of King's Bench for a prohibition.

The motion was granted *nisi*.

The reason why the court doubted, whether the prohibition was to be granted or not, was their ignorance of the practice of the spiritual court. For the court seemed clearly of opinion, that if the practice of the spiritual court was agreeable to that of the courts at law, *viz.* to take every thing *pro confesso* against a defendant that makes no defence, and so give sentence for the plaintiff without obliging him to prove the truth of his case, then the prohibition was not to be granted; because the custom set forth by the plaintiff was not denied by the defendant, and consequently no occasion for trial of the custom. But in case the practice of the spiritual court was, not to give sentence for the plaintiff, even in case of no defence made by a defendant, without proof made to the court by the plaintiff of the truth of his case, that then a prohibition was to be granted; because then the sentence of the spiritual court was founded plainly upon proof made before them of a custom, which is not to be permitted, because the proof required by them is very different from that required by the common law.

Dr. Pinfold, who spoke against the prohibition, ingenuously owned, that it was the practice of the spiritual court to require proof.

However, the court took time to consider, and would not make the rule absolute.

Tr. 5 Geo. Scacc.

Sir *Edw. Delaval v. Sir Edw. Blackett.* [Bunb. 45.] 2 Wood, 79.

Upon a bill of revivor for the duty as well as the costs, an executor defendant shall pay costs; *aliter* when the revivor is only for the costs to be ascertained.

**T**HE plaintiff preferred his bill against the defendant for tithes, and had a decree for an account; but before the costs were ascertained Sir Edw. Blackett died; Sir Edw. Delaval revived against the executor, and upon the question, whether the defendant should pay costs, this distinction was taken, that if the revivor against the defendant had been only for costs, which had not been ascertained in the lifetime of the testator, then the defendant should not have paid costs; but here the revivor was for the duty as well as the costs; and therefore the defendant, though an executor, should pay costs.

Tr. 5 Geo. Scacc. *Anon.* [Bunb. 46.]

An impropriator's predecessor's book admitted as evidence of a mortuary due.

*Quere*, if a book of the lord of a manor is evidence of quit-rents; though a bailiff's accounts of rents paid and allowed is evidence.

**U**PON a bill by an impropriator for a mortuary, the book of some of the predecessor impropriators was offered to be read as evidence, wherein were entries of payments of mortuaries; but it was objected, that although a parson's book (who is only tenant for life, and therefore not supposed to enter any thing with partiality to his successor) may be read; yet the book of a lay impropriator, who has the inheritance, ought not to be read: to this it was answered, that the book of a lord of the manor, who has the fee, is admitted as evidence of quit-rents. (*Sed quere*, if the bare entry of the lord of a manor in his book be evidence; though a bailiff's accounts, where it appears the rents have been paid and allowed in the account, are admitted as evidence.) *Per Curiam*, let the book be read.



Tr. 5 Geo. Scacc.

The Bishop of Exeter v. *Trenchard et al.* [Bunb. 47.]

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**I**N a bill for tithes, the defendant, as to some of them, insists upon a *modus*, but admitted others, which he had not paid, and having omitted to make a tender of them by his answer, he upon motion obtained an order, that he might be at liberty to pay so much money in lieu and satisfaction of all his tithes not covered by the *modus*, together with the plaintiff's costs to that time, and the plaintiff to proceed at the peril of costs. (But I believe this was by consent.)

Tender of payment for tithes admitted after answer, but *quære* whether by consent.

M. 6 Geo. B. R. *South v. Jones.* [1 Stra. 245.]

**T**HE plaintiff declares, that he being occupier of certain lands in Downham, 20th of August cut down his grass and divided it into cocks, and the same day gave notice to the defendant, who was rector, to come and carry away his tithes, which he has not done, *per quod* he lost the use of that part which was under the cocks, from the said 20th of August to the 10th of December following. The defendant pleads, that for all that time the close where, &c. was surrounded with ditches; and that the ditches, ways and passages were so filled with water, that he could not carry off his tithes. The plaintiff replies, that the ditches, ways and passages were not so; and the defendant demurs.

The parson is not obliged to take the tithe of grass the day it is cut, but may let it lie long enough to make it into hay, and what is a reasonable time for that purpose, (because of the accidents of wind and weather,) must be decided by a jury.

*Bootle pro defendente.* The declaration is ill, in demanding more damages than the plaintiff ought to go for; he demands from the time of mowing, whereas the parson is not obliged to carry it away then, but it must lie till the parishioner has made it into hay. 1 Roll. Abr. 643. X. 1 Roll. Rep. 420. 172. We are not after a verdict, where this might be helped by a release, but on a demurrer. So *non constat*, the plaintiff will release.

2. The replication is ill in offering to put the whole time in issue, and though we plead to the whole, as we were obliged, yet the fault is in them.

3. The replication is in the copulative, ditches, ways and passages, when it should have been in the disjunctive. 2 Saund. 205. 3 Keb. 162.

**CH. J.** The declaration is ill, for it should have shewn when it was made into hay, and dated the wrong from thence: the replication is well enough in the copulative, because the plea is one entire matter of excuse, and the defendant relies on the whole, and not on each particular's being impassable. *Et per Powis, J.* The defendant has not denied the wrong which the plaintiff has laid, but takes upon him to excuse the whole. *Et per Eyre, J.* Suppose the tenant will not make it into hay, the parson has no remedy to compel him, but he may do it himself, which it appears he had time enough for. **FORTESCUE, J.** The issue is well offered, for the passages being over the ditches, as they must be, (because it is said the close was surrounded,) it was proper to put it in the copulative. The time laid in declarations is for the most part immaterial, and in trespass it is sufficient if part of the time be according to law, because the jury may apportion it, or the party release it: it is plain here is a wrong for some part of the time, and I believe the precedents will warrant this declaration. Hearn, 725. 1 Brown. 69, 70. *ulterius*.

*Cheshyre, Serjeant, pro defendente.* If the parson is hindered by the act of God, or the party, from taking his tithes; it is an excuse. 1 Roll. Abr. 109. pl. 37. Though our plea is double, yet it is a principle in pleading, that if the other does not demur, he must answer the whole plea. Our plea amounts to this. The way, says he, to the close was very bad, and if I could have got through it, yet when I came to the close, it was so encompassed with ditches, and those filled with water, that I could not have got over. The replication puts us to prove both, when either is an excuse, and therefore it is bad. 1 Saund. 268.

The declaration likewise is ill, because the defendant cannot be guilty as to all

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all the time; for the court will take notice, that it is impossible to make the grass into hay the same day it is cut: and the parson has of common right time to have it made into hay. If a man reserves a rose, the court so far respects the order of nature, as not to make him pay it in winter.

*Receve contrâ.* The plea is not double, but the defendant relies upon it as making one entire excuse, and therefore we have properly traversed the words of it in our replication.

As to the declaration, it is well enough, for the measure of the damages is not how long the cocks remained after they were cut, but after a reasonable time to remove them; as in an action for beating his servant, *per quod servitium amisit*, the smart of the servant is not the measure of the damages, but it is the loss of service which the master recovers for; and what is a reasonable time in this case, is matter of evidence, and must be left to a jury.

But if we do go for too much, they are not proper to make the objection, till they see whether we take damages for an improper time; for as part of this time is well alleged, the jury may sever the time, and give damages accordingly.

POWERS, J. held with the plaintiff. - *Et per EYRE, J.* The plea is not double, for the first part is only inducement, but the gist of it is the ditches being filled with water; so the replication meeting the plea is right. It is certain the defendant let his tithes lie too long, and that is a damage to the parishioner. If a *continuando* is laid in trespass, the jury may give damages as to part of the time only.

FORTESCUE, J. The replication is well enough, for the substance of the plea is but one fact, that he could not come at his tithes, and all the rest is only matter of circumstance. We cannot judge what is a reasonable time, because of the accidents of wind and weather, but that is to be left to a jury; and if the plaintiff had gone only from three or four days after the cutting, I do not see how that could have mended the case upon a demurrer. *Judicium pro querente.*

M. 6 Geo. Seacc. *Johns v. Stafford.* [Bunb. 50.]

Publication of old depositions refused to be granted, though it was insisted that the plaintiff, by referring to them in a new bill, had in effect revived the suit.

JOHNS exhibited his bill against Stafford to establish a decree relating to a dispute about the right to mills and the water running to them; and in his bill (*inter al'*) sets forth, that in King Charles the Second's time the city of Exeter preferred their bill against the now defendant's father; to which the then defendant put in his answer, and there were depositions taken, to which he refers; that cause abated by the death of one of the parties before the hearing; and the defendant moved, that these depositions might now be published to be made use of in this cause, and insisted, that though the cause abated by the death, and was consequently out of court, yet that the plaintiff, by referring to them in his now bill, had in effect revived the suit: but Lord Ch. B. BURR, PRICE and PAGE (*absente MOUNTAGUE*) were against the order for granting publication; and the defendant took nothing by his motion.

H. 6 Geo. B. R.

*The King v. Furness.* [11 Mod. 320. 1 Stra. 264.]

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On an appeal to the sessions, if the right of tithes come in question, the court cannot proceed in the cause.

The complaint to found an order for non-payment of

ON affidavit read, that the right of tithes was in question when the cause was heard at the sessions upon an appeal, it was moved, that the *certiorari* and return might be filed.

*Receves, contrâ.* The affidavit not only says, that the right of tithes came in question, but also proceeds to shew what was meant by that, *viz.* that time immemorial they had not paid tithes for lambs proceeding from ewes but a year old. This is a prescription *de non decimando*, which is void; for all things are by right titheable, and a layman cannot prescribe *de non decimando*.

*Fazakerly,*

small tithes under 7 and 8 W. 3. must be in writing.

*Fazakerly*, in reply. A particular place may be exempt from tithes for a particular matter, which is the present case. The statute 7 and 8 Will. 3. c. 6. s. 7. says, that no proceedings or judgment had by virtue of this act, shall be removed, &c. unless the title of the tithes come in question. This order is not made by virtue of that act, or according to it; for the act directs, that there must be a demand in writing twenty days before the justices have jurisdiction, and nothing of that appears on the order, nor how long the tithes have been due; and if this be not an order made by virtue of this act, a *certiorari* lies of common course to remove it without the affidavits.

*Reeves*. They are not now to take exceptions to the form of the order, but only to consider whether the return should be filed.

*PRATT*, Ch. J. The only matter now is, Whether the right of tithes came in question at the sessions? Common right is against the defendant, but he says there is a custom for him; then, Whether or not this is a good custom? is a question of law; and that point has been doubted. In the case of *Hunsfield Puriton*, in Lord Chief Justice Holt's time, a prescription *de non decimando* was not allowed for live cattle; and it is there said, that it was allowed good for wool only; and the reason given was, that tithes of wool are by custom, and not of common right: it is then a question in law not proper for the sessions to determine.

*EYRE*, J. The justices of the peace cannot judge of that matter.

*FORTESCUE*, J. It would be a good defence to the spiritual court, and a good ground for a prohibition; and I cannot think that the act was designed to give the court of sessions a larger jurisdiction than the spiritual court.

*Per Curiam, absente Powys*. Let the return be filed.—[*Mod. Rep.*]

ORDER for non-payment of small tithes was quashed, *quia* said only upon complaint generally; and the 7 and 8 W. 3. c. 6. requires the complaint to be in writing.—[*Strange.*]

### H. 6 Geo. Scacc.

*Roe et al v. The Bishop of Exeter*. [Bunb. 57. 12 Vin. Abr. 255. 2 Wood, 136.]

**I**N a bill to establish *modus*, these were insisted upon, and allowed; 1st, For every cow having a calf, for the tithe of the milk and the calf, seven-pence. 2dly, For every milch cow milked without a calf, eleven-pence for the tithe of the milk. 3dly, For every heifer, the first year she has a calf, thirteen-pence for the milk and calf; these payable at Michaelmas. For every hogshead of cider made of apples grown in the parish, eight-pence. For board apples, a penny. For fire-wood spent on the farm, an hearth penny. For fruit, herbs, roots, and other garden stuff, a garden penny. For a colt, a penny; these payable at Easter.—[*Bunbury*]

every heifer; these three payable at Michaelmas: 4. 8d. for every hogshead of cider; 5. 1d. for board apples; 6. A hearth penny for fire-wood; 7. A garden penny for fruit, herbs, roots, and other garden stuffs; 8. 1d. for a colt; these five payable at Easter.

Every composition is an evidence of the right and duty of the tithes for which the composition is made, yet in the Bishop of *Exeter's* case it was held, that a general composition may include a *modus* as well as tithe in kind; where the *modus* were for several matters, for some years they may be more, in some years less, and so may be compounded for; and though this composition continue forty years, yet the *modus* shall continue.—[*Viner.*]

Devonshire, 22d February, 1719.

THE bill stated, that the plaintiffs were owners, occupiers, tenants, and landholders of divers messuages, lands, gardens, and orchards, in the parish of Shobrook, in the county of Devon; that the plaintiff Rowe occupied a messuage, several gardens, orchards, and about eighty acres of land, meadow and pasture; that the other two plaintiffs occupied the like; that there were, and

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Moduses of,
1st. 17d. for the tithe of the milk and calf of every cow;
2d. 11d. for the milk of every milch cow not having a calf;
3d. 13d. for the milk and calf of 1d. for board apples;
4. 8d. for every hogshead of cider;
5. 1d. for board apples;
6. A hearth penny for fire-wood;
7. A garden penny for fruit, herbs, roots, and other garden stuffs;
8. 1d. for a colt; these five payable at Easter.

Moduses may be included in a composition for tithes, and though it continue for forty years, the *modus* shall not be extinguished.

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time out of mind had been, divers *modus*es, or perpetual customary sums payable, by the occupiers of lands in the said parish, to the rector, in lieu of tithes in kind, for the matters following, viz. for every cow having a calf within the said parish, seventeen-pence, for and in lieu of tithe of the milk and calf of such cow; for every milch cow milked within the said parish, without a calf, eleven-pence, for the tithe of the milk of such cow; for every heifer the first year she has a calf within the said parish, thirteen-pence, for and in lieu of the tithe of the milk and calf of such heifer; which said several and respective *modus*es were, by the custom of the parish, due and payable at Michaelmas every year; for every hogshead of cider made within the said parish of apples which grew and were gathered in the said parish, eight-pence, payable at Easter, by the owners and proprietors of the apples, for and in lieu of the tithes of such apples, and after that rate in proportion for a less quantity than a hogshead; for the tithes of all hoard apples of every tenement gathered within the said parish, and not made into cider, one penny, payable also at Easter by the owner of such apples; for the tithe of all firewood grown, cut, and burnt within the said parish, on the farm on which the same grew, in every year, one penny, called a hearth penny, payable also at Easter, by the tenant or occupier of the lands whereon such wood grew; for the tithe of all fruit, herbs, roots, and other things arising in gardens within the said parish in every year, one penny for every garden, commonly called a garden penny, payable also at Easter by the tenants or occupiers of such gardens; for the tithe of every colt foaled within the said parish, one penny, payable also at Easter, by the owner or possessor of such foal so foaled; and divers other *modus*es or customary payments within the said parish, which the rectors accepted, and ought to accept for other titheable matters, in lieu of the tithes thereof; that all the said *modus*es, &c. had been paid by the said plaintiffs, in lieu of the said tithes, to Michaelmas, 1716, and that they were willing and ready to pay the same to the defendant, who was then rector, but that he insisted on being paid tithes in kind for the said years 1716 and 1717, whereas the plaintiffs had been under general compositions for the ease of the defendant, to pay yearly to him for all their tithes and customary payments within the said parish, home to Michaelmas then last past, but without prejudice to the said *modus*es, or any way to extinguish the same; that the defendant insisted on being paid tithes in kind, and refused to accept the yearly compositions, according to his agreement, though he never gave the plaintiffs notice that he would break the same, and refused to allow them any customary payments in lieu, or to discover the same; that the plaintiffs were in great danger of losing the evidence of the said *modus*es or customary payments, their witnesses who could prove the same being very aged and like to die. The bill therefore prayed a full discovery of the matters aforesaid, and that the plaintiff's ancient witnesses might be examined, and their testimony preserved, and the said *modus*es established by the decree of the court.

The defendant answered, and said, that he believed the plaintiffs were occupiers of the several messuages, &c. as stated in the bill, and in the said years had several milch cows, calves, &c. but he denied the said ancient *modus*es or customary payments; and said, that he had been informed that some of the late rectors had made general compositions with the landholders for several gross sums, in lieu of all their tithes, payable at Lady Day and Michaelmas, and that his curate, finding them under such compositions, had agreed with them to Michaelmas, 1717, but that he, the defendant, insisted on being paid tithes in kind for everything titheable since Michaelmas, 1717; and that he had refused to allow of any yearly composition, *modus*, or customary payment, nor could he give notice to the plaintiffs that he would break the said compositions, he never having agreed to accept the same after Michaelmas, 1717, when he gave proper notice to the plaintiffs that he would take his tithes in kind; and he spoke as to the terriers.

The Bishop of Exeter filed his cross-bill against several of his parishioners stating, that, for two years past, he had been rector of the said parish, and was entitled to all great and small tithes arising therein; that the defendants were

occupiers

occupiers of several messuages, &c. and had several titheable matters arising therein; that he had applied to them, and expected to have received tithes in kind of the several matters from Michaelmas, 1717, but that they pretended a *modus* or composition for the same. The Bishop therefore prayed a discovery of their titheable matters and things, and an account for the same.

The defendants admitted the plaintiff was rector of the said parish, and entitled to great and small tithes, or to some *modus* or other satisfaction for the same, and that from Michaelmas, 1717, they had been occupiers of divers messuages, &c. and had several titheable matters therein; but they insisted that there was, and time out of mind had been, paid by the owners and tenants of lands in the said parish, to, and accepted by, the rectors of the said parish, for the time being, certain *moduses* or perpetual customary payments in lieu of tithes in kind, for the said several kinds and species of the several titheable matters as mentioned in the original bill, without interruption (except when the same had been suspended by some composition for the whole tithes in gross, wherein such customary payments were included); and the said defendants set forth the several titheable matters and things they had, and submitted to pay the hearth and garden penny, with the other *moduses*.

To which answers in both causes, the plaintiffs replied; the defendants rejoined; and witnesses were examined in both causes.

The cause came on to be heard the fourth day of February instant, and upon reading the several proofs taken in the cause, and two paper books, both containing chiefly an account of the receipt of tithes and *moduses*, and other matters relating to the tithes of Shobrook; and one of the said books dated 1646, and the other 1656 and 1660; and several receipts relating to the tithes of the said parish, dated 1690, and so on; all which were fully proved in the original cause;

The court was unanimously of opinion, that the several and respective *moduses*, for the several and respective things mentioned and insisted on by the plaintiffs in the original bill, and in their answers to the cross bill, were fully and well proved, and ought to be confirmed and established by the decree of this court, but declared, that his lordship might try the said *moduses* at law, if he thought fit so to do, and he was to give his answer, whether he would go to a trial at law.

And whereas, by an order of court, dated the tenth of February instant, upon the motion of the Bishop, it was ordered, that this cause should stand over for his lordship to consider of the said trial,

And these causes now standing in the paper accordingly, his lordship gave his answer, that he submitted to the opinion of the court, and would not go to a trial at law.

Whereupon it is ordered, adjudged, and decreed by the court, that the several and respective *moduses* for the several and respective things mentioned and insisted upon by the plaintiffs in their original bill, and in their answer to the cross bill, be and are hereby confirmed and established by this court; and that the said cross bill do stand absolutely dismissed out of this court.

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F. PAGE.

[Decree Book.]

H. 6 Geo. Scacc.

Glanvil v. Trelawney. [Bunb. 70.] 2 Wood, 126. 2 Gw. 622.

WHERE a man prefers a bill to establish a *modus* against the lessee of the impropriation, he must make the owner of the impropriation a party; for this court will not bind the inheritance of any person, unless he is before the court.

The impropriator must be a party to a bill brought against his lessee, to establish a *modus*, for the court will not bind the inheritance unless the owner be before them.

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Although a *modus* be pleaded, yet quantities and values must be set forth, for tithes may only be in the personal knowledge of the party, who may die before examination.

E. 6 Geo. Scacc.

Gumley v. Fontleroy. [Bunb. 60.] 2 Wood, 231. 2 Gw. 628.

BILL by a vicar for tithes; the defendant pleads that the plaintiff employed a person to collect the tithes, and that he the defendant paid the collector five pounds, and does not set forth quantities and values; so the plea was overruled with costs; for this court never admits a plea, even of a *modus*, to cover the discovery of quantities and values, because the defendant may die before they go to examination, and then tithes lying only in the personal knowledge of the party, there would be no way of coming to the knowledge of the particulars: and the case in Hard. was denied, and it was said it had often been so.

E. 6 Geo. Scacc.

Jordan v. Colley et al. [Bunb. 61.] 2 Gw. 625.

The court said that a parish could not prescribe in *non decimando* for tithe-wood: But the reporter observes, that he did not find it certainly determined whether tithes were due of wood of common right.

BILL by a rector for tithe-wood in the parish of Little Wenlocke in the county of Salop, as it had been time out of mind paid in that parish, against the defendants, as vendees of Sir William Forrester, the defendants in their answer say, that no tithe had been paid for this coppice-wood called Holebrook Coppice, when felled before, and that they never heard that any tithe or *modus* had been paid for wood in that parish. It was insisted upon for the defendants, that tithe-wood was not due *de communi jure*, and therefore that the proof lay upon the plaintiff, and that it was only founded upon a canon in Bishop Stratford's time, anno 17 Edw. 3., and therefore the defendants need not allege any prescription or custom by way of exemption: but it was answered for the plaintiff, that occupiers must always set forth an exemption. And *per curiam*, the defendants ought to have shewn some exemption; and there is no instance that a parish can prescribe in *non decimando* for tithe-wood; wilds and hundreds are upon another consideration. But *nota* (says the reporter himself), though the defendants were decreed to account, I do not find that it is yet certainly determined that tithe-wood is due *de communi jure*.

E. 6 Geo. Scacc.

Dodson v. Oliver. [Bunb. 73. 160.] 2 Wood, 143. 2 Gw. 623.

The court was divided upon the point, whether tithes of an ancient corn mill were due of common right.

THE single question adjourned until this day for the solemn judgment of the court was, Whether tithe of an ancient corn-mill, that had never paid tithes, was payable or due of common right. Baron PARCE and Baron MOWATAGUS were of opinion, that an ancient mill ought to pay the tenth toll dish, which being a tenth part of the thing itself, was a predial tithe, and due of common right: but Lord Chief Baron BURY and PARS, that it is a personal tithe, and not due of common right, and not having been paid, is now exempt by the statute 2 Edw. 6. So the court being divided, the plaintiff had no decree as to this matter of the mill.

If there be no customary mode of paying tithe of milk, the parishioner need not carry it to the church porch or to the parson's house; but of common right he is to pay every tenth meal milked in his own pails, to be carried away by the parson in his own pails in reasonable time, and if it be not fetched away before the next milking time, the parishioner may throw it upon the ground.

Nota, If there be any custom in a parish for the manner of tithing milk, as to carry it to the church porch or parsonage house, that must be observed by the parishioner; but if there be no particular custom or usage, the parishioner is obliged *de jure* to pay every tenth meal, to milk the cows at the usual place of milking into his own pails, and the parson is obliged to fetch it away from the milking place in his own pails in a reasonable time; and if he does not fetch it before the next milking-time, the parishioner may justify the pouring the milk upon the ground, because he then has occasion for his own pails. And it was determined by the whole court of Exchequer, in this cause of *Dodson and Oliver*, at a former day, that the milk ought not to be carried either to the church porch, or to the parson's house, and that it ought to be fetched by the parson.

H. 8

H. 8 Geo. Scacc.

BILL of revivor both for the duty, (which was three pounds, six shillings, and eight pence, for tithe-milk and Easter offerings,) and costs, against the defendants as executors to the first defendant, who died after the decree, but before he costs were taxed; and therefore it was objected for the defendant, that the costs not being ascertained in the lifetime of the party by taxation, there could be no revivor for them now: But *per Curiam*, although there can be no revivor for costs alone, yet there may be for the duty and costs; and decreed accordingly.

Nota, In Scaccario, all the enrolment there, is the entry.—*Nota*, There can be no *Subpana scire facias* until the decree be entered.

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Although there can be no revivor for costs alone, yet there may be for the duty and costs.

E. 6 Geo. Scacc.

Pye v. Rea. [Bunb. 72. 2 Wood, 170.] 2 Gw. 628.

BILL by a vicar for tithes; the defendant admitted in his answer, that the plaintiff was entitled to all sorts of tithes, but insisted upon a special exemption; upon this admission the plaintiff was not obliged to shew any special title either by endowment or prescription, which otherwise, he ought to have one.—[*Bunbury.*]

rights of tithes, but relied upon a special exemption; it was held, upon such admission, that the plaintiff need not shew any special title by endowment or prescription, as he otherwise ought to have done.

Where a defendant by his answer admitted that the plaintiff (a vicar) was entitled to all tithes, the plaintiff need not shew any special title by endowment or prescription, as he otherwise ought to have done.

Monmouthshire, 27th April, 1721.

The plaintiff, as vicar of the vicarage and parish church of Dixon, in the county of Monmouth, stated by his bill, that he was, and for two years past had been, lawful vicar there, and ought to have had and received all tithes of coppice wood, and all small and minute tithes, oblations, offerings, and other profits whatever, and all portions, compositions, rates, and payments in lieu of tithes, or some satisfaction in lieu of the same yearly, which by common right or custom, time out of mind, had been due or payable to his predecessors; that all and every person and persons owners and occupiers of messuages, gardens, lands, and grounds at all times justly paid or ought to have paid tithes in kind, or made some satisfaction; that the defendant, for three years past, had been owner and occupier of a large coppice wood, called Priory Wood, and of other coppice woods and underwoods there, and had felled and cut down the same, made thereof one thousand cords of wood, and had sold great quantities of poles of ash and other trees from the wood so fallen, without setting out the tithes thereof, or making any satisfaction for the same, on a pretence that the said woods were exempted from the payment of tithes in kind, and liable only to a certain *modus* in lieu thereof. The bill therefore prayed a full discovery, and an account for the same.

The defendant admitted, that the plaintiff was vicar as stated in the bill, and entitled to all tithes personal, predial, and mixed; but he denied that either the plaintiff or his predecessors had any right to the tithes of the said woods. He admitted, that he had been, for several years past, owner of Priory Wood; that it was formerly part of an ancient messuage and lands, called Priory Estate, or the demesnes of the ancient dissolved priory of Monmouth, situate in the parish of Saint Margaret; and that the said Priory Estate and Priory Wood are all exempt from the payment of tithes, and so had been enjoyed time out of mind; for that Monmouth anciently was a cell to the abbey of Saint Florence, at Samures; that one Willenochus, then lord of Monmouth, built a church in his castle of Monmouth to the honour of God, Saint Mary, and Saint Florence, and gave it in perpetual alms to the monks of St. Florence, at Samures, from whence he used to call the monks to live and serve in the said church, and for their encouragement gave them possessions in lands, churches, and tithes, and three plough lands near his castle of Monmouth, as by the

charter

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charter of foundation, memorandums, and records will appear; that the priory of Monmouth afterwards continued for some time in the hands of some of the monks of Saint Florence till the dissolution of the alien priories in the reign of Henry the Fourth or Henry the Fifth; that after the said dissolution, the said priory and wood were given, settled, or annexed to the abbey of Saint Saviour's, in Bermondsey, and therewith held; that afterwards, in the year 1533, Robert, then abbot of the exempted monastery of Saint Saviour, in Bermondsey, gave the priory of Monmouth to one Richard Tailbusse, his brother monk, with full license for him to govern there; that afterwards the said Richard Tailbusse, as prior of Saint Saviour's, and his convent, enjoyed the same, and granted leases thereof to tenants, as appears more fully by the records and accounts in the alienation office; that at the dissolution of abbeys in the reign of Henry the Eighth, the said priory came into the hands of the crown, and remained in the crown until the reign of Philip and Mary; that in the fourth or fifth years of their reign, the said dissolved priory, of which the Priory Wood was part, was granted to Gregory Price and T. Kerry, and their heirs, as appears by the grant in the augmentation office; that the said Gregory Price and T. Kerry, after such purchase, conveyed the same to Thomas Williams; that the said Priory Estate continued in the name and family of Williams by intermediate settlement; and that the several branches of it successively enjoyed the same, together with the said Priory Wood, exempt and free from payment of any tithes, and without any demand or suit concerning the same, from the time they were purchased by Thomas Williams until the reign of William the Third, when there was a fallage of all or part of Priory Wood; one John Williams, since deceased, being then owner, and in possession thereof; that the said John Williams, before his death, sold the same to the defendant; that at that time one Richard Vaughan being vicar of Dixon, and claiming the tithes of that fallage, brought his bill in this court to impeach the title of the said John Williams, he having mortgaged the same; and that the said John Williams, instead of defending his right, compounded for the tithes; which was the only instance in which any tithes had ever been paid for the said coppice woods, or other titheable things happening in Priory Wood; and he gave in an account of the fallage of the same.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon reading the depositions on both sides, and divers proofs in the cause, and on full debate,

It is ordered by the court, that the defendant do forthwith account with the plaintiff for the tithes demanded by his bill. And it is referred to the deputy-remembrancer to take the same.

In obedience to which order, the deputy made his report, dated the twenty-third of December last; and upon reading the said decree and report, and no exceptions filed, it is ordered by the court, on the first of February, 1721, that the said report be ratified and confirmed, and that the said defendant do forthwith pay to the plaintiff twenty-nine pounds, nine shillings, and nine-pence, for his tithes so reported due, together with his costs to be taxed,

THO. BURY.

JA. MONTAGUE.

RO. PRICE.

F. PAGE.—[*Decree Book.*]

Tr. 6 Geo. Scacc. *Clark v. Dashwood.* [Bunb. 66.]

Where the proof of non-payment (and that the land was part of the possessions of a greater monastery?) was belief and hearsay, an account was decreed.

BILL for the tithes of the rectory of Carsington in the county of Oxford, particularly of the coppice-wood called Burleigh Wood; and the plaintiff derives his title from the lessee of the dean and chapter of Christ-church: the defendant insists, that no tithe of this wood was ever paid but once (being terrified) for that it was exempt as part of the possessions of Eynsham-abbey, which was one of the greater abbeys, and consequently capable of an exemption by the stat. 31 H. 8., and insisted by Mr. Ward, for the defendant, that constant non-payment was an evidence of exemption in the case of a lay impropriator. But *nota*, the proof was only belief and hearsay, and the defendant was decreed to account.

Tr. 6 Geo. Scacc.

Bliss v. Chandler. [2 Wood, 146.] Rayn. 152. 2 Gw. 625.

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Kent, 15th July, 1720.

THE bill stated, that, for four years past, the plaintiff had been lessee of the tithes of corn, grain and hops arising and belonging to the rectory or parsonage of Maidstone, in the county of Kent; of the tithes of hay and hops in the borough of Stone; of corn, grain, and hops in the borough of Week, parcel of the said rectory; of the tithes of corn, grain, and hops in Lodding-ton; and of the tithes of corn, grain, hay, hops, and small tithes in the borough of Westree, parcels of the said rectory; that the defendant, in the year 1719, occupied, in the said rectory, seven acres of hop-ground, lying within the boroughs of Stone, Week, or Westree, and had a quantity of hops growing thereon, the tithes whereof the plaintiff was entitled to receive; that, before the time of picking the said hops, he had given notice to the defendant that he would take the tithes of the said hops in kind; that the defendant agreed thereto, and promised to set out the full tenth part of the said hops justly in kind; that at the beginning of the picking, for about six days, he did so set out the tithes thereof by the tenth bushel, after they were picked from the bine; that he, the plaintiff, by his servant, took and carried the said tithes away, and expected that the defendant would have continued to set out the tithes in the same method, when he picked the remainder; that the defendant forbore picking for some time, and sent the plaintiff word that he would not set out the tithes of his hops by measure any longer, but would lay down on the ground every tenth pole of hops for the plaintiff to pick and carry away; but that, the said method being unusual and unequal, he had refused to agree thereto, and had informed the defendant of his refusal; that nevertheless the defendant picked the remainder of his hops, and took the same away, without paying his tithes in kind, or making any satisfaction for the same. The bill therefore prayed, that the defendant might pay his tithe hops in kind, and answer the matters complained of in the bill.

The defendant said, that he believed the plaintiff was lessee of the tithes, and entitled to receive the tithes of hops in the boroughs of Stone, Week, and Westree, parcel of the rectory of Maidstone, or some composition in lieu thereof. He admitted, that in the year ending at Michaelmas, 1719, he had seven acres of hop grounds lying in the said boroughs, and that he had great quantities of hops therein; that the plaintiff did, some short time before he began to pick his hops, put up a writing signifying, that he would receive the tithes of hops in the said year in kind, unless the planters would make a new composition with him; but he denied that he had any personal notice; and said, that the plaintiff had refused to take the old composition of twelve shillings an acre, and that he had offered to give him fifteen shillings an acre, which the plaintiff had also refused to receive. He also admitted, that at the beginning of the picking, he did for a few days, pick here and there a pole that was forwarder than the rest; that the hops so picked were measured and set out for the plaintiff by every tenth bushel, which tithes the plaintiff had carried away; and that had he sent word to the plaintiff, that he would give him notice when he picked the remainder. He said, that he understood the tenth part of the bines, as well as of the hops, belonged to, the plaintiff, and that therefore he designed to set out the tithes by the pole, and not by the bushel, that the plaintiff might provide persons to pick the same; that on the seventeenth of August, he began to pick the residue of his said hops; and that his servants, as they went on, set out equally every tenth pole for the plaintiff's tithes; but that the plaintiff's servants had demanded every tenth bushel for the tithes, and refused to accept the tenth pole, or to pick or take away the tithes of the hops so set out; but had left the same unstripped and unpicked on the defendant's ground; and that he, the defendant, had stripped the bines from the poles, and stacked up the poles, and left the bines on the ground for the plaintiff's use. The defendant set forth the quantities and values of the hops

Hops are not titheable until they are picked, and the tithes are to be paid by every tenth bushel after the picking.

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he had so picked, and denied, that he had agreed to set out the tithes of all his hops by measure; or that there was, to his knowledge, any customary way of tithing hops in the said parish, or that the tithe of hops had ever before been demanded in kind, but said, that some composition had constantly been paid in lieu thereof, and that the setting out the tenth pole or hill was as equal a way of tithing, as setting them out, when picked, by the tenth bushel.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon opening the bill and reading an order whereby the said defendant undertook to appear *gratis* at the hearing, and the answer, and no counsel attending for the defendant;

It is ordered by the court, that the defendant do account with the plaintiff for the value of the tithes of the hops in question; and it is referred to the deputy-remembrancer to take the said account, unless cause be shewn to the contrary; the said defendant first paying five pounds costs before he be heard.

This cause now, on the tenth of November, 1720, standing in the paper, and counsel appearing for the defendant, a decree made in this court on the ninth of June, in the third of James the Second, in the case of *Clitty v. Reeve*; (1) another decree, dated the eleventh of May, 1704, in the case of *Gee v. Perch*; (2) another decree, dated the seventeenth of November, 1698, in the case of *Gee v. Perch*, (3) all relating to the tithes of hops, were read; together with all the depositions taken on the defendant's part, and the matter fully debated, when

The court declared, that hops are not titheable until they are picked, and that the tithes thereof ought to be paid in kind by the bushel, viz. every tenth bushel of the whole after picking; and

It is thereupon ordered, that the defendant shall account for and pay to the plaintiff the full value of the tithes or tenth part of the hops, which the defendant had growing within the said parish, during the time in the bill mentioned, after the rate and manner aforesaid; and it is referred to the deputy-remembrancer to take the account.

In pursuance of the above order the deputy-remembrancer made his report the eleventh instant; and upon reading the same, no exceptions being filed, it was, on the twenty-second of February, 1720, ordered, that the report be confirmed with costs, to be taxed, and that the defendant do pay to the plaintiff twenty pounds, nine shillings, and six-pence, so reported due for his tithe-hops.

THO. BURY,
RO. PRICE,

JA. MONTAGUE,
F. PAGE.

(1) *Ante*, p. 552.

(2) *Ante*, p. 632.

(3) *Ante*, p. 632.

Tr. 6 Geo. Scacc.

Jones v. Cawthorne,
and
Denston v. Jones. } 2 Wood, 149.

Cambridge, 15th July, 1720.

The cow-keepers in the parish of Downham, in the Isle of Ely, pay to the rector 2*s.* a year, for every new milch cow; 1*s.* 4*d.* a year for every old milch cow, at Easter, and the whole morning's milk of all the cows on Whitsun Monday; the owners to milk the cows and carry the milk to the parsonage house in lieu of the tithe-milk.

THE bill stated, that the plaintiff, in the year 1714, was legally instituted and inducted into the parish church of Downham, in the Isle of Ely, as rector there, and was thereby entitled to receive the great and small tithes arising therein, and also all Easter offerings and other duties according to the custom of the said parish; that the defendants, from the twenty-fourth of October, 1716, held and enjoyed, in the said parish, divers lands and tenements, on which they respectively had great numbers of milch cows, from which they had milk, but the tithes of which they neglected to set out, and

had the whole morning's milk of all the cows on Whitsun Monday; the owners to milk the cows and carry the milk to the parsonage house in lieu of the tithe-milk.

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had refused to make any satisfaction for the same, on a pretence, that there were certain *modus* payable in lieu of the tithes of cows and milk, although they knew that it had been determined by the court, that there were no such *modus* as they pretended, and that the tithes of milk ought to be set forth in kind. The bill therefore prayed a discovery of the lands which the defendants occupied in the said parish; the number of milch cows they had kept; and the quantities of milk such cows had given.

The defendants Cawthorne, Leaford, South, and Langman said, that they believed the plaintiff was rector of the said parish, and entitled to all tithes, or to some *modus*, in lieu thereof; and they set forth respectively the number of milch cows which each of them had, the quantity of milk the cows had given, and the value thereof; but they insisted, that within the said parish of Downham, and the titheable places thereof, there had been and was an ancient *modus*, payable in lieu of tithe-milk; that is to say, for every new milch cow, the yearly sum of two-pence; for every old milch cow the yearly sum of three halfpence; and the whole morning's milk on every Whitsun Monday, to be milked by the owners of all milch cows within the said parish, and to be, upon that morning, carried home to the parsonage house, by the said owners, their servants; or agents, which said sums of two-pence, for a new milch cow, and three halfpence for an old milch cow, were due and payable to the rector of Downham, for the time being, at Easter yearly, in full satisfaction of all tithe-milk yearly arising within the said parish and the titheable places thereof; and that the said plaintiff had accepted thereof.

The defendants Denston and Cole set forth the number of their milch cows; the quantities of milk they had produced, and the values of the tithes thereof; and insisted on the *modus* in lieu of the tithe of the said milk.

To the answers of the defendants Cawthorne and others, the plaintiff filed a special replication, and thereby waived his demand of tithes of the Park and the Frith, for which he admitted he had received satisfaction since the bill was filed.

The defendants rejoined; and filed their cross-bill on behalf of themselves and others, the landholders and inhabitants of the said parish, to establish the said *modus* in lieu of the tithes of milk: they also stated, that, time out of mind, there had been due and payable to the rector of the said parish, for the time being, for every foal not sold within the year, the yearly sum of one penny, and no more; and if sold within the year, the tenth penny for which such foal was sold; and said, that they had always been willing to pay the said several sums, and to deliver the said meal of milk to the said Jones, according to the *modus*, and that they had tendered the same to him; and they insisted, that the said *modus*, and no other, were due. They admitted, that a decree might have been obtained by Jones against the defendants, for the tithes of milk in kind, in a former cause in this court; but that the same was obtained for want of duly insisting upon the *modus*, and for no other cause. They therefore prayed, that the rector might be decreed to accept of the said *modus*, in lieu of the said tithes; that the same might be established by the decree of this court; that they might be at liberty to perpetuate the testimony of their aged and infirm witnesses; and that the rector might produce his predecessor's books in relation to the said *modus*.

The rector answered the cross-bill; and as to the *modus* for foals, said, that they had appeared doubtful to the court, on the hearing of the former cause; and that a trial at law had been offered to him, but which he had declined merely because he was not willing to put himself and adversaries to the expenses of a law-suit for one single *modus*; but that the court were so clearly of opinion in his favour, as to all the other matters, that the said cross-bill was dismissed without prejudice as to the *modus* of foals; and he insisted that he had obtained a decree for the tithes of milk in kind, for that the said dismission was absolute, without any saving clause to their right respecting milk; and he insisted that the morning milk on Whitsun Monday, which is stated in the bill to be part of the *modus*, had not been brought to the parsonage house a considerable time, but on what account or at whose request he knew not.

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The plaintiffs replied ; and issue was joined ; and divers witnesses were examined on both sides ; and upon reading the proofs in these and in the former causes,

It was ordered and adjudged by the court, that the original bill for the tithes of milk, be dismissed without prejudice to the plaintiff's claim of tithes in kind of the lands in the said parish of Downham, called the Park and the Frith ; and that the *modus* set forth by the plaintiffs in the cross-bill, be, and are hereby established, as to all the lands in the said parish of Downham, and the titheable places thereof, except as to the said lands called the Park and the Frith.

THO. BURY,
JA. MONTAGUE,

RO. PRICE,
F. PAGE.

Tr. 6 Geo. Scacc. *Loveday v. Moor.* [2 Wood, 151.] 2 Gw. 626.
Buckinghamshire, 13th July, 1720.

A farm *modus*
declared to be
rank without
an issue.

THE bill stated, that the plaintiff had been for four years past, and still was, rector of the rectory and parish of Hedser, in the county of Bucks, and entitled to all tithes both great and small arising therein, and in the titheable places thereof ; to Easter offerings ; and to all other dues and duties belonging to the said rectory ; that the defendant, being an inhabitant therein, held and enjoyed lands, gardens, and orchards, and had grass, turnips, carrots, apples, pears, plumbs, and other titheable matters, which he had cut and carried away without setting out the tithes thereof ; that he kept several cows, which had yielded milk, and calves ; that he had swine which had pigs ; and several geese, hens, turkeys, and other poultry, which had young ; that he had also within the said parish water corn-mills, whereat he ground corn, for which he received toll, or other emolument, for the grinding of corn therein, but had refused to set forth the tenth toll dish, or to make any other satisfaction for the tithes arising from the grinding of such corn ; that the said defendant with his wife and children had during the said time resided in the said parish, and had thereby become liable to pay Easter offerings to the plaintiff, but which he had also refused to do. The bill therefore prayed a discovery and relief in the premises.

The defendant said, that he believed the plaintiff was rector of the parish ; that he was entitled to all great and small tithes arising therein, and to Easter offerings ; and he set forth the lands, &c. which he held therein, and the tithes of the matters he had had thereon ; and that he had refused to account with the plaintiff, or to pay him the tithes in kind for all or any of the matters and things aforesaid, because that, time immemorial, a *modus* or composition of twenty-four shillings a-year had been paid by the occupiers or owners of the said messuage, mills, lands, and premises to the plaintiff's predecessors, and to the plaintiff himself, until two years last past ; and that the same had been accepted by him for all tithes arising therefrom, as well as for Easter offerings ; and he insisted upon the same, in bar of tithes in kind ; but he admitted, that he was indebted for the said *modus* for two years, which he said he had tendered, and that he was still ready to pay the same to the plaintiff.

The plaintiff replied ; the defendants rejoined ; and witnesses were examined on both sides ; and upon reading the proofs taken in the cause ;

The court declared, that the *modus*, insisted on by the defendant in his answer, was too great a *modus* for the said premises, and thereupon ordered the defendant to account with and satisfy the plaintiff the values of his tithes in kind, and for Easter offerings ; and that the deputy-remembrancer do take the account.

Pursuant to which order the deputy made his report, dated the fourth of November instant, and upon reading the same, it was ratified and confirmed, and ordered, on the seventeenth of November, 1720, that the defendant do forthwith pay to the plaintiff sixteen pounds, fourteen shillings, and sixpence, so reported due for his said tithes.

THO. BURY,

RO. PRICE,

F. PAGE.

Tr. 6 Geo. Scacc. *Thompson v. Field.* [2 Wood, 154.]

1720.

Yorkshire, 16th July, 1720.

THE plaintiff filed his bill against the defendants, being fishermen and inhabitants of Scarborough, in the county of York, setting forth, that he, the plaintiff, was seised in fee of the rectory and tithes within the aforesaid parish, being formerly part of the possessions of the priory of Bridlington, in the said county; that upon the dissolution of the said priory, the same came to and was vested in the Crown; and that the plaintiff claimed the same by virtue of letters patent under the great seal, made thereof to F. Morris and F. Phillips, their heirs and assigns, dated the twenty-second of December, in the eleventh year of James the First, under the yearly rent of twenty-eight pounds, payable to the vicar of the parish of Scarborough; that the prior of the said priory, and afterwards the kings and queens of England, for the time being, and all claiming under them, as owners or farmers of the said rectory of Scarborough, have, time out of mind, constantly had and received by custom the twentieth part of the fish, or the twentieth part of the value of all fish taken and brought by any fishermen that were inhabitants of the said town of Scarborough, wheresoever the same were caught and sold, either at Scarborough or elsewhere, in lieu of the tithes of the said fish, by way of recompense or satisfaction for the employment of the ships, cobbles, and boats, and of the labour of the inhabitants of the said town of Scarborough, exercising themselves in the said trade of fishing; that the said custom had been constantly, time out of mind, complied with without any interruption, till about the year 1651, when one John Audley, being then owner of the said rectory, filed his bill in this court against T. Fiddy and others, fishermen, being all inhabitants of Scarborough, who had refused to pay and satisfy the said Audley the twentieth part, or the value of the twentieth part of the fish taken at sea, and sold at several places distant from Scarborough; that, on the hearing of the said cause, an issue was directed to be tried at the bar of this court, whether there was such custom or not; and that upon the said trial, a verdict upon full evidence was given for the then plaintiff Audley, in establishment of the said custom; that since the said trial, the owners or farmers of the said rectory had constantly had and received the twentieth part of the said fish, or the twentieth part of the value thereof, from the defendants themselves, and others according to the said custom; that the plaintiff, as the present owner of the rectory, was well entitled to receive the same; but that the defendants, who were fishermen and inhabitants of Scarborough, for two years past, had refused to pay and satisfy him for the value of the twentieth part of the fish so caught and taken by them at sea, and not brought into Scarborough, but sold by them at several other places, which by custom and right they ought to have done. The bill therefore prayed that the defendants might answer the premises, and particularly set forth, whether there was such custom within the town of Scarborough, or not; and why they refused the twentieth part of the fish taken by them at sea, and sold either at Scarborough or elsewhere, during the time demanded by the bill; and that the said custom might be established by the decree of this court.

The defendants said, that they believed the plaintiff was rector or impropiator of the said rectory of Scarborough, and, as such, was entitled to the twentieth part, or the value of the twentieth part of all fish caught by fishermen, inhabitants of Scarborough, which was brought into and sold at Scarborough; but they absolutely denied that there is any such custom as is set forth in the bill; or that they and other fishermen, being inhabitants within the said town of Scarborough, ought to pay and satisfy the plaintiff, as owner of the said rectory of Scarborough, the twentieth part, or the value of the twentieth part, of the fish which should be taken by them, or any other fishermen, being inhabitants of Scarborough, at sea, and carried to and sold at any other place than the said town of Scarborough, as tithes belonging to the said rectory; and they said, that they were strangers to the decree and the verdict mentioned in the bill, and therefore hoped that they should not be affected thereby.

The rector of Scarborough, in Yorkshire, is entitled to the twentieth part of the fish, or the twentieth part of the value of such fish as are taken by any fishermen inhabiting the town of Scarborough, wheresoever the same may be caught or sold.

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The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and upon reading the exemplification of a decree, made in this court in Michaelmas, 1654, *Audley v. Fiddy*; said likewise an exemplification of a verdict at the bar of this court, in Michaelmas, 1654, between the said parties, in confirmation of the said custom, as set forth in the plaintiff's bill; and on reading the depositions of several ancient witnesses taken on both sides in this cause; and on long debate of the matter;

The court was well satisfied of the plaintiff's right to the twentieth part of the fish taken by the fishermen, being inhabitants of Scarborough aforesaid, at sea, or the value of such twentieth part, wheresoever the same fish are sold, as tithes belonging to the said rectory.

It is thereupon ordered, adjudged and decreed, that the custom of paying tithes for the fish taken at sea, by the fishermen, being inhabitants of Scarborough, be, and is hereby established against the defendants as demanded by the bill; and that the defendants do respectively account with and satisfy the plaintiff, for the value of the twentieth part of the fish taken by each of them at sea, during the time demanded by the bill, wheresoever the same were sold; and it is referred to the deputy-remembrancer to take the said account.

M. 7 Geo. Scacc. *Fisher v. Leman*. [8 Vin. Abr. 38.
2 Wo. 158.] 2 Eq. Ca. Abr. 732. 2 Gw. 626.

Tithes for depasturing unprofitable cattle, are payable by the occupier of the ground, and not by the agistor. The bill, in case of a common, must be against the owner of the cattle (if known).

IT was agreed, settled, and resolved by the whole court of Exchequer, that where unprofitable cattle were depastured occasionally in another man's ground, that the tithe for depasturing such cattle ought to be paid by the owner of the land, and the occupier of the ground, and not by the agistor, or the owner of the cattle; but that in the case of a common, the bill must be against the owner of the cattle (if known) because the owner of the soil has no profit by it; and Baron Paoz said, that as to what had been said, that the demand might be either against the occupier or agistor, that could not be; for that the same duty could not arise in two different persons at the same time.—[*Vinr.*]

A butcher who carries on his trade in one parish, but lodges and boards with his father in another, and occasionally turns his beasts into his father's lands, and pays him for the feeding thereof, is not liable to pay tithes for the same; but is liable to pay Easter offerings.

THE bill stated, that the plaintiff, in the year 1689, was lawfully instituted, &c. into the rectory and parish church of Hemyock, in the county of Devon, and had been ever since, and still was, rector thereof, whereby he had become entitled to have and receive all the tithes, as well great and small, and all offerings and duties arising therein; and also all sums of money and things whatsoever which, during the said time, had, by any custom or *modus* within the said parish and the titheable places thereof, been payable to the plaintiff as rector of the same; that the defendants, or one of them, for three years past, had occupied, possessed, and enjoyed, a messuage or tenement, with gardens, orchard, and forty acres of meadow and pasture belonging thereto, called Cley Park, for which tithes ought to have been paid to the plaintiff in kind; that on the said premises there had been yearly bred up, fed, depastured, and agisted several horses, foaling mares, colts, oxen, bullocks, cows, calves, wether sheep, ewes, lambs, pigs, sows, and other cattle, the tithes whereof were annually worth three pounds: that they had also kept geese, turkies, and other poultry, which had laid eggs and had young; that they also kept bees, which made honey and wax, the tithes of which were yearly worth five shillings, and several other things, for which the plaintiff ought to have received tithes in kind, but which they had refused to pay on several pretences. The bill therefore prayed a discovery and an account.

The defendant Leaman admitted the plaintiff to be rector as aforesaid, and that he was entitled to the great and small tithes of the parish, or to some *modus* in lieu thereof; and he confessed that his father, for the said three years, had held and enjoyed Cley Park; but he insisted that he had fully paid and compounded with the plaintiff for the tithes of the same. He denied that he had ever rented, occupied, or enjoyed, as tenant, any messuage or lands in the parish,

arish, or in the titheable places thereof, or that he had ever bred up, fed, destured, or agisted, on the said farm, any horses or other cattle, as in the bill was alleged; and said that he was a butcher, and boarded with his father, and that he vented lands in Cleyheydon parish, and sometimes brought home cattle from a fair late at night, and put them upon the said farm called Cley Park, but that he drove them away the next morning home to his said parish, and that he had satisfied his father for the same before this suit was commenced; and therefore he was advised that no tithe is due from him to the plaintiff. He also denied that he had ever kept any poultry upon Cley Park; and said, that he believed his father had fully satisfied the plaintiff for his said tithes for the said three years; and that he only owed to the plaintiff fourpence for two years Easter offerings as a single man, which he is ready to pay; but that the plaintiff had sued him for the same in the spiritual court. He confessed that he had used the trade of a butcher ever since the expiration of his apprenticeship with his father, and had bought all sorts of cattle in the way of his trade, but had never depastured any of them in the parish of Hemryok, other than as aforesaid; and he denied that any tithes were due from him as in the bill is alleged.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon reading the proofs taken in the cause, and hearing counsel fully on the matter;

It is ordered and adjudged by the court, that the bill be dismissed, with costs to be taxed by the deputy remembrancer.—[*Decree Book.*]

M. 7 Geo. Scacc.

For v. Ratty. [Bunb. 87. 2 Wood, 160.] 2 Gw. 627.

Wiltshire, 7th December, 1720.

BILL by the vicar of Melsham against a parishioner for tithes; an issue was directed to try whether a parcel of lands, called Ialay, usually paid tithes to the vicar of Melsham, or to the rector of Whaddon (who was not before the court): the jury find, that it had paid tithe to neither; and upon *re posita* returned, it was insisted for the defendant, that by this finding the court could make no decree, for that they had no satisfaction by it: but *per curiam*, the vicar is endowed *de omnibus minutis decimis infra parochiam, &c.* and the defendant's defence, both in law and equity, is falsified; and though tithes have never been paid, yet the vicar has the same right to all within his endowment, even without usage (unless an usage to the contrary is shewn) as the rector has of common right; in which last case a man cannot insist that tithes have never been paid, which is a *non decimando*; and decreed for the plaintiff accordingly. Serjt. Glyde and Mr. Ward for the plaintiff; Serjt. Penally, Serjt. Stevens, Sir Constantine Phipps, and Mr. Bootle, for the defendant. —[*Bunb.*]

A vicar has the same right to all tithes in his endowment, as a rector has of common right, even without usage, unless an usage to the contrary is shewn.

THE bill stated, that the plaintiff, for eighteen years last past, had been cur of the parish of Melsham, in the county of Wilts, and, by an ancient endowment of that vicarage which is on record in the muniment house of the cathedral church of Sarum, was entitled to all small tithes and dues arising in the parish and in the precincts thereof, and particularly to the tithes of milk, lyes, wool, lambs, pigs, geese, turkeys, hens, poultry, eggs, fruit, and the value of the herbage on which sheep and unprofitable cattle are depastured and sold; and that the occupiers of all lands in the parish ought to have set out their tithes yearly in kind, or to have compounded for the same, according to their respective values, which, as the same was not ascertained by any *modus*, ought to be according to a yearly agreement between the plaintiff and his parishioners by way of an ambulatory composition; that the defendant, for several years last past, had occupied several messuages and lands in the parish, some part of which was his own estate, and the other rented of J. Selfe, . Long, and R. Smith, among which were certain lands called Flowers,

Iley,

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Iley, and Calthorpe Long; otherwise Parker Weate; that the said defendant had yearly fed the said lands with dry, barren, and unprofitable cattle; that he had cows which had milk; and calves, and sheep which had lambs and wool; and also had other titheable things, the tenth whereof ought to have been set out in kind, or paid for at the rate of two shillings a pound, the plaintiff not being under any agreement with the defendant by way of composition for the same; but that the defendant had refused so to do, or to make the plaintiff any satisfaction for the ground or estate called Iley, and for some other lands which he had held for six years past, amounting to thirty-eight pounds *per annum*. The bill therefore prayed that the defendant might be ordered to discover the particulars and values of the lands he held, with the yearly titheable matters and values of the same he had had thereon, and to account with the plaintiff for the same.

The defendant admitted that the plaintiff was vicar; but whether he was entitled to the vicarial tithes and dues he knew not; but he said, that during the years in the bill mentioned, he had occupied the several lands stated in the bill, and under the several persons therein mentioned; that during the said time he had occupied a ground, called Iley, which he rented of C. Long; but whether it was in the said parish he knew not; and he set forth the several titheable matters and things which he had in the said years, with the values thereof. He also said, that he had some apples, plums, and cabbages, none of which he sold; and that he never knew any tithes paid or demanded for such things; but that if they were subject to pay tithes, he believed that such tithes were included in a composition of ninepence in the pound, which was paid for the tithes of the produce of lands in the said parish; and that it was therefore unreasonable that the plaintiff should insist on a rate of two shillings in the pound of the yearly value thereof; the said ninepence in the pound being esteemed the yearly value of estates there; that the vicar had received and taken the same in full for such tithes, without any annual agreement thereupon; and that such rate had been, save in one instance, observed as a rule within the said parish for rating vicarial tithes; which rate, considering the trouble and charges of taking tithes in kind, he believed to be the full value thereof, although the plaintiff had given notice that he would not now take the said composition; that having, for the year 1716, paid the plaintiff in full for all tithes, Iley excepted, at ninepence in the pound, he, about Easter, 1718, being the usual time of payment, had offered and tendered the said rate for all the premises, Iley excepted, but which the plaintiff had refused to accept. He also said, that as to the vicarial tithes claimed for Iley, nothing was due, for that a *modus* had been taken and received by the rector of the parish of Whaddon, time immemorially, as would appear by the ancient terriers, registers, and memorandums of the said parish, now extant; and he averred that the said ground, called Iley, lies in the parish of Whaddon, and not in Melsham, to which first parish it was charged to the land tax, poor's rate, &c. And he insisted upon paying the said nine-pence in the pound in satisfaction for tithes due.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and on reading several of the proofs taken in the cause for the plaintiff; and an endowment of the vicarage of Melsham, dated the Saturday after Ash Wednesday, 1249; and on reading for the defendants an ancient terrier of the rectory of Whaddon, of the eighth of October, 1608; and another terrier of the first of June, 1619, of the rights of the vicarage of Melsham, the court directed a trial at law to be brought by the plaintiff upon the following issues:

First, "Whether the piece of ground, called Iley, in the pleadings mentioned, does lie in the parish of Whaddon, or within the parish of Melsham?"

Secondly, "Whether the tithes of Iley have been usually paid or received by the rector of Whaddon, or vicar of Melsham?" to be tried by a special jury.

The court also ordered, that the defendant do forthwith come to an account with the plaintiff before the deputy-remembrancer of this court for all the matters and things titheable (except for the lands called Iley aforesaid) which the defendant

endant had arising, &c. within the said parish of Melsham, and the titheable tithes thereof, in and during the several years in the bill charged; the said duty to tax the plaintiff his costs to this time.

Pursuant to the said decree an issue was drawn; a *distringas* made for a *w*; the place viewed by seven of the jurors; the cause tried; and, after long debate, a verdict was given for the plaintiff, "that the piece of land called Iley lay in the parish of Melsham, and not in the parish of Whaddon; and that the tithes were not usually received by the vicar of Melsham, nor by the rector of Whaddon."

But it being found by the verdict that the ground lies in Melsham, the court is of opinion that the tithes of common right are due to the vicar of Melsham, and that the non-payment of them has not extinguished his right; and therefore, on the sixteenth of November, 1721, upon reading the said decretal *litter* and *postea*, and on mature and deliberate debate of the matter, It is ordered, on the seventh of December, 1721, that the defendant shall account with the plaintiff for the tithes of the said lands and grounds called *yer*, as well as for the other titheable matters and things in the said decretal *litter* mentioned. And it is referred to the deputy-remembrancer to take the said account, and to tax the plaintiff his costs at law and in equity.

In pursuance of the decree made the seventh of December, 1721, the deputy made his report, dated the twenty-ninth of June last; and upon reading the decree and report, no exceptions having been filed thereto, it is ordered by the court, on the twelfth of July, 1723, that the report be ratified and confirmed, and that the defendant shall forthwith pay to the plaintiff forty-one pounds, eleven shillings and two-pence for the value of his tithes in question so, referred due, together with his costs, to be taxed by the said deputy-remembrancer.

RO. PRICE.

JEFF. GILBERT.—[Dec. Book.]

M. 7 Geo. B. R. *Owen v. Hughes*. [Fortesc. 199.]

MR. *Willes* moved to set aside a rule for prohibition to the spiritual court; the libel was for removing the reading desk out of the ancient and usual place, and the judge of the court was he that read prayers; and the defendant appearing, sentence was against him by the court. *Per curiam*, there can be no prohibition after sentence, though it be not on the merits, for you might have appealed; and if he be judge in his own case, and it appear so, yet in civil law that is not allowed, so there might be an appeal to a superior court, and they might give relief, and so not like the case of an inferior court, where we are to judge; and by the court, there is no difference between sentence by default and sentence after a hearing; and the court discharged the *ple* for a prohibition.

No prohibition lies after sentence, on the ground that the ecclesiastical judge was judging in his own cause, even after sentence by default; for there is a remedy by appeal in such case.

H. 7 Geo. Scacc. *Powell v. Powell*. [2 Wood, 166.]

Monmouthshire, 23d February, 1721.

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THE case stated, that the plaintiff was, in the year 1713, duly inducted, &c. into the vicarage of Llantilio and chapelry of Penrose, in the county of Monmouth, and entitled to the tithes and other things thereto belonging; particularly to the tithes in kind of clover grass, hay, clover, clover seed, lambs, wool, apples, and other small tithes; that the defendants, for six years past, had occupied and held several lands therein, from which they had cut clover grass, clover hay, and clover seed, and on which they had lambs yeaned, and her tithes, the tenth whereof ought to have been set out and paid to the plaintiff for tithe; but that they pretended he was not entitled thereto. The plaintiff therefore prayed a discovery, and satisfaction for the same.

The defendant *Smart* said, that he believed the plaintiff was legal vicar, and entitled to the vicarial tithes and dues arising in the said parish, and in Chake-

A *modus* of 2d. a day's mow, in lieu of the tithes of all grass and clover cut or mowed for hay or seed; and a like *modus* of 1d. per acre in another chapelry.

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ley; but he denied that he was entitled to all tithes in kind, for that there was a *modus* in Llantilio Cresseney of two-pence a day's math, payable in lieu of the tithes all grass and clover cut or mowed for hay or feed; and that in and through the parish and chapelry of Penrose, except in three meadows, there was a *modus* of one penny a day's math; and he said that all former vicars, time immemorial, had accepted such *moduses*; that the plaintiff himself, for some years, had submitted thereto; and that tithes in kind of such hay and seed had never been paid. He admitted that he held several lands, during the said years, from which he had cut hay and clover; and said, that he was ready to pay the said *moduses*, which he had duly tendered to the plaintiff, amounting to three shillings and eight-pence for forty-four days' math of hay.

The defendants, the Powells, admitted the plaintiff was vicar, but insisted on the said *moduses*; and said, that they had cut the like quantity of hay, and had tendered for the same one shilling for the year 1717; and that they had satisfied the plaintiff for all their tithes for the preceding years.

The defendant Crofts said, that neither the plaintiff, nor any former vicar, was entitled to any tithes or offerings from or out of her ancient free chapel of Llanwrish Gilgoed, or the Grange or Demesne Lands thereto belonging, and wherewith it was anciently endowed, or to any *modus* or composition in lieu thereof; that she and her ancestors had been, above one hundred and fifty years, owners and occupiers of the said chapel, exempt from all tithes; that the said grange, chapel, and lands were asserted out of the ancient free forest of Grounount, within the bounds of the said parish of Llantilio Cresseney, and were part of those possessions and demesne lands of the abbey of Dour, of which the abbot and monks were seised at their dissolution; and that they were entitled to all tithes thereof, or else had held the same exempt from tithes; that the same abbey and lands came to the Crown on the dissolution of the said abbey; that the Crown had granted the same to those under whom she claimed; and that the same had been ever since, and time out of mind, enjoyed exempt from all tithes to the vicar or impropriator; that she had never heard of any tithes, duties, or offerings being claimed by any vicar in respect of the said lands and premises; and therefore she insisted, that she ought not to pay any tithes or dues in respect thereof. She admitted that, in the year 1717, she had occupied other lands in that parish, from which she made a boghead of perry, for the tithes of which the plaintiff had accepted one shilling since the suit began; and that she had mowed from such other lands one day's math of clover and grass mixed; and insisted, that the *modus* of two-pence a day's math extended over all the parish (except the grange and lands so exempted), and that the same had been constantly paid and accepted by the plaintiff's predecessors; and she averred, that she was ready and willing to pay according to the *modus* for two days' math of hay cut from the said lands not exempted from tithes.

The plaintiff replied; the defendants rejoined; and several witnesses were examined on both sides; and the cause came on at the defendant's request; and upon hearing counsel, and what was alleged by them for all the said parties;

The court declared, that they saw no cause to give the complainant any relief in the premises; and therefore ordered and adjudged, that the said several defendants be absolutely dismissed out of this court from the said bill, and the matters and things therein contained, with costs to be taxed by the deputy-rememberancer of this court, to whom it is hereby referred to tax the same.

THO. BURY,

RO. PIERCE.

H. 7 Geo. Scacc. Jones v. Davies and Winn. [2 Wood, 168.]

Flintshire, 22d February, 1721.

THE bill stated, that the plaintiff was instituted, &c. into the parish and parish church of Bangor, in the county of Flint, and had been rector there for many years past, and by virtue thereof had become entitled to all manner of

A custom that the landholders in a parish are exempt from agistment tithes, on payment of their other tithes, is bad.

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tithes arising therein, and particularly to the agistment and tithe herbage of barren and unprofitable cattle depastured on any lands in the said parish; that the defendants, for several years past, had been owners or occupiers of lands therein, whereon they had depastured several dry, barren, and unprofitable cattle; that particularly the defendant Winn had held and occupied a parcel of land in that parish, called the Dole Bangor, then divided into two parcels, and another parcel, called the Nuntesovery; that during the said time had depastured thereon divers unprofitable cattle, and had fattened sheep for a butcher, without paying any thing for the agistment or tithe-herbage thereof, though the tithes amounted to eight pounds a-year; that the defendant Davies, for two years past, had been owner or occupier of a parcel of land in the said parish, called the Tyrod, and also of another parcel, called Brynax Dongrey, and had depastured the same with unprofitable cattle and sheep for a butcher, for which he ought to have paid tithes yearly, according to the value of the lands. The bill therefore prayed a discovery of quantities and values, and an account for the same.

The defendants admitted, that the plaintiff was inducted into the said rectory, and entitled to all tithes arising therein, except the agistment and tithe-herbage of barren and unprofitable cattle depastured on certain land there by the inhabitants of the said parish.

The defendant Davies admitted, that for two years past he had been occupier of a parcel of land, called Tyrod and Brynax Dongrey, and had depastured thereon some unprofitable cattle.

The defendant Winn admitted, that for six years past he had occupied land, called the Dole Bangor and Nuntesovery, and had grazed thereon some unprofitable cattle.

And both the defendants admitted, that they had not paid or allowed anything in lieu of tithe-herbage for such unprofitable cattle; but alleged, that they had refused so to do, because that, during all that time, they had been inhabitants of the said parish, and had paid other tithes in kind, according to custom, to the plaintiff, and the plaintiff had made no demand of tithe-herbage until lately; and they insisted, that they were exempted from payment of any such tithes for the agistment or depasturing of unprofitable cattle on the said lands; for that the occupiers of land in the said parish who reside there were, they conceived, exempted from such tithe-herbage by the custom of the said parish, or otherwise, by law, on payment of their other tithes, no such inhabitant having ever, to their knowledge, paid to the rectors of the said parish, or to their farmers, any tithe-herbage, or any satisfaction for the same, for unprofitable cattle by them depastured in the said parish.

The plaintiff replied; the defendants rejoined; and witnesses were examined on both sides; and upon hearing counsel on both sides;

The court was satisfied, that the plaintiff is entitled to have tithes from the defendants for the barren and unprofitable cattle fed on their respective grounds within the said parish; and therefore ordered and decreed, that the said defendants shall account with and satisfy the plaintiff for the agistment or tithe-herbage of the unprofitable cattle by them respectively depastured on the several closes of land in the bill mentioned for the several years therein charged; the taking of which account is hereby referred to the deputy-remembrancer.

In obedience to the said decree, the deputy-remembrancer made his report, dated the twenty-sixth of June last; and upon reading the said decree and report, no exceptions having been filed thereto,

It is ordered by the court, on the seventh of July, 1721, that the said report be ratified and confirmed, and that the defendants shall respectively satisfy and pay to the plaintiff the several sums so reported due for their agistment tithes, together with the plaintiff's costs, to be taxed by the said deputy.

- BURR, Ck. B.

PAICE, B.

1721.

Tr. 7 Geo. Scacc.

Franklyn and others Parishioners v. The Master and Brethren of St. Cross, Impropiators, Bennet, their Lessee, and Jenkins, Vicar.
[Bunb. 78. 2 Wood, 185.] 2 Gw. 629.

Moduses of 12d. for the milk of a cow, and of 6d. for every calf killed and sold, are rank, and void. A modus of 1d. for all fruits, herbs, and roots, in any ancient garden belonging to any ancient messuage is good. So of 1½d. for every colt weaned and sold. The vicar being endowed with all tithes but of corn, lambs, pigs, and geese; it was held that he was entitled to tithes of hops, though introduced since the endowment; and also of clover, sainfoin, and rye-grass, which are kinds of hay. No tithes are due for after-pasture or stubble feed. Where altaragium has by usage been extended to small tithes, it will include them, otherwise not.

THIS was a bill brought by the plaintiffs, the parishioners, against the defendants, to establish certain *moduses* in the parish of Fareham. The first *modus* insisted upon was twelve-pence for a milch cow; the second was six-pence for every calf killed and sold: These were both of them adjudged to be void *moduses*, being too rank; the first being above half the value of the milk at the time the *modus* was supposed to commence; and the second, if ten calves were sold, five shillings must be paid, which is in effect for one calf, for the tithe is one in ten. A penny for gardens and orchards, allowed to be good. (But *nota*, this can be only for ancient gardens and orchards, as was adjudged *inter Perrot and Markwick*, July 5, 1716.) The vicar being endowed of small tithes and hay, it was decreed that he was thereby entitled to hops, being a small tithe, though of growth since the endowment; and also to clover, sainfoin, and rye-grass, which are species of hay, that is the *genus*. No tithes due for after-pasture, or cattle fed on stubble. Although by the endowment the vicar was to find the sacrament wine, yet the court were of opinion it should be found by the parishioners, according to the direction of the canon. *Nota*, Where *altaragium* is mentioned in old endowments; and supported by usage, it will extend to small tithes, but not else.— [Bunbury.]

Southampton, 15th June, 1721.

THE bill stated, that the master and brethren of St. Cross had, for several hundred years; been seised of the rectory impropriate of the parish and parish church of Fareham; in the county of Hants, and had, time out of mind, enjoyed all tithes rightfully thereunto belonging, or some *modus* or composition in lieu thereof; that the said corporation did, by lease, demise the said rectory and tithes to W. Bennet, for a term of years yet to come, by which he claimed and enjoyed the said rectory and tithes; that the vicarage was endowed, and the endowment in the custody of the confederates; that the defendant Jenkins had been vicar about twenty-seven years past; that, time beyond the memory of man, there had been and were divers *moduses*, customary payments, exemptions, and discharges from the payment of certain tithes in kind, founded upon real compositions, and other good, substantial, real and valuable foundations; that is to say, for and in lieu of milk or white sole of every cow yielding milk, twelve-pence yearly; for every calf killed or sold, six-pence; for every weaned calf, one penny halfpenny; and for every colt weaned or sold there, one penny halfpenny; for all fruits, herbs, and roots in any ancient garden belonging to any ancient messuage, one penny yearly; and one penny yearly by every inhabitant keeping domestic fowls, in lieu of the tithes of them and of the young fowls thereof; for every sheep brought into the parish at or after the twenty-fifth of March, and shorn the same year, in lieu of tithe-wool, one penny, or half the tithe-wool only, and no more. The bill further stated, that no tithes in kind had been paid for coppice-wood, or wood felled or cut there, but that, time beyond the memory of man, wood had been sold, felled, cut, and carried away without any tithes ever having been paid or demanded for the same; for that a parcel of land called Compound Cloft, otherwise Pouly's Cloft, was given and granted to the impropiator, parson, or vicar of Fareham, for the time being and his heirs and successors for ever, in lieu and full satisfaction of the tithes of all coppice-wood, and other wood grown and cut within the said parish. It also stated, that every master of a family, time beyond the memory of man, had yearly paid for Easter offerings, for self and the whole family, four-pence and no more, which had been constantly received, without any further demand being made of or for Easter offerings; all which *moduses* the plaintiffs hoped they should have enjoyed, but that the defendants endeavoured to break through the same. The bill

urther stated, that the defendant Jenkins, as vicar, had demanded and sued for the tithes of hops, clover-seed, and other seeds of grass, and of vetches; and that the other defendants had also demanded them, and therefore the plaintiffs did not know to whom the same ought to be paid. It also stated, that the vicar had demanded and exacted duties for burials in the church and churchyard, though if any were due, they were due by custom, beyond the memory of man, to the churchwardens, because the inhabitants repair the walls of the said churchyard. It also stated, that he had refused to find bread and wine for the sacrament of the Lord's supper, although by the endowment of the said vicarage, he ought so to do. The bill therefore prayed, that the defendants might answer the bill and the plaintiffs be relieved.

The defendant Jenkins said, that the matters, &c. of St. Cross then were, and for some hundred years had been, seized of the rectory impropriate of 'Areham, and of all the tithes mentioned in the composition, agreement, or endowment, dated the twenty-first of April, 1440, kept in the bishop's registry of Winton; that pursuant thereto the tenants and farmers of the said rectory had received the tithes of all corn, except of thirty acres called Caines, and four acres called Polly's Croft, and the tithes of lambs, pigs, and geese; and that the defendant Bennet, the present lessee, had received such tithes; that ever since the composition, the vicar had received, or ought to have received, all vicarial tithes (except of lambs, pigs, and geese) particularly hops, and divers sorts of grass and seeds of grass, which in their nature are small tithes, and that he had enjoyed the same; that the tithes of wood, milk, and cheese, had been unlawfully detained from him; that he first came to be vicar in the year 1689, and that vicarial tithes, except fruit, had been taken in kind; and that he, for want of a barn and other conveniences, was forced to agree for the tithes as he could, so that there was not any *modus* or fixed rate, but all titheable matters were lumped together, and so it had been proved in a former cause between the defendant and Fussell; that the defendant, before he could let a barn, &c. did as well as he could; and that the parishioners did not pay according to any *modus*, or constant usage (except three) who paid for every half sold, the tenth penny or shilling, which was from six-pence to three shillings; if killed, some the shoulder, but generally the tenth of what it was worth; if weaned, sometimes more or less as they could agree; that as for the tithe of milk, the defendant, for quietness sake, and for his subsistence, until it could be determined by the court, accepted of twelve-pence, which is not one third part of the value; that they all paid the full tithes of sheep and wool for several years, or the values in money; that they likewise paid two-pence a head, by way of composition, and not as a *modus*, for the agistment of all sheep that were brought out of other parishes to be wintered; and for composition of horses let or worked for hire, and for horses not employed in husbandry, the tenth shilling, when depastured in the stubbles and after-grass; and otherwise, two shillings in the pound for all grounds rented for that purpose; that they paid the tithes of meadow and all other grass in kind, or compounded for the same as they could agree; that the plaintiff Grossmith had so done, and, since the bill, had paid two years tithes of cinquefoil seed; but that when they passed grass in kind, they compelled him to take it in grass cocks; that they paid and agreed to pay for the seed of clover, cinquefoil, trefoil, and rye-grass yearly, or the full value thereof (deductions being first made for thrashing and cleaning); but that the tithes of till, buck-wheat, vetches, and beans, are wholly detained from the defendant, though they belonged to him; that all persons paid him tithes of hops, and that the plaintiff Franklyn did so till the year 1713, and then agreed to pay five pounds, seven shillings, and sixpence for all his tithes (except wood), but had not paid one penny since; that those likewise who had honey, wax, fruit, and other beasts paid tithes for the same, either in kind or in money, more or less; that every married couple paid for Easter offerings six-pence, and divers single persons two-pence a-piece yearly, which is due for all aged above sixteen; that the tithes of eggs were due in kind; and the tenth shilling in place for a cock when weaned; that he had never received any thing for either

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colts or eggs of young and domestic fowls, nor had he ever heard that his predecessors did, unless in gross amongst other tithes; that the vicarage was anciently endowed with tithe-wood by the endowment, and that, as he believed, it was now due; for that he did not know that the close of land called Compound Croft, otherwise Pauly Croft, was given in lieu of the tithes of wood, nor did he know, that there are, or ought to be, any exemptions or *modus* whatever in lieu of tithes within the said parish, and he hoped that no such should be now established. He insisted, that all vicarial tithes were due to him in kind, except the tithes of lambs, pigs, and geese, which belonged to the impropriator; that he constantly demanded and received for burials of every person, whether parishioners or strangers, in the churchyard, twelve-pence, and in the church, six shillings and eight-pence; and if vagrants, the proper officers paid the fees till of late, and that he had a just right to the same, the soil being the freehold of the minister, though the repairs were done by the parishioners; that as to the charge of refusing to provide bread and wine for the sacrament, he submitted whether by the said endowment he was obliged to do so.

The defendant Bennet admitted, that the master, &c. of St. Cross were and had been seised of and in the rectory impropriate, and that they, their tenants and farmers were well entitled to all tithes, both great and small, as well predial and personal as mixed, of all titheable matters and things therein, except such tithes as the vicar was entitled to by his endowment, and except such as were covered by any *modus* or customary payment in lieu of tithes; and that he was lessee under the said master, &c. of the said rectory, for lives, under whom he and his ancestors had held the same for some hundred years past. He said, that he believed that there were, and had been time beyond the memory of man, such *modus*es, and customary payments in lieu of tithes; and he denied that he had ever endeavoured to break through the same; but he insisted, that, as lessee, he was entitled to the tithes of all hops, clover-seed, and the seed of other grass and vetches, inasmuch as they were not mentioned in the said endowment; and that in case the vicar should prevail in his demands of tithes of hops, clover-seed, and other grass-seeds, of vetches and of horse-beans, buck wheat, and tills, the said hospital would be in a great measure disinherited and want support.

The master, &c. answered and said, that they were, and their predecessors had, in their politic capacity, been seised in their *demesnes* as of fee of and in the rectory impropriate of the parish and parish church of Fareham, and of all tithes and tenths thereunto belonging, or to some *modus* or composition for the same, and that they, their tenants and farmers ought to hold and enjoy the same in like manner. They said, that they believed the said vicarage was a vicarage endowed, but what it was endowed with they could not set forth, they not having seen the same. They admitted that the defendant Jenkins was vicar, but how long he had been so they said they knew not, nor whether, time out of mind, or by any other manner, there had been or were such *modus*es, customary payments in lieu of tithes, or other compositions, as in the bill mentioned, nor that the said close was given in lieu of tithe-wood, or that there had been paid or was payable any tithe for coppice-wood or other wood. They admitted that the impropriation had been for many years demised by them and their predecessors to Bennet and his ancestors for lives, and was now in him by lease, dated the twenty-second of May, 1718; and that the same having been in lease so many years they could not set forth the manner of tithing, or the customs or *modus*es in the said parish; but they insisted that they were entitled to the inheritance thereof, and to all tithes arising therein, whereof the said vicar was not endowed, and to all legal *modus*es, compositions, and agreements for the same; and they hoped the court would take care of and protect their rights.

The plaintiffs replied; the defendants rejoined; and witnesses were examined on both sides; and upon reading the endowment, dated the twenty-first of April, 1440;

The court declared, that the tithes of hay, clover, and cinquefoil do belong to the vicar and not to the rector.

And also, that no tithes are due for the agistment or depasturage of cattle upon stubble grounds or after pasture, for which tithes have been paid.

And also, that nothing is due for the breaking of the ground for the burial of the inhabitants, either in the church or churchyard.

And the court also established and confirmed the several *modus* of one penny halfpenny for a colt, and a penny for an ancient garden belonging to an ancient messuage.

And as to the tithes of hops, the court directed, that a case be made and agreed to by counsel on both sides.

And it was ordered by the court, that the bill, as to the tithe-wood, should be dismissed without costs.

But as to the tithe of milk, calves, wool, eggs, fowls, Easter offerings, and bread and wine, that they should be absolutely dismissed with costs, to be taxed by the deputy-remembrancer of this court.

BURY, C. B. PRICE, B. PAGE, B.

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Tr. 7 Geo. Scacc.

Turton v. Clayton. [Bunb. 80.] 2 Wood, 180. 2 Gw. 628.

BILL for tithes by the rector of Standish, in the county of Lancaster; the defendant insisted on a *modus* of three-pence for house, hay, hen, and yard, viz. for hay a penny, for an house a penny, for hen an halfpenny, and for yard an halfpenny. *Per opinionem totius curiæ*, this is a void *modus*, taking it either distributively or entirely; for as to the hay a penny is unreasonable, for if a man has sixty acres of hay he pays only a penny, and if he lets them to sixty several persons, they should pay a penny a-piece.—If a man should declare in debt for one entire rent of six-pence, viz. two-pence for Black Acre, two-pence for White Acre, and two-pence for Green Acre, this would be bad, *per PAGE, B.* Defendant decreed to account.

A modus of 3d. for house, hay, hen, and yard, viz. for hay a penny, house a penny, for hen a halfpenny, yard an halfpenny, is void, taking either distributively or entirely.

Tr. 7 Geo. Scacc. *Hathway v. Edwards.* [2 Wood, 178.]

Herefordshire, 26th June, 1721.

THE bill stated, that the plaintiff, in the year 1710, was instituted and inducted vicar of the parish and parish church of Bodenham, in the county of Hereford, and entitled to all small tithes, as also to the tithe of a third part of the corn, and the tithe of all the hay within the said parish and the titheable places thereof; that the defendant had been, for two years, an inhabitant of the parish, and had held and occupied land therein; that he had kept many cows, which had calves; and sheep, which had lambs and wool; that he had also many dry and unprofitable cattle; and many acres of hop-ground that produced hops; that he also had orchards, which produced apples, pears, crabs, and other fruits; that he had honey and wax, and hives of bees; many pigeons, poultry, eggs; great quantities of hay, corn, flax, hemp, wood, and other titheable matters of great value, which he had carried away and converted to his own use, without setting out the tithes thereof, or making any recompense for the same, on a pretence that the premises were discharged from the payment of tithes. The bill therefore prayed to have a full discovery of the quantities, qualities, and values of the same, and an account for them; and his Easter-offerings.

No tithe is due of pigeons eaten by the family; nor of cattle bred for the plough or pail.

The defendant admitted the plaintiff was vicar, and as such entitled to all small tithes; and that, in the said years, he was an inhabitant there, and had occupied several acres of meadow and pasture; and he set forth the number of cows, calves, wool, and lambs which he had in the year 1717, which he said were kept, &c. sometimes in the parish of Penkham, and sometimes in Bodenham; that the plaintiff, being minister also of Penkham parish, did set to the defendant all his tithes arising therein for the said two years, at the yearly rent of fifty-five shillings, which he had paid to him, and he had accepted the same; that in Bodenham parish there had been immemorially an

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ancient *modus* of a penny for every cow depastured in that parish, to be paid at Easter yearly to the vicar, and to be by him accepted in full for tithe-milk and calves; but that he, the defendant, had paid him three halfpence for each calf, not knowing of the said *modus*, and which he had tendered to the plaintiff for the said years, but that he had refused to receive the same; that for the year 1717 the plaintiff took his tithe-hops in kind, but had refused to take them in the year 1718, though justly set out; that he knew not the quantity of fruit he had in the said years, but that the tithe thereof was duly set out, and that the plaintiff had taken away the greater part of the same, and left the remainder; that in the said years he had set forth his tithe hay and pigs; that he reared and depastured a few yearlings and two-year-old heifers and bullocks, for which, he insisted, he ought not to be accountable for tithes; that he had not kept any dry and unprofitable cattle; and that the said yearlings and heifers were kept for the plough and pail; that he had no honey or geese in the year 1717; and that for the year 1718 he had tendered to the plaintiff his full tithe for the same, as well as for his poultry; that he also had one colt fallen in Bodenham, for which he had paid the plaintiff his tithe, as also for his bees-wax; that he had, one year with another, nine dozen of pigeons, but never sold any; nor during that time ever felled any coppice or other titheable wood, except what he spent in his house, for which there had been a *modus* time immemorially paid to the vicar for the wood so spent; that in the year 1717, the plaintiff received one penny for the said wood, but in the year 1718 had refused the same, though it was duly tendered him by the defendant; that he had constantly paid the tithes of the corn and grain he had, or a sum of money in lieu thereof, to one J. Mason, who rented the same of Lord Coningsby, and which the plaintiff had never demanded, except by the present bill; that he had, in the said years, no flax nor hemp; and for the year 1717 had paid the plaintiff for Easter-offerings for himself and family, four-pence, which he received; that in Bodenham parish there had been, time immemorial, a *modus* or customary payment of one penny for each garden in the said parish, payable at Easter in every year to the vicar, which ought to be accepted in full of the tithes or tenths of all garden herbs and other things growing therein, which the plaintiff had received for the year 1717, but refused to give the defendant a receipt for the same; that for the year 1718 the plaintiff had refused to accept the said Easter offerings and garden penny, and one penny for the wood, though duly tendered; and that he had no other titheable matters.

The plaintiff replied; the defendant rejoined; and several witnesses were examined on both sides; and upon reading the proofs taken in the cause, and on full debate;

It is ordered by the court, that the defendant shall and do forthwith come to an account for the tithes demanded by the bill before the deputy-remembrancer of this court, (except for the tithes for pigeons spent, and not sold, and young cattle reared for the plough and pail,) with costs to be taxed; to whom it is referred to tax the said costs, and take the account.

Tr. 7 Geo. Scacc. *Hankin v. Fotheringham*. [2 Wood, 184.]

Lincolnshire, 6th July, 1721.

Embanked
lands are not ex-
empt from tithes
for seven years
under 2 E. 6.
c. 13. sect. 5. as
barren.

THE rector of Holbeach, in the county of Lincoln, claimed the value of the tithes for six years past, of all sorts of corn, grain, hay, wool, lambs, flax, and of other titheable matters and things yearly arising, &c. upon two hundred acres of marsh land, lying within the rectory and parish of Holbeach, and in the possession of the defendant, by virtue of two several leases thereof to him and his heirs, made, the one by the then Bishop of Lincoln, dated the twenty-second of August, 1713, for three lives, and the other lease, being surrendered, made by the present bishop, dated the twenty-ninth of May, 1718, also for three lives, and which lives were now living; the plaintiff, P. R. Peirson, as son and heir of R. Peirson, deceased, claiming the reversion of

of the said rectory and tithes, subject to a mortgage of a former lease thereof to Richard Lord Gorges, deceased, and which former lease was legally assigned to the plaintiff Hankin.

The defendant admitted the plaintiff's title to the rectory and tithes; and set forth, amongst other things, what quantity of corn he had on one hundred and fifty-five acres of new embanked lands within the said rectory yearly for three years past; and what sheep he had yearly depasturing thereon; but insisted, that he had had no wool shorn or lambs yeaned on the said lands within the said parish in the said year; and that if tithes were due for such sheep, then, by custom within the parish, there ought only to be paid, in lieu of tithes of the said sheep, one fleece of wool, or the value thereof, for every one hundred and twenty sheep brought into the said parish after Candlemas for every month the same had been depastured within the said parish until clipping-day; and so in proportion for a greater or less number, or a longer or shorter time; but he insisted, that no tithes ought to be paid for the said lands, the same having been embanked at great charges in 1716, and being before that time waste and barren ground, and of no value or profit, and therefore ought not to pay tithes for seven years after the embanking thereof, such lands being exempt from tithes by the equitable construction of the statute of 2 & 3 Edw. 6. c. 13. s. 5.

The plaintiff replied; the defendant rejoined; and several witnesses were examined; and upon opening the bill, and reading an order of court, dated the ninth of May last, whereby the defendant was ordered to appear gratis at the said hearing, and reading the defendant's answer, and no counsel attending for the defendant;

It is ordered by the court, that the defendant shall account with and satisfy the plaintiff for the values of the tithes in kind, of the corn, grain, and other titheable matters and things had by the defendant on his said lands in the said years demanded by the bill; which decree was afterwards made absolute on the twenty-sixth of November, 1721.

M. 8 Geo. Scacc.

Stratford v. Neale. [Stra. 482.] Fortesc. 350. (Stratford.) 8 Mod. 1.

ERROR on an attachment *sur prohibition*, wherein the plaintiff declares, that by the laws of Ireland no tithes ought to be paid twice in one year, or for cattle fed with hay whereof tithes have been paid, or for stubble, &c. That he was seized of certain lands for which he had paid tithes, and yet the defendant libelled against him, as being rector, and entitled to two thirds of the tithes of certain bullocks and horses depastured upon the land, for which tithes had been paid as aforesaid, and that he was proceeding against him, though he had alleged all this in his defence.

The defendant as to the contempt pleads Not guilty, upon which issue is joined; and for a consultation, that as to two entire parts of the tithes of the agistment of those lands he is intitled to them as rector, and therefore libelled; and traverses, that for all the time aforesaid the cattle were fed with hay for which tithes had been paid, and only in meadows that had been tithed: upon which issue is joined and found with the defendant in the words of the traverse: on this the king's bench in Ireland award a consultation, upon which error is brought, and the general errors assigned,

Mr. Solicitor General *pro querente in errore* took several exceptions.

1. That the traverse to the merits of the suggestion was immaterial; for it ought to have been to the refusal of the plea, which is the foundation of the sending the prohibition, and it is not any want of jurisdiction. 2 Co. 45. a. Cro. El. 511. The judge below might have tried whether the beasts were fed with hay of which tithes had been paid.

If the matter was properly traversable, yet the traverse is too narrow; for it is, that during all the time they were not so fed, and so is the verdict, whereas they should have answered to every part of the same. 2 Towns. Jud. 174. F. N. B. 54.

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FOTHERINGHAM.



In prohibition the contempt is but form, and the jury need not give any verdict about it.

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3. The traverse is a negative pregnant; that the beasts were not fed with hay that had paid tithes, and only in meadows which had been tithed that year; all in the conjunctive; whereas these being several matters ought to have been separately traversed. 1 Roll. Abr. 640, pl. 12, 13, 14. Yelv. 86. It amounts only to saying both facts are not true, but yet one of them may. A negative pregnant is a denial with an insinuation of another affirmative, as *ne dona pas per le fait* implies a parol gift. Cro. Jac. 505. 560. And this exception goes likewise to the verdict, for that finds both the same way; when if one was true the plaintiff will be excused. 12 E. 4. 6. Bro. Issue, 39. And the difference lies between the affirmative and negative proposition.

4. There is no verdict as to the issue upon the contempt, which is a discontinuance. 1 Roll. Abr. 801. pl. 4. 802. pl. 7. And it is not barely an imperfect verdict. 3 Lev. 55. Trespass for a coat and mantle, and a special verdict as to one, and none as to the other; held ill. Co. En. 459. the precedent is with the objection.

5. The defendant in his plea does not go for a consultation as to every thing in the libel; whereas the consultation is awarded generally for the whole. 1 Book of Judg. 97. Ash. 376. 2 Towns. Judg. 107, 172, 173, 174. Vid. 61. 6 Co. 66. *Jefferies's* case.

6. After the judgment *quod nil capiat per billam*, there is no *eat inde sine die*. 1 Roll. Abr. 771, 772. pl. 26. Cro. Jac. 439. 1 Keb. 488. 1 Book of Judg. 102.

7. The quantity demanded in the plea is uncertain, being for two entire parts, but does not say whether thirds or tenths. Now that ought to be certain, for the plea is in nature of a count, being a suit for a consultation.

Cheshyre, Serj. contra. 1. We have followed the words of the allegation, as to the refusal of the plea. 2 Co. 45. says, it is but form, and not traversable.

2. I did not hear the answer.

3. The traverse is in his own words, and we could not divide them by several traverses.

4. In the case of trespass there never is any verdict as to the *vi et armis*. 1 H. 7. 9. Salk. 346. And in the case of *Sumner v. Acton, in Scaccario*, I took this very exception in trespass, and it was over-ruled; and yet that is in a point material, because the king is intitled to his fine of 6s. 8d.

5. The general award of a consultation can only go to what is covered by the plea.

6. *Eat inde sine die* would not be proper, because there may be another prohibition. Nor is it necessary here, where the plaintiff claims nothing.

7. The uncertainty in the quantity is nothing in the temporal courts: their proceedings below are more loose than ours; they libel for words *et eis simil'*: for such a sum of money, *aut eo circiter*. 2 Lev. 193. 2 Roll. Abr. 298. 2 Lev. 173. 1 Mod. 182. Fine for two parts of a manor. 1 Leon. 115. And 13 Co. 58. explains it that two parts are two-thirds, three parts three-fourths, &c.

Mr. Solicitor General. The case of trespass is different, for there finding the justification is a denial of the force, but here a verdict upon the merits is no denial of the contempt.

Ch. J. The uncertainty of the demand in their proceedings is no objection in a case within their jurisdiction, as to which their law is the rule. The refusal of the plea need not be traversed; the material point being, whether tithes are payable or not. I think the traverse good, in denying it as the plaintiff alleges it, but there does seem to be a difference between a case of a trespass and the contempt.

EYRE, J. In demurrers the contempt is never answered, for that is but form, and of a modern introduction, it being the course before Queen Elizabeth's time to sue out a *scire facias quare non fieret breve de consultatione*. Co. Ent. 452. 2 Co. 46. *Archbishop's* case, has no *eat inde sine die*; nor can it be necessary because *inde* would refer to the contempt, and that is only matter of form.

FORTES-

FORTESCUE. I think the uncertainty is no objection, and as to the contempt it is but form, and the jury is never charged with it.

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Adjournatur. And this term,

Receve pro querente in errore, waiving all the exceptions which on the former argument the court inclined had nothing in them, mentioned only three, which he insisted on.

1. The praying a consultation for two integral parts, without distinguishing whether thirds, fourths, &c.

The plea extends to lands not mentioned in the libel, so the award of a consultation *in hac parte* goes to the whole; and a consultation cannot be granted for a matter not in suit below.

3. But the objection he principally relied upon was, that there was no verdict as to the issue joined upon the contempt. It must be agreed, that if the verdict does not go to all the material points put in issue, it will be error, 3 Lev. 39, 55. (which the court agreed); then the nature of this contempt is to be considered. In prohibition both parties are actors, the plaintiff for damages, and the defendant for a consultation, and nobody can say but the proceeding after a prohibition is a damage, an injury to the plaintiff. 1 Cro. 559. 1 Jon. 447. 2 Roll. Abr. 516, 575. And therefore in 1 Vent. 348, 350, 362. 2 Jon. 128. a judgment was reversed for want of alleging a venue where the proceeding was, and *Jones* cited two precedents, Pasch. 3 Car. 2. and Pasch. 22 Car. 2.

Pengelly, Serj. *contra*. When two parts are demanded, it cannot be understood otherwise than that one only remains. It is allowed in ejectment, 1 Leon. 115. 1 Mod. 182. 13 Co. 58, 59. In *finis* and *formedons*.

2. The consultation can go only to what lands are comprised in the libel, and therefore *in hac parte* is confined to that; or if it should go farther, yet as it can give no new authority to the court below, it signifies nothing. Hob. 119.

3. As to the contempt, every body knows it is but form, and like the case of the *vi et armis* in trespass. 1 Saund. 81. Parl. Ca. 201. where the cause is determined on a demurrer, there never was any instance of inquiring into the contempt. 1 Towns. Jud. 101, 102, 103, 105, 106. Rast. 491. 1 Saund. 140, 143. Co. Ent. 456. a. 457. b. 467. a. Lutw. 1072, 1043, 1052. 2 Towns. Jud. 172. 2 Co. 43. Cro. Eliz. 512.

CH. J. The general rule laid down is certainly right; that it will be error, if the verdict does not go to all the material parts of the issue: and, therefore, the question is truly stated, whether this be material or not. Now as to that; consider what is the design of the party's declaring in prohibition; it is only to see whether the court below ought to proceed farther, and not whether they have proceeded; for that is a matter alleged for form sake, that there may be a demand of damages, to give it the requisites of a suit in law; but in fact we all know it is a fiction, for they never proceed after the first motion, and we must take notice of the course of proceeding: besides, if this exception should prevail, it will avoid almost every judgment in prohibition. As to the other two objections, I think there is one answer for both; that upon the whole it appears, the court below ought to proceed upon the libel, and the consultation doth not enlarge their jurisdiction. Powys, J. accord.

EYRE, J. The only point in prohibition is, whether the court below should be admitted to proceed. Formerly, this was determined by a *scire facias quare non fieret breve de consultatione*, and then it lay upon the inferior court to shew they had a jurisdiction. But in case of them this method of declaring was introduced, and that puts the plaintiff to show, that the court below has no jurisdiction.

The consultation does not depend on the prayer of the plea, but upon the libel, and is only giving them a power to proceed upon the libel, without any regard to the pleadings upon the declaration. As to the contempt, it is merely fictitious, for does any body think we would not punish the judge if he should proceed? The case where no venue was alleged is widely different, for there the point was tried; and if they do try it, no doubt it must be tried in the same manner as all other issues are tried.

FORTESCUE, J. I do not think *duas partes* are two thirds, they may as well

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v.

NEALE.



Tithe wool of lambs shall be paid, and tithe for agistment of yearlings.

Depositions in a former cause, respecting *modus*, where the owner of the land was not a party, cannot be read.

The bill and answer in a former cause must be read to make the depositions evidence in another cause, to show that it was between the same parties, or their derivatives, and the same matter in issue.

well be *fifths*. But the true answer is, that the libel is two-thirds. And it matters not what the party prays in his plea. In Co. Ent. there is a precedent, where the judgment is *quod fiat consultatio*, and that the judge shall proceed *in iud. caus.* The same answer serves for the supernumerary lands. As to the contempt, I concur with the rest, for since the precedents are both ways, we must adhere to them which tend to support the judgment. The judgment affirmed.

M. 8 Geo. Scacc. *Baker v. Sweet*. [Bunb. 90, 91.] 2 Gw. 629.

IN this case it seemed to be admitted, that wool of lambs shall pay tithes, though the lambs had paid tithes two months before; and that there ought to be paid tithes for the agistment of yearlings, being a new increase. Sir *Constantine Phipps* and Mr. *Bootle* for the plaintiff; Mr. *Ward* for the defendant.

DEPOSITIONS taken in a cause in chancery in 1675, relating to *modus* now in dispute, to establish these *modus*, wherein the occupiers of land in this parish were plaintiffs, and the impropiator (who was the provost and college of Eaton) and the vicar were defendants: but the impropiator had never answered, and there was no replication to the vicar; and therefore it was objected, that these depositions could not be read, for that *modus*, being to affect the inheritance, the act of the farmer shall not bind, unless the impropiator or landlord be made a party, and issue be joined as to them: And *per curiam*, They cannot be read; and the bill and answer upon these occasions must be produced to make the depositions evidence in another cause, to shew that it is between the same parties, or those under whom they claim; and, secondly, that it is the same matter that is now in issue, (*absentibus PRICE & MONTAGU*). Sir *Constantine Phipps* for the plaintiff; Mr. *Ward*, for the defendant.

M. 8 Geo. Scacc.

Heaton v. Regal. [3 Burn's E. L. 456.] Rayn. 160. 2 Gw. 630.

The first of August and not the first of May, is proper time to set forth tithe-lambs.

THE defendant insisted on a custom in that parish, to set forth tithe-lambs on the first of May; but the court disallowed it, for that they were not fit to live without their dams, as appeared by the depositions in the cause; and it was referred to three neighbouring justices of the peace, to inquire what was a fit time for setting forth tithe-lambs in that country; who certified the first of August, in their judgment, to be a proper time; and the court approved of it.

M. 8 Geo. Scacc.

Crofts, Rector of Upper Clatford, in Hampshire. [3 Burn's E. L. 456.] Rayn. 160. 2 Gw. 630.

A custom to set forth tithe-lambs on St. Mark's day is void, and the time for setting them forth, is when they are

THE defendant insisted on a custom in that parish to set forth tithe-lambs on St. Mark's day: the court declared it to be a void custom; and that the time for setting forth tithe-lambs is, when they are fit to live without their dams, and thrive on the same food which their dams live on, and when the owner weans his own.

fit to live without their dams, and when the owner weans his own.

H. 8 Geo. Scacc. *Pocock v. Titmarsh*. [Bunb. 102.] 2 Gw. 630.

Tithe of houses in Southwark decreed, though no custom or prescription was alleged.

BILL for tithe of houses not within the city of London, and so not within the statute 37 Hen. 8. It was admitted by the plaintiff, that this demand was against common right, and he did not allege this payment to be either by custom or prescription, but that this was the only provision for St. Saviour's, Southwark, in right of which church the plaintiff claimed: it was proved that the houses in the parish had, since the year 1633, generally paid twelve shillings

per

per annum, but no proof that the defendant's house had paid for twenty-five years, but by one single witness; yet the court decreed an account without directing an issue.

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TITMARSH.

H. 8 Geo. Scacc. *Goddard v. Keble*. [Bunb. 105.] 2 Gw. 691.

1722.

BILL by the rector of Castle Eaton, in the county of Wilts, for tithe. The defendant insists upon several *moduses*. 1. Three-pence for every milch cow, in lieu of tithe-milk. 2. Three-pence for every lamb yeaned in the parish; but this was given up as too rank, for ten three-pences amount to the present value of a lamb. 3. One shilling for a dry cow and ox depastured, &c. 4. One penny for each dry sheep, not shorn in the parish. 5. Three-pence for every colt fallen.

Moduses disallowed, no time being mentioned when payable.

Three-pence for a lamb is too rank a *modus*.

It not being alleged at what time these *moduses* were payable, the defendant was decreed to account. Note, the reporter believes this is the first instance in a court of equity that *moduses* were disallowed, upon this reason.

E. 8 Geo. Scacc.

Baker v. Planner and others. [Bunb. 108.] 2 Gw. 691.

BILL for tithes. Exception taken to the answer, that the defendant does not set forth quantities and values; the defendant sets forth what titheable matters he had, and says he had no other titheable matters whatsoever.

The quantities and values of tithes must be set forth particularly in an answer.

Barons PRICE and PAGE thought this insufficient; and that he should have set forth particularly "that he had not such and such things as charged in the bill;" and upon their opinion the exception was allowed. (But note, this seems very extraordinary and contrary to the constant method of drawing answers.)

Baron MONTAGUE thought it would be well enough, if the defendant says he has no other titheable matters in the bill mentioned. But note, then it might be thought insufficient, if there was (as is usual) a general charge in the bill, that the defendant had divers other titheable matters.

Tr. 8 Geo. Scacc.

The Bishop of Lincoln v. Sir W. Ellis and others. [Bunb. 110.] 2 Wood, 193. 2 Gw. 692.

UPON a bill for tithes, as rector of Barney, in the county of Lincoln; the defendants insisted that the lands were parcel of one of the greater monasteries dissolved by the stat. 31 Hen. 8. A decree was offered to be read in evidence, wherein Sir Thomas Skipwith, lessee of the then Bishop of Lincoln, was plaintiff against the then tenants of the land; but it was objected to the reading of this, for that no admission of the lessee shall bind him that has the inheritance, and who was no party to the decree. But by the opinion of the Lord Chief Baron MONTAGUE and Baron PRICE, it was read, who said they should have made no doubt of reading it, if the lessee had prevailed; and therefore they saw no reason why it should not, since he did not prevail. But Baron PAGE was of another opinion, and his reasons seemed to be the better. Mr. Ward for the plaintiff; Serjt. Chesshyre for the defendants.

A former decree was read in evidence, where the lessee, without the improprator, was party.

Tr. 8 Geo. Scacc.

Penny, Executor of Penny, v. Hoper. [Bunb. 115.]

IN a bill for tithes in Lucton, in the county of Hereford. The plaintiff sets out his title, that Sir Herbert Croft, being possessed of a long term of years unexpired of the great and small tithes demised to the plaintiff's testator. ought to shew in whom the fee is vested, and derive his title from thence.

In a bill of tithes by a lessee of a lay improprator, he

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It was objected at the hearing, that the plaintiff had made no sufficient title; for, first, they had not proved Sir Herbert Croft's lease, so that it might appear whether his term was subsisting or not; and if they had, that alone would not be sufficient, for they ought to have shewn (being a lay impropriation) in whom the fee is vested, and derived the title from thence. And the court seemed of this opinion, but let the cause stand over with liberty to amend. (1)

(1) At the Sittings at Serjeants'-Inn after Mich. Term, 1722, this cause came on again, and the plaintiffs had amended their title in exhibits, by shewing a lease from the impropriator to Sir Herbert Croft; but it was objected for the defendants, that the plaintiffs

had not amended their bill, and consequently had not given the defendants an opportunity of controverting the plaintiff's title; and upon this objection the cause was again put off with liberty for plaintiffs to amend. [Note in *Bunbury*.]

Tr. 8 Geo. Scacc. *Baily v. Worrall*. [Bunb. 115.] 2 Gw. 632.

In a bill for a portion of tithes in a neighbouring parish, the vicar of that parish must be a party, as well as the impropriator.

BILL by plaintiffs, as lessees of the rector of Winterbourn, for a portion of great and small tithes in Stoke Gifford, being a neighbouring parish, the tenants and the lay impropriator, who claimed the great tithes in Stoke Gifford, were made parties; but because the vicar of Stoke Gifford, who might be entitled to the small tithes, was not made a party, the bill was ordered to be dismissed; but, upon application, stood over with liberty to amend.

Tr. 8 Geo. Scacc.

Penrice v. Dryard. [3 Burn's Ecc. Law. 410.] 3 Rayn: 1098.
2 Gw. 632.

A *modus set* aside because no day of payment was mentioned in the answer.

MODUS of 4l. 10s. for all small tithes, arising on an estate called Impney, set aside, because no day of payment was set forth by the defendant in his answer.

M. 9 Geo. Scacc. *Lord v. Turk*. [Bunb. 122.] 2 Wood, 201.

Such lands only of the Cisterians as were held in their own hands, and belonged to them before the council of Lateran (which was held 1179) were discharged from the payment of tithes.

The method of proving whether lands were acquired before the council of Lateran, is only by payment of tithes, which will

BILL by the vicar of Tircehurst, in the county of Sussex, for tithes; the defendant insists the lands were parcel of the monastery of Robertsbridge, which was of Cisterian order, and therefore discharged, being dissolved by the stat. 31 H. 8. as one of the greater abbeys. But *nota*, lands, though of the Cisterian order, were not discharged, but *quandiu in propriis manibus*, and even not all those, but only such as were in them before the council of Lateran, as is expressed in that council, which was held 25 Hen. 2. anno 1179.—The method of proving whether the lands were purchased before or since the council of Lateran, is only by payment of tithes, which will induce a presumption that they were purchased after; and *per curiam*, the defendant was decreed to account, for that it appeared that the lands were in tenants' hands, and consequently not discharged when they came to Hen. 8.—Sir *Constantine Phipps* for the plaintiff. (1)

(1) This case was cited in *Benison v. Smith*, E. 11 G. 3. when the Lord Chief Baron PARKE said, that it appeared by a note of Mr.

Baron PRICE, which he had seen, that *Bunbury* had misrepresented the case.

induce a presumption that they were acquired after. Where it appeared that lands of the Cisterians were in tenants' hands, when they came to Hen. 8. the court held that they were consequently not discharged; but *quere*, as Chief Baron PARKER said the reporter had misrepresented the case. [3 Wood, 346.]

M. 9 Geo. Scacc. *Tyrell v. Kennett*. [2 Wood, 204.]

1722.

Essex, 7th December, 1722.

THE impropiator of Shopland and Foulness, in the county of Essex, claimed all the glebe lands, and all the tithes of corn, grain, and hay, yearly arising in several acres of arable, meadow, and pasture ground, called Little Borrowwood, in the occupation of the defendant, and within the titheable places of the said rectory.

The defendant admitted that the plaintiff was seised in fee of the rectory of Shopland, but not of the rectory of Shopland with Foulness; and insisted, that he was not entitled to any sort of tithes arising on the defendant's lands in the bill mentioned, for that his lands laid all within the island and rectory of Foulness. He alleged, that the rectory of Foulness was a distinct rectory, and not annexed to Shopland; that the Island of Foulness was heretofore part of the sea, and extra-parochial: that it had been, by parcels, at several times, recovered from the sea, by inclosing the same with banks of earth; that a considerable quantity of lands, of late years, had been so inclosed, and that a number of acres without the banks were fit to be inclosed; that neither the plaintiff, as rector of Shopland, nor the vicar of that parish, nor the rectors or vicars of any other parishes near the island, had or could lawfully make any claim to tithes of the said lands, they not lying within any of the said parishes; and that the said lands were enjoyed without paying any sort of tithes; that upon the first recovering of the said island (long before the reformation), the inhabitants of Rochford Sutton, Little Wakering, Shopland, Eastwood, and Little Standbridge, became farmers of the said lands so recovered, which they held with their other farms in those parishes; that there being then no church or chapel in the island, they resorted, to hear divine service, to the churches where their upland farms laid; that the priests then desired voluntary presents for the lands in the said island; that such presents, being continued for a length of time, were afterwards claimed as due to the rectors, vicars, or priest of those parishes; but that whatever claims they then had to such presents in lieu of tithes for the said lands in the island, the same were since extinguished; for that in the year 1708, the island and the main land were for some time separated by every tide, whereby the inhabitants were deprived, at the point of death, of the benefit of the sacraments, they having no person constantly there to administer the same; that the lord of the manor of the said island, having obtained license, with the consent of the bishop, and all persons interested, erected a perpetual chantry, for the chaplain to perform divine service in a chapel built there; and that he and they did grant to the said chaplain, and his successors, for their maintenance, the tithes and profits arising within the said island, of the parishioners of Rochford, &c. aforesaid inhabiting within the said island: that divers chaplains were instituted in the said chantry, enjoyed the tithes and payments in lieu thereof, in respect of their lands in the said island, until the reformation, when the said chantry was converted into a rectory; that since the same was made a rectory, rectors were instituted thereto when vacant; that the rectors had enjoyed all such tithes as at the time of the grant were due or payable from any of the parishioners of the said parishes for their lands in the said island, or something in lieu thereof; that from the said grant to this day, the duties of christenings, &c. of the inhabitants of the said island, and particularly of the occupiers of the defendant's lands, had been performed by the rectors of the said chantry, and not by the rectors or vicars of Shopland, or other neighbouring parishes, and that all fees had been paid to the rector of the said chantry; that he has paid and was ready to pay to the present rector of Foulness for all tithes, great and small, arising on the lands in the bill mentioned, according to such compositions, and in such manner as he formerly paid the said rector; that neither the plaintiff's father, who was rector of the said parish of Shopland, nor the plaintiff, since his death, had ever, before this bill, claimed any sort of tithes arising on the said lands, or any composition for the same; that the inhabitants of

The rector of Shopland, in Essex, with the chapel of Foulness annexed, is entitled to the tithes of corn, grain, and hay, of the farm called Little Borrowwood, situated in the island of Foulness.

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the said island, and in particular the occupiers of the lands in the bill mentioned, never served any parish offices, in Shopland, or paid any church or parish rates made for Shopland (except as thereafter); that the parishioners of Shopland, in making procession round the said parish, never bounded out the said island, or any part thereof, or in particular the lands in the bill mentioned, as part of the said parish; that no boundary remained whereby it appeared that the said island, or any part thereof, and in particular the said lands, ever belonged to Shopland; that the inhabitants of Foulness had, time immemorial, annually chosen constables, who had served for the island and parish of Foulness alone, and never intermeddled with Shopland, and had paid their own constables' rates without demanding any thing of Shopland; that before and until the statute 43 Eliz. for the relief of the poor, some pretensions were kept up; that many years since, the church of Shopland, being out of repair, the churchwardens did pretend to make separate rates for the island, and to compel some of the inhabitants to pay the same for the repairs, which they refused, until they were compelled by the spiritual court to pay the same; that about ten years ago, the plaintiff demanded of W. Newberry, then occupier of the lands the defendant now holds, great tithes, which he refused, and the plaintiff brought his action against Newberry, who, being a timid man, agreed with the plaintiff to pay him ten pounds a-year, which he had paid for some time in his own wrong, as a composition to Michaelmas, 1717; that the lands from that time had been in the defendant's occupation; and as plaintiff had no right, he had refused to pay any tithes arising on the said lands; and he set forth what corn and grain he had had for three years past; and admitted that he had paid several annual sums to the vicar of Shopland.

The plaintiff replied; the defendant rejoined; and several witnesses were examined on both sides; and upon opening the said bill, and no counsel attending for the defendant; and reading an affidavit of service of *subpoena* to hear judgment; and also reading the answer of the defendant;

It is ordered by the court that the defendant shall account with, satisfy, and pay to the plaintiff tithes in kind for the lands and premises in question, for the years in the bill set forth, according to the proofs taken in the cause; and it is referred to the deputy-remembrancer to take the said account, unless cause shall be shewn to the contrary; the defendant first paying five pounds costs before they be heard.

The cause came on again, on the twenty-third of February, 1722, when the defendant's counsel objected for want of parties, and the Court ordered, that the bill shall be retained; and the plaintiff be at liberty to amend the same, by adding B. Collins, clerk, the pretended rector of Foulness, a party defendant thereto; the plaintiff paying to the defendant Kennett three pounds costs, for this day's attendance, before he be heard.

In pursuance of the above order, the said bill was amended, and B. Collins made a defendant thereto, who appeared, and said, that, about the year 1716, he was presented by the Earl of Nottingham to the church of Foulness; that the said church had been presented as a rectory for many years past; that from the time he became rector thereof, he had received from the defendant Kennett, the annual sum of eight shillings and four-pence, in lieu, or as a composition for the tithes of coleseed and mustard seed growing on Little Borrowood Farm, in the defendant Kennett's possession; that he had also received from him ten pounds a-year, as, or under the name of a pension, charged on or payable out of the said farm to the rector of the said church, in right of the said church, and believed that several of his predecessors had received the like annual sums out of the said farm; that he had not received any great tithes, or any *modus* or composition in lieu thereof, and had not heard that any of his predecessors had ever received any; that he apprehended that, as rector, he was or might be entitled to the great and small tithes arising upon the said farm, as lying within the said island and rectory, but could not make out any right to the great tithes, or any *modus* for the same, and therefore did not insist on the same; that he never saw the endowment of the said church, which the plaintiff suggested was endowed as a chapel, but admitted that he had seen

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an old imperfect writing, taken out of the old church book of Hockley; and that the same was shewn to him, as an exact copy of such endowment, but as he cannot set forth whether it was so or not, he refers, as to the fees given to the chaplain, and as to the reservation made to any mother churches, to such endowment when produced.

The cause came on to be further heard the nineteenth of November, 1724; and on reading the proofs taken in the cause, and also an entry in the Bishop of London's register, dated the seventeenth of May, in the sixth year of Elizabeth, and other entries in the said register; and on mature and deliberate debate of the matter had by the court,

It is ordered by the court, that it shall be referred to a trial at law, upon this issue, "Whether the said farms and lands in the defendant Kennett's possession, or any and what part thereof, do lie in the said parish of Shopland?"

The cause, on the twenty-second of April, 1725, standing upon the equity reserved, it appeared, upon reading the decree and *postea*, that the farm and lands in the defendant's possession do lie in the parish of Shopland: and upon full debate,

It is ordered by the court, that the defendant shall account with, satisfy, and pay to the plaintiff his tithes in kind, according to the prayer of the bill; the defendant Collins to be dismissed with forty shillings costs.

R. EYRE,
RO. PRICE,

F. PAGE,
JEFF. GILBERT.

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M. 9 Geo. Scacc. *Hughes v. Billingham*. [2 Wood, 207.]

Berkshire, 10th December, 1722.

THE vicar of Sunning, in the county of Berks, claimed all small tithes, and particularly the tithes of corn mills; and stated the decree he had before obtained, in the cause of *Hughes v. Englefield*. (1)

The defendant admitted, that the plaintiff was vicar of Sunning, and entitled to all small tithes, or to some *modus* in lieu thereof, and stated, that until he became vicar, the occupiers of lands in the said parish had never, in the memory of man, paid their tithes in kind, but, in lieu thereof, certain sums amounting to 120*l.* a-year, which the vicar had endeavoured to augment to 400*l.* a-year; that he occupied two water corn-mills, and had willow aits; that the said mills were ancient mills, and, having been erected before the statute 9 E. 2. ought not to be charged with the payment of any tithes for grinding corn or grain thereat, or for the toll thereof; that he had yearly paid the lessee of the dean of Salisbury, who was impropriator of the great tithes, six shillings, as a *modus* in full for all great tithes arising from the willow aits and the mills, or rather for the willow aits only, the mills being tithe-free, as having been erected before the said statute; and that if tithes were due for the said mills, the same would belong to the impropriator, who, in such case, should be made a party to the bill.

The plaintiff replied; the defendant rejoined; and several witnesses were examined; and upon reading a record of the nineteenth of May, the seventh year of James the First, and the depositions of divers witnesses taken in the said cause;

The court declared, that the said bill ought to be dismissed as to the demand of the tithes of the mill in question, no proof having been made of the payment of tithes at any time for the same.

It is thereupon ordered by the court, that the said bill be dismissed, as to the demand of the tithes for the said mill, with costs, to be taxed by the deputy-remembrancer of this court, to whom it is hereby referred to tax the same.

The court dismissed a bill for the tithes of a water corn mill, no proof having been made of the payment of tithes at any time for it.

(1) *Ante*.

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H. 9 Geo. Scacc.

Doctor *Bennett v. Treppas et al.* [Bunb. 106. 143. 2 Bro. P. C. 437. Gilb. 191.] 2 Wood, 197. Rayn. 168. 2 Gw. 633.

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London.

BILL by the vicar of Cripplegate for 2s. 9d. per pound, according to the rent of the houses, pursuant to the decree and statute 37 Hen. 8. and to support the jurisdiction of this court (the statute giving power to the lord mayor of London to determine, &c.) the cases in the margin were cited: several instances were given, where the 2s. 9d. per pound had been decreed; as the case of *St. Bride's, Townley v. Wilson*, Mich. 1705; *Sawyer v. Mountford*, 1694; *Grant v. Cannon*, Mich. 5 Gul. et Mar.; *Sheffield v. Serjeant*, 1658; *St. Swithin's, Humfreville v. Plumstead*; *Aldgate Parish*, 21 Car. 2. But the difficulty in this case was, that here appeared to have been paid from time to time several payments, as 10s. for T.'s house, 6s. for Borkett's, and 4s. for Whiccomb's, and the charges in the vicar's books appeared to be the same, though in some of them the payments sometimes varied, and the right of the vicar cannot be destroyed, but by an uniform, constant payment. (See the statute.) This being a thing of great consequence, the court took time to consider of this decree. (1)

In Michaelmas Term, Oct. 26, 1722, the court gave judgment: B. PRICE, That there ought to be a general decree for the plaintiff: MOUNTAGUE, PAGE, and GILBERT, directed an issue to try whether there had been such customary payments as were set up by defendants; and a verdict was for the defendants. From this decree Doctor Bennett appealed, and the decree was confirmed. Sir Constantine Phipps, Mr. Ward, Mr. Edlin, and Mr. Bostle, for the plaintiffs Serjeant Chesshyre, Mr. Fazakerley, Mr. Brown, and Mr. Bunbury, for the defendants.—[Bunbury.]

7th March, 1722. Dom. Proc.

THE appellant became vicar of the said parish, in April, 1717, and in Trinity term, 1719, he exhibited his bill in the court of Exchequer, against the respondents, as occupiers of houses within the parish, for tithes in London, after the rate of 2s. 9d. in the pound, according to the yearly rent of their respective houses: and he grounded this demand upon a statute and decree of 37 Hen. 8. whereby it was decreed and enacted, "That the citizens and inhabitants of the city of London, and liberties of the same, shall yearly, without fraud or covin, for ever, pay their tithes to the parsons, vicars, &c. after the rate following; viz. of every 10s. rent by the year, of all and every house and houses, shops, warehouses, cellars, stables, and every of them, within the said city, and liberty of the same, 16½d. and of every 20s. rent by the year, of all and every such house and houses, shops, warehouses, cellars, stables, and every of them, within the said city and liberties, 2s. 9d.; and so above the rent of 20s. by the year, ascending from 10s. to 10s. according to the rate aforesaid."

The respondents, by their answer to this bill, admitted, that during the time therein mentioned, they had respectively occupied houses within the said parish, viz. the respondent Treppass, a house of the yearly value of 12l.; the respondent Bocket, a house of the yearly value of 16l.; and the respondent Witchell, two houses of the yearly value of 22l. But they insisted, that no such demand was ever made as 2s. 9d. in the pound, by any former vicar of the parish; nor was the same ever heard of within the parish, till the appellant became vicar, which was but two years before the commencement of the suit. And they further insisted, that they were exempt from such payments, after the rate of 2s. 9d. in the pound, either by virtue of a proviso in the said statute and decree, whereby it was provided and decreed, "That where less sum, than after the rate of 16½d. in the 10s. rent, or less sum than 2s. 9d. in the 20s. rent, has been accustomed to be paid for tithes, that then, in such

(1) This case came before the court of Exchequer seven times, besides the hearing on the appeal in the House of Lords.

"places, the said citizens and inhabitants shall pay only after such rate as has been accustomed;" or by some other lawful ways and means.

The cause being at issue, and witnesses examined, was heard on the 27th of October, 1720; and there being no proof that the 2*s*. 9*d*. was ever paid, or demanded within the parish, till by the appellant's bill, and some doubt arising concerning the same; the court directed that a case, as it appeared upon the evidence, should be stated and settled by counsel on both sides; which was accordingly done to the effect following, *viz.*—

That there was no proof in the cause whether the houses in question were, or any of them was in lease, at the time of making the said act, or not; or that the sum of 2*s*. 9*d*. in the pound, was at any time paid, according to the value of the houses, by virtue of the statute and decree of the 37th Hen. 8.; but it was proved, by some of the appellant's witnesses, in their cross-examinations on the part of the defendants, that till the time of the present vicar they never heard of any such demand, as 2*s*. 9*d*. in the pound for tithes, within the said parish: That in two ancient tithe books there appeared to be charged for tithes, against the names of the then occupiers of Trepass's house, the several sums of 5*s*. and 3*s*. 4*d*. and in another ancient tithe-book the several sums of 5*s*., 3*s*. 4*d*., and 2*s*. 6*d*. which last mentioned sums of 3*s*. 4*d*. and 2*s*. 6*d*. were proved to be the collector's hand writing, but the 5*s*. charged against Trepass's house was of another hand writing; and in another book, the several sums of 3*s*. 4*d*. and 2*s*. 6*d*. were so charged and proved to be of the collector's hand writing: and that no certain sum annually, or *modus*, in relation to Trepass's house, was proved to have been paid, but as aforesaid: that in another tithe-book, commencing in the year 1708, and ending in the year 1713, Bocket's house was charged 1*s*. 6*d*. and Witchell's houses 1*s*. each quarterly. It was proved by one Suretys, that for nine years, during the time Bishop Fowler was vicar of the parish, he, the said Suretys, lived in Trepass's house; and during that time never paid more to the vicar than 10*s*. *per ann.* or 2*s*. 6*d*. *per quarter*: therefore the question on the said case was, whether 2*s*. 9*d*. in the pound, of the yearly rents of the said defendant's respective houses, was due for tithes, by virtue of the said statute and decree of 37th Henry 8. or not.

This case was twice argued, by counsel on both sides; first on the 18th of April, 1722, and afterwards on the 26th of October, following, but the court, conceiving some doubt in relation to these payments, ordered that it should be referred to a trial at law, upon this issue, *viz.* "Whether any, and what sum or sums, less than 2*s*. 9*d*. in the pound, had been accustomedly paid for any, and "which of the houses in possession of the respondents, or any, and which of "them."

From this order the plaintiff appealed, insisting, that no issue whatever ought to have been directed; because there could be no occasion to send those facts to be tried by a jury, which had already been settled and agreed to by the consent of both parties, in the above case; and that with so much care and deliberation, as to take up fifteen months in preparing the same, to the appellants great delay and prejudice: that it appeared from the answer of the respondents, that there was no one customary rate in that part of the parish of Cripple-gate, which lies within the city of London; the respondent Trepass's pretended payment, being after the rate of about 12*d*. in the pound, and Bocket's and Witchell's after the rate of about 4*d*. in the pound, and no more; and for this reason also, it was apprehended an issue was unnecessary: That the respondents had not given the least colourable proof of any *modus* or customary payment whatsoever, so as to bring them within the proviso of the act of parliament; nothing more being proved, than that, between the years 1708, and 1713, Bocket's house had been charged with 1*s*. 6*d*. and Witchell's houses, with 1*s*. each; and as to Trepass's house, that different sums had formerly been paid, *viz.* 3*s*. 4*d*. and 2*s*. 6*d*. That the respondents ought not, in this case, to have been admitted to read their proofs, to support such pretended customary rates, because they had not fixed or alleged any time when the same were payable; and by the constant practice of the court of Exchequer, a *modus* is held to be void, where no time is alleged or appointed for the payment of it: that

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that the neglect of the appellant's predecessors to demand according to the statute, could be no prejudice to a right vested by the express words of that statute, which was made to regulate and establish an immemorial custom of paying tithes in London; and therefore it was hoped, that the decree would be reversed, and that the appellant should have an account from the respondents, according to the statute; since he must either have that or nothing, there being no proof of any customary rate payable for the respondent's houses, sufficient to ground a demand upon.

On the other side, it was said to be usual for courts of equity to direct trials, where matters of fact appeared doubtful; especially if such facts depend upon custom and usage, which are matters most proper to be determined by a jury: that the constant acceptance of lesser sums than 2s. 9d. in the pound was apprehended to be sufficient to induce the court, to direct such an issue as they had done, as it could not be presumed, that the vicars of the parish would so long have accepted of such lesser payments, if 2s. 9d. in the pound had been due to them; because the same would make the living 3,000*l. per ann.* more than it was now worth, being only about 800*l. per ann.* That as it appeared, that lesser sums than 2s. 9d. in the pound had been paid for the respondents houses respectively, it was a strong evidence of an accustomed payment; and especially in this case, where the full sum of 2s. 9d. had never in any single instance been paid; nor was there any evidence that contradicted the payment of these lesser sums, or proved any variation in those payments: as to the objection made by the appellant, that the direction of the trial would be the occasion of great delay and expense to him; it was said, that the contrary was true, for that a trial might have been had, and a final decree made, in less time, and at less expense, than what was occasioned by the present appeal. But it was manifest, that the avoiding either expense or delay, had been very little in the appellant's view; there being a clause in the aforesaid statute or decree, "That if any variance, controversy, or strife, do or shall arise within the said city, for the non-payment of tithes, &c. or if any other doubt arise, upon any other thing contained within the said decree; that then, upon complaint made by the party grieved to the mayor of the city of London, for the time being, the said mayor, by the advice of counsel, shall call the said parties before him, and make a final end in the same, with costs to be awarded, by the discretion of the said mayor and his assistance." Which method, if the appellant had thought fit to have taken, the matters in question might have been long since determined, at a very easy expense: and therefore it was hoped, that the order would be affirmed and the appeal dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed; and the order therein complained of, affirmed.—[*Brown's Parl. Ca.*]

M. 1726. Scacc.

THE case is, that the plaintiff, having been vicar of the parish church of St. Giles's without Cripplegate, London, ever since the 4th of April, 1717, did, in Trinity term, 5 Geo. 1. exhibit his bill in this court against the defendant, for tithes in London, after the rate of 2s. 9d. per pound, according to the yearly rent of their houses, by virtue of the statute and decree, 37 H. 8.

The defendant, Trespass, was on the 4th of April, and has ever since continued, an occupier of an house within that part of the said parish which lies within London, or the liberties thereof, of the yearly value of 12*l.*; Bockett of an another, of 16*l. per annum*; and Whitehall of two houses, from April the 4th aforesaid, till Midsummer, 1715, at 22*l. per annum*.

There was no proof in this case, whether these houses were, or any of them was in lease at the time of making the act or not; nor that the sum of 2s. 9d. in the pound was at any time paid according to the value of the houses, according to the statute and decree of H. 8. But,

It is proved by some of the plaintiff's witnesses, in their cross-examinations, on the part of the defendants, that till the time of the present vicar, they never heard of any such demand as 2s. 9d. per pound for tithes within the said parish.

That in two ancient tithe-books, there appear charged for tithes against the names of the then occupiers of Trespass's house, the several sums of 5*s.* and 4*s.* 4*d.* and 2*s.* 6*d.* so charged; which said sums of 4*s.* 4*d.* and 2*s.* 6*d.* are proved to be the collector's hand writing; but the 5*s.* is of another hand writing; and in another book, the several sums of 4*s.* 4*d.* and 2*s.* 6*d.* so charged, and proved to be the collector's hand writing; but no customary sum, *modus*, or other certain sum was proved to have been ever paid than as aforesaid.

That in a book, commencing in 1708, and ending in the year 1713, Bockett's house is charged 1*s.* 6*d.* and Whitehall's house 1*s.* each.

It was proved by one Sureties, that for nine years, during the time of Bishop Fowler, he lived in Trespass's house, and during that time he never paid more to the vicar than 10*s.* *per annum*, viz. 2*s.* 6*d.* *per quarter*.

The question is, if 2*s.* 9*d.* *per pound*, of the yearly value of the said defendant's respective houses, be due for tithes, by virtue of the said statute and decree of the 37 H. 8. or not.

For the plaintiff, it was argued, that the sum of 2*s.* 9*d.* in the pound ought to be paid by the decree on the statute of 37 H. 8. cap. 12. and they looked upon that statute to be the general law of tithing in the city; and that if the defendants could not set up a *modus*, or composition, whereby it appeared, that they paid less, that this rule of tithing ought to take place. And they made several objections to this *modus* set up by the defendants; as,

First, That it was not proved to be time out of mind; and nothing less than an immemorial custom ought to be a bar against a common right.

Secondly, It was not set out, that the *modus* was paid annually, or half-yearly; and if the particular time of the payment of a *modus* be not set out, that *modus* is not well pleaded, nor is it a good bar; and the reason is, because the original agreement must be certain, that the person may know when and what to demand. But here there was no time set forth in this *modus*, and therefore it could be no good bar, nor was the *modus* tendered to the plaintiff.

In this case they quoted for the plaintiff a decree in the 16 Jac. 1. wherein the court had decreed 2*s.* 9*d.* in the pound; and likewise the case of *Sheffield and Serjeant*, in Mich. 1657; and likewise the case of *Humfrevill and Plumstead*, Trin. 27 Car. 2. *Grant and Cannon*, Mich. 5 W. & M. *Sir Patience Ward and others v. Kidder*, 5 W. & M. *Sayers v. Mumford*, Mich. 6 W. & M. and the case of *Townly and Wilson*, 7 Julii, 1705; in all which cases, the court had decreed the sum of 2*s.* 9*d.* *per pound*, according to the said statute and decree.

And Mr. Baron PRICE, who was of opinion for the plaintiff, said, the statute was thought to be in derogation of the rights of the clergy; for it appears by Linwood, 201, and by Stow, that the laity used to pay an halfpenny in the pound to the clergy upon every Sunday and holyday, which came to a greater sum than 2*s.* 9*d.* viz. 3*s.* 5*d.* *per pound*.

But it was resolved by the other three judges, that the case upon this statute was not like a *modus*; for the decree in the statute is, that all houses within the city of London and liberties, shall pay 2*s.* 9*d.* for every 20*s.* rent; and then comes the provision in the 18th section.

Provided also, and it is agreed, that where any less sum than 2*s.* 9*d.* in 20*s.* rent, has been accustomed to be paid for tithes, that then, in such places, the said citizens and inhabitants shall pay only after such rate as has been accustomed.

Now they said it was plain by the statute itself, and by the citation before-mentioned in Linwood, that in many places in the city, there had been a custom to pay tithes according to the pound rent; and these the statute never intended to alter or enlarge, but to establish; for the statute was not designed in destruction of any settled right; nay, they took it farther, that if there had been a payment of lesser sums by agreement between the parson and parishioners, they were confirmed by the statute; because it was the design of the statute, to settle such customary payments: and it was their design, that

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they should not be unravelled on either side ; and accordingly such customary payments and agreements have been complied with ever since the statute. And,

That lesser sums have been paid by almost every parishioner to the parson, and therewith they have been content. And although several decrees have been made in this court, for payment of 2s. 9d. in the pound, yet no customary payments, in any parish, have been set aside or broke through ; but these matters have been compounded between the parties, and the manner of tithing has continued the same in each parish, except in such parishes as are otherwise regulated by the statute 22 Car. 2. c. 15.

They said, that the 18th proviso was a perfect exception of all those that had paid lesser sums out of the decree ; and therefore this could not be urged as a *modus*, or set up in bar of tithes : for tithes were originally due, and therefore the bar must be complete ; but there are no tithes of houses due of common right ; for they are none of those things that *renovare in annum* ; and therefore the common law (which followeth the Levitical pattern) did not make them titheable ; and therefore they are titheable only by custom or agreement, where there have been such customs and agreements.

The new rate of 2s. 9d. per pound was super-induced by the decree ; and it is a strange thing to say that the decree was in prejudice of the clergy, when it appears, that less sums are now constantly paid for houses in the city, than what would be paid if they were rated under the decree. And *Note*, it appears, the ancient payments, in lieu of tithes of houses in London, were somewhat less than 2s. 6d. per pound.

But it plainly appears, that before the dissolution of monasteries, a great deal of service in London was performed by the regular priests, who not only said their masses, but visited the sick, and performed offices of devotion in many parts of the city. And when they were extirpated, this duty fell upon the parochial clergy ; and then it was necessary that their maintenance should be increased, and therefore this decree was made, that all persons should pay the received rents from houses, (that is) where there had been accustomed payments, the tithes were to continue payable, according to that custom ; and where there was no immemorial custom, yet if there had been by agreement, &c. a payment for eight years past, this, according to the frame of the statute, is to be looked upon as a customary payment ; for the divisions and severances of the houses, wharfs, and warehouses, were to be as they had been for eight years past. So that the construction seems to be, that if there had been an agreement to pay tithes for eight years past, they were accustomed payments within the statute : and this will form an uniform notion, that if there were tithes, by custom or by agreement, for eight years past, they are within the 18th proviso of that statute.

But where there were no such accustomed payments, there the statute is introductive of a new law, and lays the charge upon all others to pay 2s. 9d. in the pound.

As to the objection, that there was no particular time of payment alleged, Baron PAGE said, that the statute, by the 11th proviso, had appointed the payment of tithes quarterly, and therefore it need not be set out in the bill as the authorized payment.

But it seems doubtful whether that proviso extends any further than to the 2s. 9d. mentioned in the decree, and not to the accustomed payments, mentioned in the 18th section of the act.

But in this all the three judges agreed, that they were not obliged to set up these customary payments, as *moduses*, in bar of tithes ; for these customary payments are exemptions out of the decree ; and therefore, in what manner soever they have been paid, if there have been a customary payment since the statute, of a lesser sum, they cannot be bound by decree, to pay 2s. 9d. per pound.

Now, if all that pay less sums be exempt from payment under the decree, and be not within the decree, nor within the obligation of the statute, we ought to try whether there be such accustomed payments or not ; especially since in this case, it appeared by the books of the parson, that less sums were collected ; and it could not have been presumed, that they would have been

collected in that manner, if they had not been the old accustomed payments. For how could those sums have come into the parson's books, if they had not been the old accustomed dues?

And the difference of the payments in the books may be reconciled, by supposing some of them to be quarterly, some half yearly payments.

This case relates to the inheritance, and the inheritance is to be bound by our decrees. And where the inheritance is charged, merely by custom, it is usual and just, if the parties desire it, to try such custom at law.

Therefore the court directed an issue at law, to try whether any less sum, than after the rate of two shillings and nine-pence in the twenty shillings rent, had been accustomed to be paid by the defendants for tithes, and what such sum was.

In this case were quoted 2 Inst. 660. Noy, 130. Hard. 116. Watson, 387 to 399. Cro. Car. 596. Yelv. 31. Moor, 912. 11 Co. 15. Grant's case.

From this decree the plaintiff appealed to the House of Lords, where the decree was (*Dissentiente clero*) justly affirmed.—[*Gilb.*]

An issue was directed in this cause, to try whether there had been any variation in the payment of tithes, or sums of money in lieu of them, for houses in London, according to the statute 37 Hen. 8. It was now moved, that the plaintiff should produce at the trial the books of the former rectors: and although it was objected that these were properly private books, and the plaintiff's own evidence, yet as they had before been produced at the hearing of the cause, and as the issue to be tried is to inform the conscience of the court, the jury ought to have all the light the court can give them: So *per curiam*, the plaintiff was ordered to produce these books at the trial.—[*Bunb.*]

H. 9 Geo. Scacc.

Bate v. Hodges. [Bunb. 125.] 2 Wood, 210. 2 Gw. 645.

BILL by the rector of Wareham, in the county of Kent, for tithes; the defendant insists upon this *modus*, viz. one shilling *per acre* for marsh land, four-pence *per acre* for upland, payable at Michaelmas, for hay and all small tithes within the parish (except hops.) *Nota*, It was admitted, if this *modus* had been for tithe-hay only, or the tithe arising on the land, the one shilling had been too rank. Baron PRICE was of opinion this was (as laid) a void *modus*; PAGE and GILBERT, Barons, that it was good, and decreed accordingly for the defendant. Against the *modus* was cited Cro. Eliz. 139. *Bury and Grascomb and Jeffries*, 17 Novem. 1687; *Gardiner and Wickford*, 1704.—For the *modus* SMELTER and BRIDGES, Hil. 1694.

This cause of *Bate v. Hodges*, was reheard November 23, 1724, before EYRE, Ch. B. and PRICE, PAGE, and GILBERT, Barons, and the decree was reversed, *dubitante* GILBERT.

Nota, After this upon a new bill and cross-bill, the several objections to the manner of laying the *modus* were cured, and it was allowed to be good at last.

H. 9 Geo. Scacc.

Tully v. Kilner. [Bunb. 126.] 2 Wood, 208. 2 Gw. 644.

BILL by the rector of Aldingham in the county palatine of Lancaster, for the tithes of ley ground formerly used as arable, but since converted into hay ground: the defendant insisted upon this *modus*, that the occupiers of ancient tenements within particular vills, or townships (expressed) within the said parish, with their own carts, carriages and horses, led and carried, and ought to lead and carry a cart-load of peat and turf, from Ulverstone Moss to the parsonage house, for the use of the parson and rector, his farmer or deputy,

tithes of hemp, flax and hay arising on such tenements is void, for a cart-load is too uncertain, and no right of turbary alleged in the parsonage house or ancient tenements.

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A *modus* of one shilling *per acre* for marsh land, and four-pence *per acre* for upland, in lieu of hay and all small tithes (except hops) within a parish, allowed.

A *modus* that the occupiers of ancient tenements within a parish should each carry a cart-load of peat to the parsonage house, on discharge of the

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on such a day, or within the space of every two years, as they have or should require the same, in full discharge of all the tithe of hemp, flax and hay growing or arising on the said ancient tenement. This was held to be a void *modus* by three barons (absente Lord Chief Baron MONTAGUE); for a cart-load is too uncertain, it may be drawn by two or six horses; and there is no right of turbary alleged in the parsonage house, or in the defendant's ancient tenements. Sir *Constantine Phipps*, Mr. *Ward*, and Mr. *Brown* of counsel for the plaintiff; Serjeant *Cheshyre*, Mr. *Fazakerley*, and Mr. *Bootle*, for the defendant.

H. 9 Geo. Scacc.

Lloyd v. Mackworth. [1 Bunb. 125.] 2 Gw. 645.

Timber shall be presumed to be above twenty years growth, unless the contrary be proved.

BILL for tithe-wood; the defendant insists that it was timber, but does not say that it was above twenty years growth. *Per curiam*, we will presume timber to be above twenty years growth, unless the plaintiff proves the contrary.

E. 9 Geo. Scacc.

Evans v. Newell, [Bunb. 128.] 2 Wood, 212. 2 Gw. 645.

Assart means lands grubbed up and made fit for tillage.

BILL for all the tithe-wood of all extra-parochial lands within the forest of Dean, by virtue of a grant from King Edward I. of all tithes issuing *de assartis* within the forest *de novo assartatis et assartandis*; but by the proofs it appeared, that these lands never were grubbed up, but were always wood-lands, and no tithes ever paid.

Nota, The debate in this case was principally upon the meaning of the word *assart*, (1) and *per curiam*, it is only such lands as have been grubbed up and made fit for tillage; and the bill was dismissed. Sir *Constantine Phipps* for the plaintiff; Mr. *Bootle* and Mr. *Ward* (2) for the defendant.

(1) Spelman, verb. *assart*. Manwood c. 9. Stat. 4 Edw. 1. Extenta Maner. Register. Du Fresne, verb. *assart*. Blunt's Dict. verb. *assart*. Jacob's Dict. verb. *assart*.

(2) Mr. *Ward* said the word *assart* was derived either from *exarando* or *asserendo* Maner'.

E. 9 Geo. Scacc. *Burwell v. Coates*. [Bunb. 129.] 2 Gw. 646.

Quere, whether there be any difference between a lay and a spiritual person as to the title to be set forth in claiming tithes. A *modus* of four shillings at Easter, payable in lieu of tithe-hay of a farm disallowed.

BILL by the plaintiff as lessee of the impropriate rectory of Normanby, in the county of Lincoln, under the Dean and Chapter of Lincoln, for tithe-hay: it was insisted upon for the defendant, that the plaintiff (being a lay impropriator) had not set forth a sufficient title; and upon that the long-controverted question, whether there was any difference between a lay and a spiritual person (claiming tithes) was revived: But it was not now determined; for, *per curiam*, the title was well enough set forth in the present case.

The defendant insisted upon a *modus* of four shillings payable at Easter, in lieu of tithe hay arising on his farm and other lands particularly set forth: But *per curiam*, This is a void *modus*, because it may introduce fraud; for if a farmer should turn all his arable land into meadow, he would be discharged of the whole for four shillings; besides it is too uncertain, it not being certain what a farm consists of. Mr. *Ward* and Mr. *Brown* for the defendant; Sir *Constantine Phipps* for the plaintiff.

M. 9 Geo. B. R.

The King v. Inhabitants of Lambeth. [1 Str. 525. 11 Mod. 375.] 8 Mod. 61. Fortesc. 318.

The parson must be assessed for the poor's-rate on his tithes, as the occupier thereof, although he has agreed with the tenant that he shall retain them.

THE parson lets his tithes to farm; and the farmer agrees with the tenant of the land, that in consideration of his paying so much, he shall retain the tithe, and gather in the whole crop without dividing: and which of the two is charge-

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chargeable to the poor's rate as occupier of the tithes was the question. And the sessions discharge the lessee of the parson, and tax the tenant of the land. *Et per curiam*, The order must be quashed. The farmer of the tithes is *primò facie* liable to the poor's rate, and therefore, unless he can throw that charge over upon another, the tax must be made upon him. The tenant of the land in this case can never be said to be the occupier of the tithes; for he is either a person who buys the tithes, or else he is to be taken as only excused from paying any; and nobody can say but that though the parson thinks fit to excuse a parishioner, he will still remain in point of law the occupier of the tithes. This agreement being only by parol, cannot enure as an under-lease of a thing that lies only in grant. Suppose it was the case of underwoods, which are sold standing, and the vendee grubs them up; can it be imagined, that makes him the occupier? or suppose the tenant sells the whole crop standing, will that make him less the occupier of the land? If it should, it would be impossible for the officers of the parish to know whom to charge. We must take this tenant of the land to be like any other buyer of the tithes, since he has no more title to them than any stranger whatsoever: and when the parson or his farmer receives a sum of money in lieu of tithe, that is in law a receipt of tithe, with this only difference, that it is not tithe in kind. In the case of a composition (as this is) or a *modus*, it was never thought but that the parson was chargeable as occupier of the tithe; therefore there being no colour to charge the tenant of the land, the order of sessions must be quashed.—[*Str.*]

REEVES moved to show cause why an order for confirming a poor's rate should not be quashed. The rector granted a lease of the tithes to J. S. at a certain rent; J. S. for a certain consideration, covenanted with the occupiers of the lands in the parishes severally, that they should keep and retain the tithes to their own use. The question is who shall be rated for these tithes? They may lay a two-fold rate, according to the substance, or as occupiers of lands, tithes, &c.: the last must be upon the tenant, not the landlord; then the rate for these tithes must be paid by the persons receiving the profits of the tithes. All agree, that those who rent the nine parts must be rated for them; and why not those who rent the tenth part or tithe? The act appoints the rate to be made upon the occupiers of both. The thing in substance that should have been set out, the retainer takes; therefore he is occupier. The tithes remain not extinguished, notwithstanding unity of possession.

Darnell, *contrà*. It returns to this question, Who is the occupier? The lessee is the person who takes the profits, and whoever takes the profits is the occupier. To say the retainer is the occupier because he has the corn; they may as well say the baker and brewer are, for they have the corn.

Reeves, in reply. The act puts lands and tithes upon one footing, and the latter is considered as one-tenth of the former: and he who receives the profits of the land is the occupier of the tithes; he who receives the tithes and puts them into his barns, is occupier, whether he has them by contract or otherwise.

PRATT, Ch. J. No doubt but somebody must be rated in respect of the tithes. The only question is, Who is occupier? And I think the farmer of the rector is so, *primò facie*: but he has made a contract with the farmers of the land, for which he is to have (as we must intend) the value. They do not know what the retainer makes of it. Shall he be rated to the whole when he has paid the value for it? The farmer of the land pays, because he takes the land subject to it: there is no harm done if the farmer of tithes (who takes them subject to the rate as farmer of land) be rated for them: whether he sells them after they are set out or before, is the same thing as to that; the profits and value are in him, and he receives them.

POWYS, J. of the same opinion.

EYRE, J. The question is, Who is occupier? I think the farmer still continues occupier: I should think otherwise if retainers were under-lessees; but the farmer of tithes sells them to the farmers of the land, and it is in nature of such to them. 2 Co. 137. He agrees, by parol, that for so much they shall retain

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them; this does not put the lessee out of possession of the tithes; he is occupier still, and only sells them.

FORTESCUE, J. of the same opinion.—[1 *Mod.*]

The court quashed the order of sessions.

Tr. 9 Geo. Scacc. *Reignolds v. Vincent.* [Bunb. 133.]

The usual time for tithing lambs is when they can live without the dam.

BILL for tithe (*inter al*, of lambs); the defendant insists that it was customary to tithe their lambs at St. Mark's day (25th of April): But for the plaintiff it was said, that by the defendant's own proofs it appears, they generally then are but three weeks old, and cannot live without the dam; but it is usual to tithe them not until August, and sometimes not until Michaelmas; but the general rule is to tithe them when they are capable of living without the dam. And *per curiam*, the custom insisted upon by the defendant is unreasonable; and decreed for the plaintiff.

M. 10 Geo. Scacc.

Lambert v. Cumming. [Bunb. 138. Decree Book.] 2 Wood, 215.
2 Gw. 647. 3 Gw. 1017.

A defendant insisted upon an exemption for an estate called Hilderstone, and a right of common *sans* number in Yealand, which estate was parcel of one of the greater abbeys; and although it was objected that a common was only a *profit appendre* out of other land, and an exemption could not arise for an appendancy or an appurtenancy, the exemption was allowed.

BILL for tithes in the parish of Warton, in the county of Lancaster; the defendant insists upon an exemption for his estate called Hilderston, and for his right of common *sans* number in Yealand, which estate was parcel of the abbey of Cockersand, one of the greater abbeys; which exemption was proved: But it was objected for the plaintiff, that the common is only a *profit appendre* out of other land, and an exemption cannot arise for an appendancy or an appurtenancy. But, *per curiam*, we will make no distinction between the common and the estate; and decreed for the defendant. [*Bambury.*]

WHEREAS, Josiah Lambert, gentleman, did, in Michaelmas term in the seventeenth year of his present Majesty's reign, exhibit his English bill of complaint in this court, against Edward Cummin and other defendants, thereby setting forth, that the dean and chapter of Worcester, by indenture of lease, dated 12th of September, 1712, demised to the plaintiff for the term of twenty-one years, all tithes, great and small, of all sorts, of the rectory and parsonage of Warton, in the county of Lancaster. That the defendant had for five years then last past, divers titheable matters growing on the lands they held in the said parish, and offerings, oblations, and other dues to which the plaintiff had right, which they refused to pay or satisfy; that the said defendant Cummin and his mother had, in those years, several quantities of corn and hay and other titheable matters, on the lands they held in the said parish, which they pretended were ancient glebe-lands, and therefore exempt from paying tithes in kind; that they had also depastured many sheep and other cattle, and on the same pretence refused to pay tithe-lamb and wool, and endeavoured to bring other grounds for which there was no pretence under the privilege of such exemption. And the bill charged that the defendant's lands were under no legal protection, and that they fraudulently fed their sheep sometimes on one ground and sometimes on another, to deprive the plaintiff of tithes in kind or any proportionable recompense for the time the cattle depastured on the ground for which they claimed no exemption; that the defendants fed their sheep and other cattle on Yealand Common in the said rectory, and had sown several parcels of common or moss near their estate at Moss-side with corn and grain, for which they refused to pay tithes, or to discover the particulars or value of any of the premises, or the value of any proportionable tithes for the same, and refused to pay Easter dues, oblations, and obventions, for any part of the seven years the plaintiff had possessed the same premises. Therefore, that the said defendants might answer the premises, and that the plaintiff might be relieved, was the scope of the plaintiff's bill. To which said bill the defendant Cummin, being duly served with process of this court, appeared to answer, and by his

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answer said, he knew not that the plaintiff was entitled to the tithes of the said rectory, and confessed he was, during the time in the bill mentioned, owner and occupier of an estate called Hilderstone, in the said rectory of Warton, consisting of one messuage, and gardens, and orchards, and one inclosure of arable and meadow ground, called the croft, containing by estimation ten acres, and one other inclosure adjoining thereto called the Great Parrock, containing by estimation one acre, and another inclosure adjoining called the Cow Close, containing by estimation two acres, and one other inclosure called the Lesser Parrock adjoining to the said Cow Close containing by estimation half an acre, and one other inclosure adjoining to the said Cow Close called the Head Close, and also a parcel of barren heath or moss ground adjoining the said inclosures, containing by estimation sixteen acres, all which messuages, lands, and premises, with the appurtenances (*inter alia*), by letters-patent, dated 23d of March, 36 Hen. 8. were granted to Jon. Braddul, his heirs, and assigns for ever, under which letters-patent the defendant claimed the same, and said he was credibly informed by divers ancient persons well acquainted with the said rectory of Warton, that no impropiator or lessee thereof was intitled or ever took or received any tithes in kind, or in lieu thereof for any titheable matters or things that did arise and happen in the said estate. And the defendant insisted that the same was parcel of the dissolved Abbey of Cockersand, in the county palatine of Lancaster, which was one of the great monasteries, and came to the crown by statute 31 Hen. 8. and was held and enjoyed always and at the time of the dissolution by the abbot and convent of Cockersand aforesaid freed and discharged from the payment of any tithes in kind, or any rate *modus*, or composition in lieu thereof, and had been so enjoyed ever since the dissolution of the said monastery and convent by the persons claiming under the crown, and said he believed the plaintiff or any former lessee of the said rectory, never before this suit, pretended to demand any tithes of the said estate, and he was advised such exemption was not lost by the dissolution of the abbey, but a privilege continued by virtue of the statute of dissolution or otherwise, and that as owner and occupier he ought to have advantage of such discharge, and said he and his predecessors had enjoyed the said estate above a hundred years discharged from tithes or any thing in lieu thereof. And he was informed the said abbot and convent did, before the said dissolution, hold and enjoy, by virtue of the said lands, a right of common, called Yealand Common, which, ever since the dissolution, had been enjoyed by the owner of the said abbey-lands, exempt from the payment of the tithes or any thing in lieu thereof. And that he and his ancestors, by virtue of their estate aforesaid, had enjoyed, time out of mind, a right of common on the said Yealand Common: and that the said right of common was appurtenant to the said estate, and so had always been exempt as aforesaid, and insisted that the benefit arising by the said right of common ought likewise to be exempt from payment of tithes; and that no tithes for the same were ever had or demanded but by the plaintiff. But the said defendant admitted that, during the time in the said bill mentioned, he held and occupied four acres and a half of other land in the said rectory, not included in the said abbey-lands, for which he claimed no particular exemption from tithes; and that he sowed the same in 1716 and 1717 with oats and barley, for the tithes whereof the plaintiff received satisfaction by virtue of a warrant from two justices of the peace, as also for all other titheable matters arising thereon, and the rest of the time he had no barley or oats or other grain growing on the said four acres and a half, but depastured the same with plough oxen and working horses used for the benefit of the said land, for which he was advised no tithes were due, and denied that he pretended his lands were glebe-lands and exempt, but said that the abbey-lands were, and likewise denied that he drove his cattle or ewes from the said lands not exempt to them that were, to defraud the plaintiff of his tithe; and denied combination, and concluded with the general traverse. To which answer the plaintiff replied, and the defendant rejoined, and divers witnesses were examined on either side, and the depositions being duly published, and the cause put into the paper of causes, came on this 21st day of November, in the Exchequer Chamber, at

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Westminster, before the Honourable ROBERT PRICE, esquire, Sir FRANCIS PAGE, knight, and JEFFREY GILBERT, esquire, three of the barons of this court; whereupon on opening the plaintiff's bill, by Mr. *Bootle*, of counsel for the plaintiff, and of the defendant's answer by Mr. *Wearg*, of counsel for the defendant, and hearing Mr. *Ward* with the said Mr. *Bootle*, of counsel for the plaintiff, and of Mr. Serjeant *Pengelly*, Mr. *Brown*, and the said Mr. *Wearg*, of counsel with the said defendant, and on reading of a surrender of the abbot of the abbey of Cockersand, in the county of Lancaster, to the crown in the thirteenth year of the reign of King Henry VIII. being a record out of the augmentation office, and of another record of the rolls of letters-patent from the crown to John Breedyll, dated 23d March, 36 H. 8. and the minister's accounts of 38 H. 8. being a record out of the augmentation office, whereby it appeared that the said abbey of Cockersand was one of the great monasteries, and of the proofs taken in the cause, and on hearing of what was insisted on by the counsel on either side, the court declared that the defendant's estate called Hilderstone, and the lands thereto belonging, insisted on by the defendant in his answer to be discharged from the payment of any manner of tithes, were exempt from any manner of tithes, and that the right of common upon Yealand Common was appurtenant to the estate called Hilderstone, and was therefore likewise exempt from payment of tithes. And it is therefore this day ordered, adjudged, and decreed by the court, that as to the defendant's estate called Hilderstone, and the land and right of common thereto, declared by the court to be exempt from the payment of any manner of tithes as aforesaid, the plaintiff's bill shall be and it is hereby dismissed out of this court, with costs of this suit to be taxed by the deputy of his Majesty's remembrancer of this court. And it is further ordered, adjudged, and decreed by the court, that the defendant shall come to an account with the plaintiff for such Easter offerings and other titheable matters and things which the said defendant had arising and growing on his said farm and lands within the said rectory and parsonage of Warton, and the titheable places thereof not exempt from payment of tithes during such part of the time by the said bill charged and required as the plaintiff had received no satisfaction: the taking of which said account is hereby referred to the said deputy-remembrancer. And for the better stating and taking of the account the said deputy is to be armed with a commission for the examination of witnesses touching the said accounts and of the value of the said tithes, and a commission is to issue into the county for that purpose if need shall require; and the said deputy is to make to all parties all just allowances, and to make his report herein to the court with all convenient speed, and this cause is to be continued in the paper of causes, to be further heard on the coming in of the said report, when this court will make such further order herein as shall be just.—[*Decree Book*.]

M. 10 Geo. Scacc.

Lloyd v. Mackworth. [Bunb. 138.] 2 Gw. 646.

Where two defendants were sued for tithes, and one made default, and a decree passed against the other with the whole costs, he was left to get his contribution from the other as he could.

BILL for tithes against two; the defendants answer separately, and there were separate examinations; one defendant made default, and there was now a decree against the other with the whole costs; and the court would not distinguish as to the costs between the two defendants, but left Mackworth to get his contribution from the other as he could. But *nota*, this, as it seems, can only be by bill.(1)

(1) It appears from the Decree Book that this case is so mistated as to be of no authority; both the defendants appeared at the hear-

ing, and the decree was that each should pay the sum due from him, with costs to be taxed.

M. 10 Geo. Scacc.
Boys v. Ellis. [Bunb. 139.] 2 Gw. 647.

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IN a bill for tithes, a question arose whether there was fraud in tithing lambs, on this case: The ewes were kept by the defendant in the parish of Driffild, in the county of York (where the demand lay) all the year, until Christmas, when they were ready to drop their lambs, and then were removed into the parish of Skern (where there was a small *modus* only for lambs) and there kept till Lady-day for convenience of forage, as insisted upon by the defendant, and at Lady-day were brought back to Driffild. *Nota*, There was no demand of tithe *pro ratâ*, and *quare* if there had, if it could be decreed; for the tithe of lambs must be paid where they fall, and is not a divisible thing as wool is. *Nota*, The land in Skern was the defendant's own. *Per curiam*. Here is not a sufficient proof of fraud, and the plaintiff's bill was dismissed. But *PAGE* and *GILBERT*, barons, thought, at first, it might be proper to send it to an issue, to try whether fraud or not fraud, and whether this had been the usual method of the defendant's course of husbandry; but, afterwards they concurred with Baron *PRICE*.

Where sheep were removed when they were ready to drop their lambs to another parish for convenience of forage, as insisted upon by the defendant, the court of exchequer would not send it to an issue to try whether fraud or not.

M. 10 Geo. Scacc.

The Bishop of London and Beaumont v. Nicholls. [Bunb. 141.]
 2 Gw. 648.

BILL by the bishop of London and Beaumont, as sequestrator during the incapacity of mind of Barefoot the present incumbent, for tithe-wood in the parish of Birchanger in the county of Essex: The defendant demurs, for that it does not appear, that either of the plaintiffs had any title; and it was insisted upon by the counsel for the defendant, that (now, since the division of parishes) the whole right to tithe was vested in the rector, and the bishop had nothing to do with the right (ever since the statute Hen. 8. which relates to a vacancy) but only to take care that the cure be supplied, and the profits sequestered for that purpose; and the other plaintiff was only a sequestrator, who, as it appears by the form of sequestration, and by his own shewing in the bill, was only an agent or collector; besides the incumbent Barefoot should have been made a party, for possibly, at this time, he may have recovered his right senses; and if he should exhibit his bill, a recovery now could not be pleaded in bar of his demand. Baron *PRICE* was of opinion, that no decree could have been for the plaintiff, if it had been a sequestration during the vacancy, nor can there be in this case; But *PAGE* and *GILBERT*, barons, were of opinion the bill had been well enough, if Barefoot had been a party, either in person or by his committee; and the bill was dismissed, but without costs, the want of parties not being expressly assigned as cause of demurrer. And *nota*, the words ("and for divers other causes, &c.") were not in the demurrer, as they should have been.

Bill for tithes by the bishop and the sequestrator during the incapacity of mind of the incumbent, dismissed for want of making the incumbent or his committee a party.

Where a bill is dismissed for want of parties, such cause not having been expressly assigned as cause of demurrer, it shall be without costs.

H. 10 Geo. Scacc.

Goole, Clerk, v. Jordan et al. [Bunb. 144. 2 Wood, 218.]
 2 Gw. 648.

BILL by the vicar of Eynsham, in the county of Oxford, for six years tithe-herbage and furze, of a close called Amberry *alias* Hanborough Close, in the parish of Eynsham: the defendants insisted, that they did not know that the vicar was entitled to these tithes; that they were informed no tithes thereof ought to be paid to the vicar; but that the great tithes, herbage, and furze, (if any was due,) belonged to the impropriator; and then say, that it was part of the dissolved abbey of Eynsham, and exempted by the stat. 31 Hen. 8. The plaintiff made out by his proof, that the vicar was entitled to all small tithes within

Where a vicar proved that he was entitled to all small tithes in a parish, the court decreed tithe of herbage and furze to him, though only one instance of payment to him for years was given.

the close in question within thirty

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within the parish, that the great tithes were constantly paid to the impropriator, and gave one instance within thirty years of a composition with the vicar for the agistment tithe of this close. The defendant's proof was negative, that they never knew tithe paid for this close; and although it was objected, that a vicar should have made out a fuller title to the small tithes, yet the court were of opinion it was sufficient; and decreed the defendant to account.—[*Bunbury.*]

THE bill stated, that for six years past the plaintiff had been lawful vicar of Eynsham, in the county of Oxford, and entitled to all the tithes and profits belonging to the said vicarage, particularly to the tithe of herbage for agisting and feeding all dry, barren, and unprofitable cattle; the tithe of furze when cut; and to a pension of six pounds a-year, payable by the lords of the manor there; that the defendants, for the same time, had jointly held a close, called Hamberry, otherwise Hamberry Close, lying within the said parish, in which close they had fed, agisted, and depastured, several horses, cows, steers, and other dry, barren, and unprofitable cattle belonging to other persons; and had yearly cut divers quantities of furze, the tithes whereof ought to have been paid to the plaintiff; and also that the said defendants were jointly seized of the said manor, and ought to pay the plaintiff the said pension.

The defendants admitted, that the plaintiff was vicar, and entitled to all the tithes belonging to the vicarage; but denied that, to their knowledge, he was entitled to tithe-herbage and furze; and insisted, that the pension of six pounds a-year was payable by the impropriator of the parish, and not by the lords of the manor. They confessed, that they held the close as mentioned in the bill, and that they had taken in by agistment, kept, fed, and depastured thereon, divers horses, geldings, heifers, cows, steers, and other dry, barren, and unprofitable cattle, belonging to other persons, the herbage whereof, one year with another, might come to six pounds a-year. They also confessed, that they had dug or grubbed up furze in the said close worth four pounds a-year; and insisted, that the said close was exempt and discharged from the payment of any tithes for all or any of the titheable matters and things arising or growing therein to the vicars of the said parish; but how they cannot set forth, otherwise than that the said close was parcel of the ancient demesnes of the manor of Eynsham, and formerly parcel of the possessions of the abbey of Eynsham, and held discharged of tithes at the time of the dissolution thereof, about the thirty-first year of Henry the Eighth, and by virtue of an act of parliament passed in the thirty-first year of Henry the Eighth; and therefore ought to be held discharged of tithes. They denied, that they are entitled to the manor of Eynsham, or that they were obliged to pay the said pension; and admitted, that they had not made the plaintiff any satisfaction for the tithes of said close.

The plaintiff replied specially, and therein waived his demands as to the pension; but insisted on the tithes of the said close; the defendants rejoined; and witnesses were examined on both sides; and upon reading the proofs in the cause,

It is ordered by the court, that the defendant shall account with, satisfy, and pay the plaintiff the value of the tithes arising upon the said close for the time demanded by the bill for the agistment of dry, barren, and unprofitable cattle fed, and also for the furze cut thereon.—[*Wood.*]

H. 10 Geo. Scacc.

Beardmore v. Gilbert. [Bunb. 159.] 2 Gw. 649.

Wood ground grubbed up is not exempted for seven years as barren land, within the stat. Ed. 6. as it yielded profit before.

THIS was a bill brought by the impropriator for the tithe of Forley and Oakmore in the parish of Alford, in the county of Stafford; the defendant in his answer insists, that the ground for which the tithe is demanded, is heath and barren ground, and exempted by the stat. Ed. 6. for seven years; but he admits by his answer, that it was wood ground which had been grubbed up; and therefore the plaintiff's counsel insisted it had yielded profit before, and

was not barren ground within the meaning of the stat. of Ed. 6. This came on upon bill and answer, and it appearing from the defendant's own admission, that it was wood ground grubbed up: *per curiam*, the defendant was decreed to account.

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H. 10 Geo. Dom. Proc.

Craythorne v. Taylor. [2 Bro. P. C. 517.] 2 Wood, 273. 2 Gw. 650.

THE plaintiff exhibited his bill in the court of Exchequer, against the defendant, stating, that William Redman, of York, esq. being seised in fee, or of some other estate of inheritance, or possessed for some long term of years, or otherwise entitled in his own right, or in trust for his children, William Redman, Watkinson Redman, and Alice, the wife of Richard Atkinson, in and to all those the tenths and tithes of corn, grain, hay, and other tithes, as well great as small, of what nature and kind soever, with all and singular the rights, members, and appurtenances, yearly arising and growing within the villages, fields, and hamlets, of Eastnesse, Crook-Holme, and South-Holme, within the parish of Hovingham, in the county of York, by indenture, dated 27th January, 1721, made between the said William Redman of the one part, and the plaintiff of the other part, the said Redman demised to the plaintiff, all and singular the said tithes of corn, grain, and hay, with all and singular their rights, members, and appurtenances, yearly; and from time to time coming, growing, increasing, and renewing within the villages, fields, and hamlets of Eastnesse, Crook-Holme, and South-Holme, or in any of them within the parish of Hovingham aforesaid, and lately belonging to the dissolved monastery of Newbrough, in the said county; and all other the tithes, as well great as small, with their and every of their rights, members, and appurtenances, of whatsoever nature, kind, or condition the same were; and all his, the said William Redman's right, title, interest, claim, and demand whatsoever, as trustee for his said children, of, in, or to the said tithes and premises, or any part thereof, to hold the same to the plaintiff, his executors, administrators, and assigns, from the 25th of March preceding the date of the said indenture, for twenty-one years, under the yearly rent of 20*l.*: that by this lease, the plaintiff became fully and legally entitled to receive, or otherwise to have a satisfaction made to him for all the said tithes, growing or arising within all, or any the places aforesaid: that the defendant, who was owner and occupier of several lands, pasture and meadow, within Eastnesse aforesaid, refused to pay the plaintiff, or to make him any satisfaction, for the small tithes and herbage arising from the appellant's lands in Eastnesse aforesaid, or which grew or renewed in the year 1721, out of or upon the said lands and grounds; wherefore the bill prayed, that the defendant might set forth the particular quantities and values of the said tithes; and that the plaintiff might have a satisfaction for the same, and be otherwise relieved in the premises.

To this bill the defendant demurred; and for the causes of demurrer alleged, that the plaintiff had not by his bill set forth, as he ought to have done, how William Redman, who thereby appeared to be a layman, became entitled to the tithes demanded by the said bill, whether by grant, prescription, or otherwise; or what estate the said William Redman had in the said tithes, or whether he had power to demise the same; or that any estate in the said tithes did or could pass from the said William Redman to the plaintiff; for which reasons, and other defects in the said bill, the defendant prayed the judgment of the court, whether he should be compelled to make any further or other answer thereto, and prayed to be dismissed with costs.

On the 28th of May, 1723, this demurrer was argued, when the court were divided in opinion; the lord chief baron MONTAGUE, and Mr. Baron GILBERT, being for overruling it; and Mr. Baron PRICE, and Mr. Baron PAGE, for allowing it; whereupon, according to the course and practice of the court in such cases, the demurrer was ordered to be overruled, but without costs; and that the defendant put in his answer to the said bill.

From this order the defendant Taylor appealed, and on the behalf of the appellant it was insisted, that William Redman, under whose lease the respondent claimed,

A demurrer to a bill by the lessee of a lay impropriator, who was not rector, on the ground that it did not set forth how his lessor became entitled to the tithes demanded by the bill, whether by grant, prescription or otherwise, was overruled; and the order confirmed upon appeal to the House of Lords; for setting forth the title is but matter of form, and could have no influence on the merits of the cause, or prejudice the defendant in his right to the tithes, if he had such right, or to any discharge or exemption from the payment of them.

By the several statutes of dissolution, tithes in the hands of laymen are declared to be temporal inheritances, and lay fees; and they have also the like remedy in the temporal courts, and may sue for them in like manner, as for lands, tenements, and other hereditaments; and tithes have at this day all other incidents belonging to temporal inheritances.

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claimed, not being a rector, or one who was entitled to tithes of common right, the respondent ought to shew a title in Redman; that the appellant might have an opportunity of enquiring into, and satisfying himself concerning the title, and, if he found it good, that he might submit to pay tithes, without further trouble or expense: that the pretence of title in William Redman might be under a term of years which the respondent did not set forth, nor for what time that term was to continue, and for any thing which appeared by the bill, the term might be expired; that the bill stated Redman to be entitled in his own right, or in trust for his children; and that he demised to the respondent all his right, title, interest, claim, and demand, as trustee for his said children; whereas it did not appear, what the trust was, or what his estate was, which he had as trustee; neither did it appear, that Redman, or any under whom he claimed, ever received the tithes of the lands in question.

On the other side it was argued, that tithes in the hands of laymen, are now of a different nature, and come under another consideration from what they were at common law; for, by the several statutes of dissolution, they were made and declared, in the hands of laymen, as temporal inheritances and lay fees; and more particularly, it is enacted by the statute of 32 H. 8. c. 7. that lay persons shall have the like remedy for the recoveries of tithes in temporal courts, and are enabled to sue for them, in the like manner, as they may for lands, tenements, and other hereditaments; and tithes have at this day all other incidents belonging to temporal inheritances: that the obliging the respondent to set forth his lessor's title further than he had in general done, was binding him to a great difficulty, he being no ways privy to or consuant of his lessor's right, any otherwise than as appears from his covenant in the lease: that the respondent's not setting forth the title, as required by the demurrer, was only matter of form, and could have no influence on the merits of the cause, or prejudice the appellant in his right to the tithes, if he had such right, or to any discharge or exemption from the payment of them: that this judgment was agreeable to former resolutions in cases of the like nature; and in those where greater exactness and certainty was required, than in a bill of this kind; and therefore, it was hoped, that the appeal would be dismissed with costs.

Accordingly, after hearing counsel on this appeal, it was ordered and adjudged, that the same should be dismissed, and the order therein complained of, affirmed; and it was further ordered, that the appellant should pay to the respondent 30*l.* for his costs in respect of the said appeal.

H. 10 Geo. Scacc. *St. Eloy v. Prior.* [2 Wood, 217.]

Bedfordshire, 3d February, 1723.

A *modus* of one shilling in the pound for all pasture and sward ground disallowed, because there was no day mentioned for the payment.

THE plaintiff, as rector of the parish and parish church of Marston Mortaine, in the county of Bedford, stated by his bill, that in January, 1711, he was lawfully instituted and inducted into the said rectory and parish church, and had ever since performed the cure there, and was entitled to have and receive all manner of tithes, both great and small, arising therein; that the defendant, for four years past, had held and occupied a certain farm of meadow, pasture, and wood lands, garden grounds, and orchards, and had thereon hay and other titheable matters and things, the tithes of all which (corn and grain only excepted) were due and payable to the plaintiff; but that he had converted the same to his use, and pretended that no tithes were due. The bill therefore prayed a discovery of the quantities and values of his tithes, and an account and satisfaction for the same.

The defendant admitted, that for four years past he had occupied and enjoyed one close of pasture called the Horsecroft, and another called the Home Close; and set forth the quantities of hay, and the number and kinds of cattle depastured thereon, and all his other titheable matters; and insisted, that a *modus* of ten shillings a-year had been, time out of mind, paid to the rector of Marston Mortaine for and in lieu of all manner of tithes from the said close called the Horsecroft; that ever since he had occupied the same, he had duly paid

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paid the said *modus* of ten shillings a-year, not only to the former rectors, but also to the plaintiff, who had accepted the same in lieu of the tithes in kind thereof until the year 1718; that in November, 1718, he had paid to the plaintiff the said *modus*, which was due at Michaelmas next preceding, and which he had accepted in full satisfaction of all tithes for the said close to that time. He also insisted, that there was, and had been, time out of mind, a rate or *modus* of one shilling in the pound yearly paid to the rector for all the pasture and sward ground within the said parish, as the said pasture ground had been formerly valued and rated, which included all tithe-hay, calves, milk, pigs, and all small tithes whatsoever, arising upon the said pasture ground, in discharge of all tithes whatsoever arising from or out of the same (except the Horsecroft and such other particular parcels of ground then in the possession of R. Sawell in the answer mentioned, for which other *moduses* had, time out of mind, been paid). He also said, that he had not any other land in his occupation for the said years, save as aforesaid: and that he had offered to pay the plaintiff the said *modus* of ten shillings a-year due ever since Michaelmas, 1718; and also forty shillings a-year for the tithe of the Home Close, the same being rated at forty pounds *per annum*, and which had always been paid and accepted; and he now tendered the same by his answer.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon opening the pleadings, and hearing the plaintiff's counsel object against the validity of the two several *moduses* as laid in the answer, and on hearing the defendant's counsel, and on full debate of the matter,

The court declared, that the said two several *moduses*, as laid in the answer, were not good; and therefore this day ordered, that the defendant shall account with, satisfy, and pay to the plaintiff, for the value of the tithes of the several titheable matters and things which the defendant had upon or from the Horsecroft Close and the Home Close, within the said parish of Marston Mortaine, and the titheable places thereof, for and during the time demanded by the bill. (1)

R. EYRE,
Ro. PRICE,

F. PAGE,
JEFF. GILBERT.

(1) It is said, in a note to the case of *Goddard v. Keeble*, Bunn. 105. that the reason why these *moduses* were adjudged void was,

because there was no time mentioned when they were payable.

H. 10 Geo. Scacc. *Birch v. Stone*. [2 Wood, 219.]

Derbyshire, 19th February, 1723.

THE rector of Barton Blount, in the county of Derby, claimed all manner of tithes arising in the said parish.

The defendants said, that there was a meadow in the said parish, called the Parson's Meadow, and that the plaintiff and his predecessors had, time out of mind, enjoyed the said meadow, and also several beast grasses in the said parish, in lieu of the tithes within the said parish.

The court, upon mature deliberation had thereon, declared, that the *moduses* laid in the answer, by reason of their uncertainty, are not good; and thereupon ordered the defendants to account for their several titheable matters and things.

F. PAGE.

A custom that the person had enjoyed a meadow and several beast grasses in the parish in lieu of tithes, held to be void for the uncertainty.

E. 10 Geo. Scacc. *Cockcroft v. Utley*. [2 Wood, 220.]

Yorkshire, 4th May, 1724.

THE bill stated, that the plaintiff had, for thirty years past, been proprietor of all the tithes of corn, grain, hay, and grass yearly renewing within the vills of Warley, Midgeley, Wadsworth, Heptonstall, Erringden, otherwise

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Moduses of 1*d.* a fleece for every sheep kept the whole year, one half-

penny a fleece for every sheep wintered out; for every lamb fallen there, if but one, 1*d.*; two, 1*d.*; three, 1*d.*; four, 4*d.*; five, 1*s.*; six, 1*s.* 10*d.*; eight, 1*s.* 11*d.*; nine, 1*s.* 11*d.*; ten, 2*s.*; allowed.

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otherwise Agenden, and Stansfield, and of all tithes of wool and lambs on the south and north parts of the river Calder, within the vicarage of Halifax, in the county of York, and of all other tithes, oblations, obventions, fruits, profits, rights, jurisdictions, privileges, and hereditaments, thereto belonging; that all owners and occupiers of lands within the said vills ought yearly to pay their tithes, or some *modus* or composition in lieu thereof, to the said plaintiff; that the defendant, for twenty years past, had been proprietor or occupier of lands and tenements in the said vills, and had therein yearly sowed, and reaped, wheat, rye, barley, big, oats, beans, and peas; that he had also cut hay; that he had also depastured sheep and lambs thereon, and had clipped wool, and that he had refused to pay any tithes to the plaintiff for the said matters. The bill therefore prayed a full discovery of his titheable matters and things, and an account and satisfaction for the same.

The defendant said that he had, for ten years last past, farmed a small arable and pasture farm in Widdop, in the vill of Heptonstall; but that the arable part thereof was so soft and boggy that it could not be ploughed with cattle; that he might have dug and sown, one year with another, about two or three acres with oats, part of which was obliged to be harrowed in by the strength of men, on account of the infirmity of the land; that he had yearly mowed and made into hay about eight acres of land; that he had never held any other lands in any of the said vills or places; that he had yearly kept on the said farm, and on the moors and wastes in Heptonstall, where, by virtue of his farm, he had a right of pasturage, several sheep; and that no tithes in kind of corn, hay, wool, or lambs, had ever been taken or gathered in kind in any of the said vills or places; but that there had been immemorially a certain *modus* yearly paid by the owners or occupiers of lands there, particularly within the vill of Heptonstall where the defendant's lands laid, and by all those whose estate he had in the said farm, to the owners or farmers of the tithes, of one shilling and eight-pence, in lieu of all tithes in kind of hay and corn; that the said *modus* was due and payable on the second of February yearly; that he had constantly paid to the plaintiff the said sum, and therefore owed him nothing for the said tithes. He also insisted, that no tithes in kind were due, or had ever been demanded or taken for wool or lambs; but that immemorially a *modus* or composition had been paid for such tithes in the said place, particularly within Heptonstall, viz. one penny a fleece for every sheep that had been kept the whole year in that liberty; a halfpenny a fleece for every sheep that had been wintered out of the liberty; and for every lamb fallen there, if but one, a halfpenny; two, one penny; three, three halfpence; four, four-pence; five, one shilling; six, one shilling and ten-pence; seven, one shilling and ten-pence halfpenny; eight, one shilling and eleven-pence; nine, one shilling and eleven-pence halfpenny; ten, two shillings; and so on in proportion to the number. He also said, that he had never heard that any tithes were paid or had been demanded for any lambs fallen in a foreign parish from sheep which had been wintered there, and out of the several places and liberties aforesaid, until the plaintiff, within three years last past, made such demand; that in such case the parson or impropriator of the parish where the lambs fell demanded and took full tithes for such lambs; and that if any lambs happened to drop where the sheep were summered, the owners of the tithes of that place received the whole tithe of such lambs, though the sheep were wintered in another parish; that the said *modus* for wool and lambs was payable about Midsummer yearly; and he averred, that he had paid his tithes for wool and lambs within the said two years. He also said, that, the year before, he had lambs dropped at Broughton cum Elstock, for which he had paid the whole tithes to the farmer of the tithes there; that he had had several sheep the whole year at Heptonstall, from which he had lambs, and that he had offered to pay the plaintiff for the same according to the said custom; but that he had refused to receive the same, unless he would pay him for the lambs which had been dropped in Broughton equally with those which had fallen in Heptonstall. He also said, that he had tendered to him the whole tithe of one penny a fleece for the old ones which had been wintered at Broughton that year; but that the plaintiff had also refused.

to accept the same; and he denied that he owed for any of the said tithes, or any *modus* or composition for the same, save for the year 1721, which, he said, he had offered to pay as aforesaid, and which he was still ready and willing to pay; and that, during the time he had held his farm, he had no other tithes than aforesaid: and he set forth the quantities of the hay and oats he had in the said years.

The plaintiff replied; the defendant rejoined; and witnesses were examined on both sides; and upon reading an order dated the ninth of February, 1722; a grant from the crown of the eighth year of William the Third, in 1696; the depositions taken in the cause; and on full debate, and consideration thereon had,

It is ordered by the court, that the bill be dismissed, with costs to be taxed for the defendant.

R. EYRE,
Ro. PRICE,

F. PAGE,
JEFF. GILBERT.

E. 10 Geo. Scacc.

Finch, Cl. v. Maisters, et al. [Bunb. 161.] 2 Wood, 222. 2 Gw. 652.

BILL by the rector of Winwick, in the county of Lancaster, for tithe-grass, cut and made into hay; one defendant insists, that he and all those, &c. in an ancient messuage called Newhalls, and the demesne lands thereunto belonging, containing sixty-eight acres, two roods, and eighteen perches, in Ash-ton within the said parish, have immemorably paid a *modus* of a penny at Easter annually in lieu of the tithe-hay growing on the premises.

Another defendant insisted upon a *modus* of twenty-six shillings and eight-pence for hay, small tithes, and Easter offerings, for an ancient tenement called Brynn and Garswood, containing 625 acres.

It was objected for the plaintiff, that it appearing by the proof in the cause that this payment was for hay (as a small tithe) therefore hay made from grass being in its nature a great tithe, it must be intended that this hay penny was for something else, and the ancient import of the word hay or haw was an edge or some small inclosure belonging to a house; it was also objected to him and the other *modus*, that they were uncertain, could not be supposed to have a reasonable commencement, and, 3dly, were liable to fraud; for if all the land was turned into meadow, it would pay but one penny: but notwithstanding these objections, both these *moduses* were allowed *per curiam*.

all the land were turned into meadow it would pay no more.

Moduses of 1d. in lieu of the tithe-hay growing on sixty-eight acres, two roods, thirteen perches, allowed; and of 26s. 8d. for hay, small tithes and Easter offerings on 625 acres; although it was objected that they were uncertain; could not be supposed to have a reasonable commencement, and were liable to fraud; for if

Tr. 10 Geo. Scacc.

Gumley v. Burt. [Bunb. 169.] 2 Wood, 231. 2 Gw. 656.

BILL by the plaintiff as lessee of the vicar of Thistleworth, for tithe of peas and beans set and sowed in rows, drilled, hoed, and hand-weeded in a garden-like manner, against the lessee of the impropriator (the dean and chapter of Windsor) as being a small tithe: the defendant insists, that a great part of the parish is converted into this method of cultivation, and that this tithe was never paid to the vicar, but always to the impropriator. Two cases were quoted by Mr. Amyrant for the plaintiff; first, *Stephens v. Martin*, (1) 11l. 7 W. 3. which was affirmed upon an appeal to the House of Lords; second, *Nicholas v. Elliott*: to which it was answered by Serjeant Stevens and Mr. Ward for the defendant as to the first, that it did not appear (in that case) the impropriator contested it, nor what the endowment was; and as to the second, there was a proof of usage by the vicar for forty or fifty years receiving tithe peas and beans, where plough and spade were used; but where the plough only was used, the impropriator received them. And *per curiam*, there being no endowment produced, nor usage proved in the present case, the bill was dismissed as to the demand of peas and beans.

Tithes of peas and beans shall be paid to the impropriator, if the vicar do not shew an endowment or usage to the contrary.

Tr. 10 Geo. Scacc.

Phillips v. Symes, et al' et cōtrā. [Bunb. 171.] 2 Wo. 228.
2 Gw. 654.

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Tithe is due of furze, and of underwood, although cattle were depastured where it grew.

Moduses of a garden penny for the produce of the garden; and of 8d. for every cow, and 4d. for every heifer, in lieu of the tithe of milk and calves of such cow and heifer, were allowed.

A *modus* of 3s. 4d. for every score of sheep shorn out of the parish; and so in proportion according to number and time, for the wool and lamb of such sheep was held good by the court upon the hearing; but the point coming on again on a re-hearing, and it appearing that the payment was alleged to be at Easter, or otherwise when the sheep shall be sold, it was held to be void for the uncertainty.

Where the day of payment of a *modus* is omitted in the answer, the defect may be supplied by a cross-bill.

TILL by the rector of Stoke Abbotts, in the County of Dorset (among other things), for the tithe of furze, coppice and underwood, milk, calves, wool, and fruit, &c. of gardens.

The defendants insist, first, that no tithe of furze ought to be, or ever was paid, unless it was sold; 2dly. Nor any tithe of coppice or underwood, if cattle were depastured where the wood grew; 3dly. They insist upon a garden penny for the produce of the garden; 4thly, Upon a *modus* of eight-pence for every cow, and four-pence for every heifer, in lieu of the tithe of milk and calves of such cow and heifer; 5thly, That three shillings and four-pence was payable for every score of sheep shorn out of the parish, and so proportionably for a less number than twenty, or for a less time than a year, for the wool and lamb of such sheep.

Nota, The defendants omitted in their answer to specify the day whereupon the said respective *moduses* were payable; and therefore, to supply that defect, they exhibited their cross-bill to establish these *moduses*, and alleged the same to be payable at Easter; and also to compel the rector to keep a bull, which, by custom, he ought to do for the use of the parishioners, and so was admitted by the defendant to the cross-bill.

Upon hearing both these causes together it was decreed *per curiam*, first, That the defendants ought to account for furze, and coppice and underwood; for the defence, as to these, amounts in effect only to a *non decimando*. 2dly, That although the plaintiff in the original cause had a right to a decree for tithe in kind, because the defendants had omitted the day on which the *moduses* were payable, yet now that defect was supplied by their cross-bill, both causes being now but as one; and it would introduce great inconsistency in the decree if the *moduses* should, for that reason, be adjudged void in the original cause, and established in the cross-cause, provided they are good in other respects. 3dly, The garden penny was allowed. 4thly, The eight-pence for a cow, and four-pence for an heifer, were adjudged good; though it was objected that it was not good for the milk and calf, for then it would be payable although there was no calf; to which it was answered, that then the four-pence and eight-pence would be payable, for it was payable for all the tithe a cow, &c. produces, which is only milk and calf. 5thly, To the three shillings and four-pence for every score of sheep shorn out of the parish, and so proportionably for a less number than twenty, or for a less time than a year, for the wool and lamb of such sheep; it was objected, first, That this is too rank; 2dly, It is payable for wool and lamb, though the lambs might be fallen before the sheep were removed, and the tithe of lamb would be payable before; 3dly, There is great uncertainty because of the fractions which might arise, when a small number was only removed; 4thly, It is liable to fraud, for the parishioner might remove them out of the parish for a little way only, just before shearing time, and then bring them back again. To these objections it was answered *per curiam*, We cannot take notice of this, nor enter into the consideration thereof (*sed quare de cest reason*); 2dly, It is payable at Easter, and is a satisfaction for all the wool and lamb before that time; 3dly, The same objection might be made to arise from the fraction, where only a small quantity of wool was, and tithe in kind paid; 4thly, If fraud appeared, as it would be taken to be under the circumstances put in the objection, then the parishioner should pay tithe in kind, as well as if they had continued in the parish to which the *modus* does not extend; so the defendants were decreed to account in the original cause for tithe of the furze and wood; but the bill was dismissed as to the rest, and the other *moduses* were established on the cross-cause, and the defendant decreed to keep a bull pursuant to the custom.

But afterwards, Feb. 3, 1725, this cause came on to be reheard, and principally as to the *modus* of three shillings and four-pence for every score of sheep shorn out of the parish, &c.; and upon inspection of the cross-bill, the

payment

payment was alleged to be at Easter, or otherwise when the sheep shall be sold, which being uncertain, *per totam curiam*, this *modus* was adjudged void. Vide 1 Ro. Rep. 38, 39. 2 Leon. 70. Moore, 913. Hob. 107.

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Tr. 10 Geo. Scacc.

Lawrence v. Jones. [Bunb. 173.] 2 Gw. 662.

BILL by the vicar of Brockworth, in the county of Gloucester, for tithes. It was decreed *per totam curiam*, that Easter offerings were due of common right at two-pence per head, unless it had been customary to pay more; that the vicar ought to have a decree accordingly, though there was no proof of Easter offerings ever having been paid (there being a lay impropriator (1), who is not entitled to offerings, but he only who exercises the spiritual function). And it was said by Baron GILBERT, that offerings were a compensation for personal tithes.

Easter offerings are due of common right, at 2d a head. *Quære*, whether they are due to a lay impropriator.

Offerings were said to be a compensation for personal tithes.

(1) The Reporter himself puts a *quære* upon this.

Tr. 10 Geo. Scacc.

Harrison v. Sharp and Hurst. [Bunb. 174.] 2 Wood, 224.

BILL by the plaintiff, as vicar of Grantham, in the county of Lincoln, who therein demanded tithes of lands in the vill of Harrowby; the defendants insisted on this *modus*, viz. That when any of the inclosed pastures in Harrowby were ploughed, and sown with corn or grain of any kind, or laid for meadow, and mown and made into hay, tithes in kind were paid to the rector; but when eaten and depastured with sheep or cattle, then the occupier paid to the vicar one shilling in the pound of the yearly rent or value thereof, and no more, upon some day after Michaelmas, yearly, in lieu and satisfaction of all tithes whatsoever: *per opinionem totius curiæ* this *modus* was adjudged void upon the authority of the case of *Startupp* and *Dodderidge* (1), and therefore gave no opinion upon the uncertainty of the day.

A *modus* of 1s. in the pound of the yearly rent of the land, in lieu of agistment tithe, is void.

(1) *Ant2*, p. 566.

M. 11 Geo. Scacc.

Smithson and others v. Dodson. [9 Mod. 117.] 2 Eq. Ca. Abr. 733.

THIS was a bill brought by the parishioners of Gargrave, in Yorkshire, against the defendant, their vicar, to produce an ancient terrier in his custody, which shews the method of payment of tithes in that parish, which they suggest to be a *modus*, viz. for hay the vicar is to have the tenth grasscock, and three half-pence for every milch cow, and a penny for every swarm of bees, and six-pence for every orchard.

Tithe of hay is to be paid in grass cocks.

Moduses of 1½d. for every milch cow, of 1d. for a swarm of bees, and 6d. for every orchard

The bill prayed, that the court would direct an issue or trial at law to settle this *modus*; and sets forth, that the predecessor of the defendant did, about thirty years since, alter the payment of this *modus*, and combined at that time with his clerk to raise the fees for burials, &c. which fees had been paid ever since.

The defendant admits there was a *modus* some years since for payment of tithes in this parish, and that he has a terrier in his custody of all the tithes payable to the vicar, and that he had been very much harassed at law, when he was willing to take the tithes according to the terrier in his custody, so as he might have them peaceably; and as to the fees for burials, marriages, christenings, and churching of women, he insists, that the same should be paid as usual; for that they were not proper for a *modus*, because there is no canon to ascertain what shall be paid, if the sums now paid should be discharged; but it is not in other cases; for if a *modus* should be destroyed, then tithes in kind must be paid; therefore, as to that matter, the bill is improper, and ought

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to be dismissed, since the court has nothing before them to ascertain the measure of such fees; and the defendant is in no fault, but by continuing the payment of the fees as he found them paid before he was vicar.

The court held, that the tithe-hay must and ought to be paid in grass cocks; and as to the tithes of cows, bees, and orchards, the parties did not differ in the manner of payment, but only in the surplice-fees for burials, &c.

Therefore it was ordered, that they should attend a master to settle how far they differ in that matter, and the consideration of costs should be reserved until the master makes his report.

But as to that part of the plaintiff's demands which the defendant did not controvert, nor insist on any thing to the contrary, the parishioners were ordered to pay costs.

M. 11 Geo. Canc.

Webber v. Taylor. [Sel. Cas. in Ch. 52.] 2 Gw. 656.

A *modus* to pay a sum of money; but if in another person's hands, money or tithe in kind is bad, because desultory.

BILL was brought to establish a *modus*, which was laid thus, for payment of such a sum of money; but, if in the hands of any person, to pay tithe in kind, or the money, at the election of the parson.

Lord Chancellor. I will never establish a *modus* against the parson without a trial at law, if he desire it; but this *modus* is clearly ill; for a *modus* cannot be desultory.

A *modus* is not to be established against the parson without trial, if he desire it.

M. 11 Geo. Scacc.

Woodnoth v. Lord Cobham and Gibbs his Tenant. [Bunb. 180.]
2 Wood, 226. 2 Gw. 653.

Entries in account books by a steward of defendant's ancestor, of payments of a *modus* to the vicar in lieu of tithe of certain lands admitted as evidence.

The court seemed to be of opinion that payment of a *modus* to the vicar is good evidence against exemption against the parson.

ALAY impropriator prefers his bill for great tithe of the parish of Thornbrough, in the county of Buckingham; the defendant insisted that there was a payment of sixteen shillings and four-pence to the vicar, in lieu of the tithes of the chantry pastures (which were in demand) and to prove this, produced accounts of one Edward Chaplin, who was steward to the defendant's father, wherein there were entries of this payment. But it was objected for the plaintiff, that though a parson's or a vicar's book (where it appeared that payments were made) were evidence, yet never admitted in the case of him who has the fee: but *per curiam* (dissentiente Baron PRICE), even old rent rolls (where it appears payments have been made, &c.) are good evidence; and they ordered these entries to be read. But *nota*, by Baron GILBERT they ought to be read, because no better evidence can be had; but if Edward Chaplin had been alive, they ought not.

N.B. In this case it seemed to be the opinion of the court, that the payment of a *modus* to the vicar is good evidence of an exemption against the parson.

M. 11 Geo. Scacc. *Spendler et al v. Potter.* [Bunb. 181.]

In a bill to establish a custom which binds the inheritance, the owner of the inheritance must be a party.

BILL to establish a custom, whereby the owners and occupiers of certain lands in the parish of Tort Baldwin, in the county of Oxford, were obliged to keep a bull and boar for the use of the parishioners. It was objected at the hearing, that a custom which binds the inheritance of the lands can never be established in a court of equity, without the owners of the inheritance are made parties, as Queen's College (who were owners, &c.) ought to have been here; upon which objection the bill was dismissed *per totam curiam*.

Nota, Also it was objected, that as to the occupier, an action on the case would be proper.

M. 11 Geo. Scacc.

Chapman v. Barlow. [Bunb. 183.] 2 Gw. 657.

1724.

BILL by the rector of Radnage, in the county of Buckingham, for the tithe of head-lands, of a mill, and cherries.

The defendant insists the head-lands were only large enough to turn the plough upon, and as to this, the bill was dismissed.

As to the mill, no tithes thereof having ever been paid, and being an ancient mill, it was adjourned to consider whether the tithe of a water corn mill was a predial or a personal tithe.

As to the black cherries, the defendant insisted they grew wild in hedges and waste places, and served for fencing his grounds; but the defendant was decreed to pay the tithe of these cherries.

No tithes are due for head-lands.

Tithes are due of wild cherries.

H. 11 Geo. Scacc.

Boughton v. Wright. [Bunb. 186.] 2 Gw. 658.

1725.

BILL by the rector of Barrow, in the county of Suffolk, for the tithes of corn, &c. The defendant insisted, that he set out the tenth sheaf of wheat and rye, and the tenth shock of barley, according to the custom of the parish. The custom he would have proved was, that the defendant's cart was brought into the field, and he threw nine sheaves into the cart, and left the tenth for the plaintiff.

The question was, whether this customary method of tithing the corn was good; for it was insisted upon, on behalf of the plaintiff, that nine sheaves ought to be set out on the ground, and the tenth left out, and marked with a green bough for the plaintiff; and that they ought not to bring the cart into the field, and throw the nine sheaves into the cart before the whole ten are set out; for the plaintiff ought to be able to view and judge whether he has a fair and just tenth part.

And the court would not let the defendant in to prove the particular custom upon this general allegation; so he was decreed to account, for they thought the whole ten ought first to be set out before the nine are thrown into the cart.

Where a general customary manner of tithing in a parish is alleged, the defendant cannot be let in to prove a particular manner. A custom to throw nine sheaves into a cart, and to leave the tenth for the parson, was thought by the court to be bad, and that the whole ten ought first to be set out before

the nine are thrown into the cart.

H. 11 Geo. Scacc.

Downes v. Mooreman, et c. contrd. [Bunb. 189.] 2 Wood, 258.

2 Gw. 658.

BILL by the rector of Bonchurch in the Isle of Wight in the county of Southampton, for the great and small tithe of a farm, called Luccomb farm, in the defendant's possession.

The defendant insists that Lovecomb alias Luccomb farm formerly belonged to the abbey of Quarrer; that the abbot of Quarrer was seised in fee of the manor and farm of, &c. and all the tithes renewing thereon, as of a portion of tithes in gross; that this abbey, by surrender, and by the stat. 27 Hen. 8. came to the crown; that after King Henry's demise the same descended to King Edward the Sixth, who in the seventh year of his reign, by his letters-patent granted *manerium de Lovecomb ac Grangiam, &c. ac omnes et omnimodas decimas, &c. in dicto manerio de Lovecomb, &c. parcel' reversionum dictæ abbatiæ de Quarrer dudum existen'*, to Cotton and others, and so derives the title down to Knight, to whom the defendant was lessee for twenty-one years. And in

Where a defendant claimed the tithes of a manor and certain lands as a portion of tithes in gross, and the proof was of a grant of all and all manner of tithes, without any mention of a portion (which is a thing distinct from tithes in a general acceptance), the

bill was dismissed, and the party had a decree on his cross-bill to enjoy his tithes according to his grants. A copy of an agreement between the abbot of Quarrer and the monks of Lyra, from the Bodleian library, was read in evidence, upon the production of the Statutes of Oxford, that no book, &c. should go out of that library, although neither a record nor a public thing.

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his answer he set forth the clause in the statute 27 Hen. 8. That all persons, &c. who should have any letters-patent, any lands, &c. tithes, &c. belonging to any monastery, dissolved by that statute, should hold the same, in like form, manner, and condition, as the abbots, &c. held the same, and might have held the same, if the said abbots had not been suppressed. This cause was heard February 11, 1724, and the defendant carried his proof down from the year 1289, in a regular method, to the hands of the defendant's lessor, the Knights. But *nota*, all the written evidence produced mentioned the tithe only, "*omnes vel omnimodas decimas, &c.*" but in none of the instruments was mention made of a portion of tithes, upon which the plaintiff founded his objection, that no title appeared in the defendant; *portio decimarum* being a thing distinct from tithes in the general acceptance.(1)

But the proof being so clear, *per totam curiam*, the plaintiff's bill was dismissed, and the party had a decree on his cross-bill to enjoy his tithes pursuant to his grants, &c.

Nota, A copy of an agreement between the abbot of Quarrer and the monks of Lyra was produced in evidence; to which it was objected for the plaintiff, that by the rules of evidence it could not be read, being neither a record nor a public thing. But the defendant produced a copy of the statute of Oxon, that no book, &c. should go out of the Bodleian library; and the court gave leave to read this copy of agreement in evidence, though they admitted it not to be within the general rules of evidence, but upon the very particular circumstances of this case.

(1) *Nota*, There were never any tithes in kind paid.

H. 11 Geo. Scacc.

Jones v. Barrett. [Bunb. 192. 2 Wood, 235.] 2 Gw. 657.

Quere, Whether in a bill against a sequestrator during the vacancy of a church, the bishop ought not to be a party.

BILL by the vicar of West Dean, in the county of Sussex, against the defendant, who was sequestrator, for an account of the profits received during the vacation. It was objected for the defendant that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives by the statute 28 Hen. 8. The court seemed to think the bishop should have been a party; but by consent this cause was referred to the bishop of the diocese. *Nota*, It was said a sequestrator could not bring a bill alone for tithes.—[*Bunbury*.]

THE plaintiff, as vicar of West Dean cum Binderton, and the hamlet of Chilgrove, in the county of Sussex, filed his bill, stating, that about the seven-teenth of January, 1714, the vicarage was void of an incumbent; that it so continued until his induction; that the defendant had obtained from the Bishop of Chichester a sequestration about the first of September, 1714, whereby he entered upon and took possession of the said vicarage, and received the profits thereof, from the seventeenth of January, 1714, to Michaelmas, 1719; that the said profits amounted to the yearly sum of sixty pounds or upwards; that the plaintiff about the twenty-fifth of November, 1719, was duly presented and legally inducted into the said vicarage, and thereby became not only intitled to the growing tithes and profits, but also to those which had been received by the defendant; that he had offered to make the defendant any reasonable allowance for serving the cure, and as sequestrator; but that he had rejected his offer, and refused to come to any account. The bill therefore prayed, that the defendant might be decreed to account, and to pay him the balance thereof, with legal interest on the same.

The defendant said, that the vicarage was on the seventeenth of January, 1714, and so had been for many years before, void of an incumbent; that C. Richardson, clerk, had held the same by sequestration for forty years or more; that after the death of the said C. Richardson, he had a sequestration from the bishop of the diocese, dated the twenty-ninth of January, 1714; and that by virtue of such sequestration he had entered upon the said vicarage, and taken

possession, and received the profits thereof, from the twenty-ninth of January, 1714, to Michaelmas, 1719; that it had been a generally received opinion amongst clergymen, that clergymen holding by sequestration small vicarages, which had been held by sequestration many years before, were to have the profits for taking care of the cure; that he not knowing of any law to the contrary, or any instance where such clergyman sequestrator had been called to account for the profits by the next incumbent, had kept no account of the profits of the present vicarage, nor was any demanded by the plaintiff till three years after his induction, but that if he was to account, he hoped he should have a proper allowance, and be also repaid for what he had laid out in repairs, &c.

The plaintiff replied, the defendant rejoined, and witnesses were examined on both sides; and upon reading the proofs in the cause,

It was ordered by the court, that this cause be adjourned over; and that, in the mean time, it be referred to the right reverend Edward, Lord Bishop of Chichester, to consider of the matter, and to make such final determination therein as his lordship shall think just and reasonable; and that all parties concerned shall abide by such determination, they having consented thereto in court; and that such final determination, as the aforesaid lord bishop shall make in the premises, shall hereafter, by consent of all parties, be made the decree of this court.

THE COURT FULL.—[*Decree Book.*]

H. 11 Geo. Scacc.

Bibye v. Hurley. [Bunb. 192.] 2 Wood, 237. 2 Gw. 657.

IN a bill for tithes of wood by the rector of Whipmeed, in the county of Bedford; the question was, whether beech was esteemed timber in this country? which went to an issue to try. Vide the cases cited, Plov. Com. 470. 2 Inst. Com. *sur le stat.* 45 Edw. 3. Stat. 35 Hen. 8. Cro. Jac. 100. Moor, 908. 2 Cro. 199. 1 Roll. Abr. 640, p. 5. 1 Inst. 53.—[*Bunbury.*]

No tithes are due of oak, ash, and beech above twenty years growth, or beech wood proceeding from stools originally maiden trees above that age.

It is ordered by the court, that the defendant do come to an account with the plaintiff for the value of the tithes of wood, for the time in the bill (except for oak, ash, and maiden trees of beech above twenty years growth,) and beech wood (1) proceeding from stools originally maiden trees above twenty years growth; that as to the tithes of asp trees, or any other matter, if any difficulty shall appear, the same shall be reported specially; and that the deputy-remembrancer do take the account, and that the costs be reserved.

THE COURT FULL.

(1) It is said that the question in this case was, Whether beech is esteemed timber in the county of Bedford? and that an issue was directed to try the same, S. C. Bunbury, 192. But it appears upon inspection of the Exche-

quer Chamber book, that the words "referred to a trial at law whether" are struck out; and therefore, it seems that no issue was ultimately directed.—[*Wood.*]

H. 11 Geo. Scacc.

The Case of *Fisher & al.*, Lessees of the Dean and Chapter of Christchurch, in Oxford. [Bunb. 209.]

THIS case stood for the judgment of the court this day, when it was expected that the long controverted question, whether a constant non-payment of tithes is evidence of an exemption against a lay impropriator, would have been decided; but the court gave judgment on the words of the patents mentioned in the cause, though they determined that the dean and chapter was a spiritual and not a lay body.

Whether a constant non-payment of tithes is evidence of an exemption against a lay impropriator.

A dean and chapter is a spiritual and not a lay body.

H. 11 Geo. Scacc.

Mills v. Etheridge. [Bunb. 210.] 2 Gw. 660.

1725.

A plea of non-residence to a bill for tithes by the lessee of a rectory allowed. According to the practice of the court a plaintiff is of common right intitled to a discovery of quantities and values, whatever exemption or discharge a defendant may have.

BILL by the lessee of Matthew Hawes, clerk, (setting forth his lease, dated February 4, 1723,) for the tithes, &c. for 1724 and 1725, in the parish of Simpson, in the county of Buckingham.

The defendant as to the discovery of the quantity of lands he held, and what tithes he had in those years, and also as to the account, pleads, that it appears by the plaintiff's bill that his lease was dated Feb. 4th, 1723; then pleads the st. 13 El. c. 20. touching leases of benefices, and other ecclesiastical livings with cure, and avers, that Matthew Hawes, clerk, the lessor, was absent from his benefice eighty days and more in one year since the lease, and before filing of the bill, viz. in 1724; that the church of Simpson is not inappropriate, and that it is a benefice or ecclesiastical promotion with cure, and therefore by such non-residence, and by virtue of the said act, the lease was absolutely void.

Now upon arguing this plea (which was drawn by myself) Baron PRICE was for over-ruling the plea, because it covered the discovery, which, according to the usage of the court, a plaintiff was intitled to, whatever exemption or discharge a defendant might have. And at the time of drawing the plea I was of that opinion, and so informed my client; but the Lord Chief Baron PAGE and HALE were of opinion that the plea was good, extending even to discovery, because it amounted to an absolute incapacity in the plaintiff, which differed from the cases where the plaintiff was intitled of common right; and there is no necessity to aver that the absence was voluntary, for if it was otherwise, it lay upon the plaintiff to shew it, or to aver that the absence was eighty days together; so the plea was allowed. (1)

(1) *Nota*, The same plea came on *inter Quilter et Lowndes and Quilter et Massenden*, May 30, 1726, and then was allowed *per totam curiam*, Baron PRICE being now of the same opinion in *omnibus*. And in the case of *Bokenham v. Bentfield*, November 15, 1726; but *notas*, no counsel appeared for the plaintiff, and so upon the authority of these cases the plea was allowed.

December 16, 1726, plea to a bill for tithes

from Michaelmas, 1723, to Michaelmas, 1726, that the rector was absent eighty days, viz. in 1724, which might be after the time wherein the tithes were demanded in the bill; and for this reason it was over-ruled.

Quære, If this be a good plea, if rector and lessee join, for by non-residence before sentence he only forfeits his lease and rent, not his tithes. *Atkinson and Prodgers v. Peasley.* [Editor Bunbury.]

H. 11 Geo. Scacc.

Geale, Clerk, v. Wyntour. [Bunb. 211.] 4 Gw. 1584.

Where tithes in kind had been decreed by the court of exchequer, after a verdict upon an issue to try certain *modus*; but upon another issue afterwards upon a bill preferred in the court of chancery, these *modus* were established by a decree founded upon a verdict, a plea of such a decree was allowed to a subsequent bill in the court of exchequer for tithes in kind.

BILL for tithes as vicar of Bishop's Lyddiat in the county of Somerset, sets forth a former bill in this court in 1717, and a decree in 1718, for these tithes, after issue (to try *modus*, and verdict for the plaintiff.)

The defendant pleads, that in Trinity term, 1721, he preferred his bill in the court of Chancery to establish the *modus*, &c.; that issues were directed, and found for the *modus*, and decreed thereupon to be established, and pleads the same verdict and decree in bar of the plaintiff's now demand; and the plea was allowed *per totam curiam*.

H. 11 Geo. Scacc. *Gould v. Pearce.* [2 Wood, 232.]

Devonshire, 23d February, 1725.

Moduses of 2d. for every hog-head of cider or perry in lieu of all tithes in kind

of the apples and pears of which they are made: 4d. for every milch cow, in lieu of milk and calf or calves of such cow; 2d. for every barren cow, in lieu of milk and pasture; 1d. for every colt weaned foaled in the parish; 2d. for every hive of bees, in lieu of tithes of honey and wax; a hearth penny, in lieu of tithes of wood, allowed and decreed. Customs, to deliver the tenth fleece of all wool shorn from sheep in the parish, at or in the chancel or parish church, in lieu of tithe-wool; and to deliver and leave bound in the churchyard the tenth lamb, in lieu of the tithes of lambs, first giving notice at the house of the vicar, established.

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vicar in lieu of tithes in kind ; First, two-pence for every hogshead of cider or perry, made of any apples or pears growing or renewing in any orchard or garden within the said parish and titheable places thereof, for and in lieu of all tithes in kind of such apples or pears made into cider or perry, and no more, the said *modus* to be paid at Easter, or at any time after pounding the apples and pears before Easter, upon reasonable request made by the vicar of the said parish. Secondly, four-pence yearly for every milch cow having a calf within the said parish and titheable places thereof, for and in lieu and satisfaction of the milk or whitesole, and for the calf or calves of such cow, and no more. Thirdly, two-pence yearly for every fewer or barren cow, having no calf, for and in lieu and satisfaction of all tithes of the milk or whitesole, and of the pasture of such cow, and no more. Fourthly, one penny for every colt weaned within the said parish and titheable places thereof, and no more, in lieu and satisfaction of all tithes of and for colts foaled and fallen there. Fifthly, two-pence for every hive or butt of bees burnt or broke up within the said parish and titheable places thereof, for and in lieu and satisfaction of and for all tithes of the honey and wax thence coming and arising, and no more. Sixthly, that the said several *moduses* are to be paid yearly at the feast of Easter. Seventhly, that the said occupiers of land are to bring, deliver, and leave at or in the chancel or parish church of Staverton aforesaid, for the use of the vicar for the time being, at Midsummer, or on the Sunday or holiday next following, first giving notice thereof at the house of the said vicar, the tenth fleece of all wool shorn from sheep kept and depastured within the said parish and titheable places thereof, yearly before Midsummer, in lieu of the tithe of such wool. Eighthly, that they are to bring, pay, deliver, and leave bound in the churchyard of the said parish church of Staverton, over against the church porch there, on St. Mark's day, or on the Sunday or holiday then next following, for the use of the vicar for the time being, the tenth lamb yearly in kind, first giving notice thereof at the house of the said vicar, in lieu of the tithes of lambs. Ninthly, that they are to pay the vicar, for the time being yearly, at Easter one penny, commonly called the hearth-penny, in lieu and satisfaction of the tithes of all wood and fuel cut on their lands, and spent and burnt in their houses in the said parish. The bill further stated, that the defendant had been vicar of the said parish for above fifty years, and at the time of his institution knew that the said *moduses* and customary payments were just and lawful, and as such, of right, had been, time out of mind, payable and paid ; that John Horsham, a former vicar, in the year 1631, had attempted to defeat the said *moduses*, which occasioned a suit in chancery for the examination of witnesses, in *perpetuum rei memoriam*, to establish the same ; that the defendant knew the same, and made compositions with the owners and occupiers of the lands within the said parish, for certain sums of money, to be paid in lieu of all tithes and duties payable to the vicar, due regard being had in the making such compositions to the said several *moduses* and customary payments, though without making mention of the said particular *moduses* and customary payments, or any of them ; that the occupiers of lands within the said parish, who were parties to the first compositions so made above fifty years since, and those who had held the same lands, and the plaintiffs, had all along retained their tithes under the payment of the yearly sums compounded for and agreed to be paid to the defendant by such original compositions, in lieu of such *moduses*, until Michaelmas, 1720 ; that on the twenty-fifth of March following, the plaintiffs gave notice, that they would pay such of their tithes in kind, as ought to be paid in kind, and such customary payments in lieu of tithes, as had been used and accustomed to be paid as aforesaid ; and that on Lady-day, 1722, the said defendant sent several receipts for the same, signed by him, and attested by two witnesses, as stated in the bill. The bill therefore prayed, that the defendant might answer the premises, and that the several *moduses* and customary payments as aforesaid, and all others as should appear to be due within the said parish might be established.

The defendant said, that he did not know that there had been time out of mind, or that there then were any *moduses* or perpetual customary payments payable

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payable of right by the occupiers of lands within the said parish in lieu of tithes, particularly the pretended *modus* or customs stated in the bill; or that there was any *modus* established in the said parish. He denied, that at his institution he was satisfied, that the several *modus* by the bill pretended were just, lawful, or payable time out of mind. He said, that he had made compositions with the plaintiff's ancestors, and those whose estates the plaintiffs had in the said parish, and all other the occupiers of lands therein, whereby he had agreed, that they should retain the tithes and duties payable to the vicar, for certain yearly sums, to be paid in lieu thereof; but denied, that any regard was had in the making such compositions to any of the pretended *modus* or customs as stated in the bill. He said that he believed, that from March, 1721, the plaintiffs might give him notice that they would pay their tithes in kind, but not that they would pay any customary payments in lieu thereof; that from that time they had paid tithes in kind of several things, but had refused to pay tithes in kind of others, under pretence of the said *modus* or customary payments.

The plaintiffs replied; the defendant rejoined; and divers witnesses were examined on both sides; and upon reading the proofs taken in the cause; several receipts given by the defendant to the plaintiffs; three books, one beginning in 1630, and the other two intitled on the frontispiece thereof "*Liber Compositionis*, A.D. 1658;" also instruments beginning 1640, being the books of the former vicars, containing several entries of several *modus* and customary payments in lieu of tithes above-mentioned; an exemplification under the seal of the court of Chancery, dated the third of December, the eighth year of Charles the First; the bill, answer, replication, and depositions in the cause of *Rowe v. Horseman*, clerk; and on hearing what could be alleged by counsel on both sides, and on full debate,

It is ordered by the court, that the several and respective *modus* and customary payments in the bill mentioned, shall be, and are hereby absolutely established, ratified, and confirmed, with the plaintiff's costs to be taxed by the deputy-remembrancer, to whom it is hereby referred to tax the same.

R. EYRE, F. PAGE.
RO. PRICE,

H. 11 Geo. Scacc. *Reynall v. Wills, et à contrà*. [2 Wood, 244.]
Devonshire, 8th February, 1725.

The tithes of one-third of a parish, due to the vicar and two-thirds to the rector, such third varying each year in succession.

Moduses of 2d. for a hogshead of cider, and so in proportion; 2d. for every hoard of apples; 2d. for every milch heifer depastured in the parish; 8d. for every calf;

2d. for every cow or heifer which misses calf; a garden-penny for all garden-stuff spent in the family; a hearth-penny in lieu of tithes of all wood, furze, and broom used in the house; 1d. for every colt fallen; 2d. in lieu of all tithes of bees, honey, and wax; 1d. in lieu of all tithes of eggs of all poultry (except geese tithable in kind by their young). Upon an issue, there was found to be no custom to exempt aftermath from tithe upon consideration of paying tithe of the first math, put into cocks.

THE impropiator of the rectory and parish church of Broadclyst, in the county of Devon, claimed all great and small tithes in the said parish, or the titheable places thereof, and all oblations and obventions which had ever been reputed parcel of or enjoyed within the said rectory; and prayed, that the defendants might answer and discover their titheable matters, and what *modus* or compositions they set up and claimed, and give an account of their tithes, and a satisfaction for the same.

The defendants Moor, Harris, Wills, and R. Wish, said, that the plaintiff and his ancestors had a long time been lawful impropiators of the said rectory and parish church, and were well entitled to the profits and appurtenances belonging thereto; to the advowson of the said vicarage; and to all the great and small tithes of two third parts of the parish; that the vicar was entitled to the other third part; that the defendant Long, as vicar, had above twenty years received the same, or some customary payment in lieu thereof; that the parish was divided into three parts, called the north, the east, and the town quarters; that the tithes of one of the said quarters were alternately enjoyed by the vicar, and the other two by the plaintiff every year. They further said, that they had

had yearly divers crops of wheat, barley, and other titheable matters, and had carried away the same without setting out the tithes thereof, during the years demanded in the bill, because they had compounded for the same; and they averred, that they had paid their compositions to Lady day last. They also insisted, that there was, and had been immemorially in the said parish, accepted and taken, amongst other *modus decimandi*, or customary payments in lieu of the tithes, two-pence a hogshead for cider, and so proportionably; two-pence for every hoard of apples; two-pence for every milch heifer depastured in the parish; eight-pence for every calf; and two-pence for every ill heifer, or winter milch cow or heifer, or one that misses calf, depastured there: a garden penny, for all garden stuff spent in their family; and a hearth-penny, in lieu of tithes of all wood, furze, and broom used in their houses; two-pence each of every inhabitant for himself, wife, and every unmarried child above sixteen, in lieu of Easter offerings; one penny for every colt fallen; two-pence, in lieu of all tithes of bees, honey, and wax; and one penny in lieu of all tithes of eggs of all poultry (except geese, which were titheable in kind by their young) all payable at Easter. And they averred, that all the said *modus* had been immemorially paid to the impropiator and vicar, their lessees, and tenants, and by them accepted and received, except when the landholders had been under composition. They denied, that they knew that either the said *modus* of two-pence a hogshead for cider, or that of two-pence for every hoard of apples, had been uncertain or varied. They admitted, that the tithes of all cabbages and turnips sold in markets and elsewhere, ought to be paid in kind, or some recompense made for the same; and that they were not included in the garden penny. They further insisted, that it had been immemorially customary for those who had grounds in the parish, to mow and cut the grass every year at proper seasons, and the first math to ted and throw abroad into winrows, and to gather it up into cocks of equal bigness and quality, and to set out and divide every tenth cock for the tithe thereof; and that the plaintiff and his ancestors, as impropiators, and their lessees and tenants, and all the vicars had accepted of the same, except when the tithes were compounded for; and that no other tithe for grass, hay, aftermath, or pasture, had been demanded, paid, or insisted on, either by the impropiators or vicars, or by their lessees or tenants.

The defendant Dennis put in the same answer, as to his titheable matters; and further said, that he had occupied Cullomb John Mills and Titterly Mills; that they were ancient mills, and had been built before the memory of man; that no tithes had ever been paid for the same; and that he had never heard that any tenth dish, or other tenth of the profits of either of the said mills, or other the tithe thereof was ever paid; and he insisted on the said customary payments of two-pence a hogshead for cider, and two-pence a hoard for apples.

The defendant Long said, that he had been vicar of the parish for thirty years past, and as such was entitled to one third part of all the great and small tithes, or to some *modus* or customary payments in lieu thereof; that he was also entitled to all offerings, obventions, oblations, and other duties; and that the plaintiff was entitled to the other two thirds of the tithes and other duties, the parish being divided into three quarters as aforesaid, and enjoyed alternately every year; that he and the impropiator had sometimes taken tithes in kind of corn and grain, but had frequently compounded for the same; that he knew not of the said two *modus* for cider and hoard apples; that the garden-penny and hearth-penny had only been paid and received in lieu of the tithes in kind of the persons paying the same; that these payments were made, for aught he knew, immemorially; but he denied, that such payments were allowed, or understood to be in satisfaction of cider, garden-stuff, or fire-wood, sold or disposed of for money. He admitted, that the other customs and payments, for the tithes of agistment of every milch cow or heifer, milk, honey, wax, eggs, calves and colts had been observed. He also said, that new planted or additional orchards, cider, apples, milk, wood, furze sold, agistment and pasturage of bullocks, barren cattle, sheep, which were depastured a considerable time there, and then driven into another parish and shorn, the second math

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math of clover, the seed thereof, hops, pigs, and young apple trees, were all titheable; and he insisted on tithes in kind, great and small, or such composition as he should think fit to make. He said, that he had tithes of the first mowings of grass, when under no composition, but that such composition did not extend to the second math of grass, the tithes of which he insisted he was well entitled to receive; and also to the tithes of clover and seed, if not to the tithe of all the second math of clover-grass when made into hay; and insisted, that the said two *modus*es for cider and hoard apples, only extended to apples grown in ancient orchards and not in new orchards; and he gave his reasons.

The plaintiff replied; and the defendants rejoined.

Sir H. Ackland, bart. with the aforesaid defendants, filed their cross-bill, against Reynall, the impropiator, and Long, the vicar, setting forth that they were parishioners, landholders, owners, and occupiers of several manors, barons, &c. in the parish, and the titheable places thereof, within the impropriation and vicarage of the said parish-church, which were ancient, and had been so beyond the memory of man; that Reynall had been for thirty years past, patron and impropiator of the church, and was thereby entitled to two thirds of all great and small tithes, *modus*es, or customary payments in lieu of tithes arising in the parish; that the defendant Long, for thirty years past, had been vicar there, and as such was entitled to one third part of such tithes, offerings, and duties, the parish being divided into three parts, as before stated; that the parish consisted chiefly of arable lands; that the greater part thereof was sown with wheat, barley, oats, beans, peas, and such like grain, the tithes whereof had immemorially been answered and paid in kind to the impropiators, vicars, and their farmers; that there had been immemorially divers ancient and landable customs, or customary payments taken and accepted by the impropiators and vicars and their farmers; and they insisted on the said immemorial *modus*es and customs, as set forth in their said bill, and as before stated in the said defendants answers. The cross-bill therefore prayed, that the impropiator and the vicar might answer the premises, and the said *modus*es be established by the decree of this court.

The impropiator and the vicar appeared and answered; the landholders replied; the impropiator and vicar rejoined; and witnesses were examined on both sides; and on reading the proofs taken on both sides, in both causes; and upon mature and deliberate debate of the matters in question, the court directed a trial at law, upon the following issues:

First, "Whether there is a *modus* of two-pence, for every hogshead of cider, and so proportionably for a greater or lesser quantity of cider, payable yearly at Easter, to the impropiator or vicar of the said parish, for the time being, according to their respective annual rights and proportions, or to their farmers or agents, for and in lieu and satisfaction of the tithes of all apples made into cider, grown or renewed yearly within the orchards or lands of every landholder, owner, or occupier of orchards or lands within the said parish or titheable places thereof?

Secondly, "Whether there is a *modus* of two-pence, for every hoard of apples, had or kept by every landholder, owner or occupier of orchards or lands within the said parish, or titheable places thereof, payable yearly at Easter, to the impropiator or vicar of the said parish, for the time being, according to their respective annual rights and proportions, or to their farmers or agents, for and in lieu and satisfaction of the tithes of all apples grown or renewed yearly in such their orchards or lands, and which are not converted into cider, but gathered in and kept for their hoard?

Thirdly, "Whether there is a custom, or *modus decimandi*, for every inhabitant, landholder, owner, or occupier of any lands within the said parish and titheable places thereof, who has meadows or other grounds that produce hay, to mow and cut the grass of such meadows and other grounds every year, at the proper and usual seasons of the year, at his or their own proper costs and charges, and the first math of such grass, after it is so cut and mowed, to ted and throw abroad into weaks or winrows on the said ground, at his and their own proper costs and charges, and the same, at his and their

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"own proper costs and charges, to gather, take up, and put into cocks, as
"justly and of equal bigness and quantity as can be done without fraud and
"deceit, and at his or their own proper costs and charges, to set out and divide
"every tenth cock so gathered together from the other nine cocks, to and for
"the use of the impropriator or vicar of the said parish, for the time being,
"according to their respective annual rights and proportions, or for their
"farmers or agents, in full satisfaction and discharge, and in lieu, as well of
"tithes of the first math of the said grass grown, renewed, and increased in
"that year, as of all and singular the tithes of the grass of any after math or
"after pasture of the said meadows or grounds in the same year grown, re-
"newed, or encreased thereon?"

And it is further ordered by the court, as to all other the *modus*, insisted on by the defendants answer to the original bill, in bar of all tithes in kind, thereby demanded, for all other the several titheable matters and things in the said original bill mentioned, not comprehended in the said three issues directed to be tried, and prayed to be established by the said cross-bill, that the said *modus* shall be, and are hereby established, the said plaintiff in the original cause, and the defendants in the cross, waiving their pretended right to any tithes in kind, for any of the said other titheable matters and things demanded in and by the said original bill, and not comprehended in the said three issues.

And it is further ordered, that the defendant to the original bill, R. Long, shall be and is hereby dismissed, with forty shillings costs.

A trial was accordingly had upon the said three issues, and upon the first and the second issues a verdict was given for the defendants, and the said *modus* found by the jury to be the very same as were set forth and charged in the declaration, and hereinbefore set forth; but upon the third issue a verdict was given for the plaintiff; the jury finding that there was no such custom or *modus decimandi*, as set forth in the said issue.

Upon reading the said decretal order of the eighth of February, 1724, and an ancient decree made in this court, in the cause of the Bishop of Exeter v. The Parishioners of the Parish of *Sheebrooke*; and also the *postea*.

It is ordered by the court, on the seventh day of July, 1726, that the said two several *modus* or customary payments, mentioned and expressed in the first and second issues, shall be, and the same are hereby established according to the prayer of the cross-bill.

And it is further ordered, that the defendants in the original cause shall come to an account with, satisfy, and pay the plaintiff for the tithes of the second, or aftermath, or after-pasture of the grass grown and renewed on the said defendant's meadows or grounds within the parish, during the time demanded by the bill.

And it is referred to the deputy-remembrancer to take the account, but no costs are to be paid on either side to this day.

H. 11 Geo. Scacc. *Rives, D.D. v. Fitzherbert.* [2 Wood, 249.]

Staffordshire, 23d February, 1725.

THE rector of Swinnerton, in the county of Stafford, claimed tithes of wood under twenty years growth, felled in Swinnerton Park and the Harleys.

The defendant said, that for seven years last past, he had been, and still was seised of Swinnerton Park and the Harleys, wherein are contained several acres of coppice wood lying in the said parish, in the hundred of Pyrehill; that since his being so seised, about February, in the year 1721, he cut and felled off and from the said coppice wood, one hundred and twenty-six cords and six feet of coppice wood, and two hundred and twenty-two cords of stack wood, which consisted all of oak; and also that he had cut several quantities of

Upon a bill for tithe-wood, an issue was directed to try whether there was a custom in the hundred in *non decimando* for all wood cut therein, and the plaintiff refusing to try it, the issue was taken *pro confesso*, and the bill dismissed with costs.

pro confesso, and the bill dismissed with costs.

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woods, the tithes whereof had been paid to the plaintiff, although he was not duly entitled to any tithes from the same; for he insisted, that no tithes were due for the said coppice wood and stack wood; for that the said coppice wood was upwards of twenty years growth at the time the same was felled and cut down, and the said stack wood consisted wholly of oak which had not been cut down in the memory of man, and of the roots of old timber trees which were not titheable. He also insisted, that in the hundred of Pyrehill there was, and time out of mind had been a custom that no tithes were payable upon the fall of or for any wood cut down and felled within the said hundred of Pyrehill; and that the ground upon which the said wood or trees were growing, and from which the said coppice and stack wood were felled, laid and were within the said hundred of Pyrehill.

The court directed a trial at law upon this issue, "Whether there is a custom in the hundred of Pyrehill, in the county of Stafford, in prescribing *in non decimando* for the tithe of all wood cut or felled within the said hundred?"

The issue was accordingly made up; but the plaintiff would not try the same; and upon reading the decree, the court ordered, that the issue be taken *pro confesso*, and the bill dismissed with costs, both at law and in equity.

RO. PRICE, F. PAGE, B. HALE.

E. 11 Geo. Scacc.

Marston v. Cleypole et al. [Bunb. 213.] 2 Gw. 674.

The statute of limitations is not pleadable to a bill for tithes, for the defendant is in the nature of a bailiff or receiver for the plaintiff.

BILL by a lay impropiator for tithes for about twenty-four years. The defendant, as to such part of the bill as prays discovery and relief for any time before within six years next before the filing the bill or serving the *subpana*, pleads the statute of limitations, and that he did not promise to make any satisfaction for any tithes before the said six years.

This plea was now argued, and over-ruled *per totam curiam*; for the defendant, as to the tithes, is in the nature of a receiver or bailiff for the plaintiff, in which case the statute of limitations does not operate.

Cited for the plaintiff, Cro. Car. 513. 1 Saund. 38. 2 Saund. *Webber v. Tyrrell*.

Cited for the defendant, Cro. Car. 115. *Hetley*, 111.

E. 11 Geo. Scacc.

Hanson v. Fielding. [Bunb. 214. Gilb. Eq. Rep. 225.] 2 Wood, 225. 2 Gw. 663.

An exemption of a manor, as being parcel of the possessions of the priors of St. John of Jerusalem (no tithes in kind having ever been paid), was held good.

BILL by a lay impropiator for tithes within the parish and boundaries of Shilton and Barnacle, in the county of Warwick.

The defendant, as to the manor of Barnacle, by his answer insists, that the manor was part of the possessions of the priors of St. John of Jerusalem, whose possessions were exempt from payment of tithes *quamdū propriis manibus*, &c. then sets forth the stat. 31 Hen. 8. with the clause of discharge, and also the stat. 32 Hen. 8. whereby these priories, with all privileges, &c. were vested in the crown; and that no tithes in kind had been paid for this manor.

Upon the debate of this exemption were cited for the plaintiff, Lib. 2. 47. a. Cro. Jac. 57. Moore, 913. Degge, 346. For the defendant, Dyer, 277. b. Bridgm. 32. Latch, 89. Sir W. Jones, 182. Ray, 225. *Daniel, Vicar of Bengo in Com' Hertf'*, v. Sir J. Gower, Trin' 1687.

The court seemed all of opinion, that it was a good discharge; but the plaintiff after failed in making out his title, and the bill upon that was dismissed.—[Bunb.]

A BILL was brought by a lay impropiator claiming under a grant from the crown, after the dissolution of the religious houses, for tithes within the parish and boundaries of Shilton and Barnacle, in the county of Warwick, of the

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tithes of corn, grain, wool, and lamb, for the year 1723. Defendant, as to the tithe for wool and lamb, says, that he is lessee of the vicar of Anstis, and that the small tithes did not belong to the mother church, but were received by the chaplain of Anstis long before the dissolution of religious houses; and that after they came into the hands of the crown, they were also enjoyed distinctly. As to the tithes of corn and grain within the manor of Barnacle, he says, that the lands were formerly part of the possessions of the hospitallers of St. John of Jerusalem, and that his lands were discharged from the payment of tithes, while they continued in his own manurance and occupation; that his lands, by virtue of some acts of parliament (27 H. 8. c. 21. 31 H. 8. c. 13. 32 H. 8. c. 24), were vested in the crown, and were to be held and enjoyed by the King and his grantees, in as large and ample manner as the late religious houses held them; that he was a grantee under the crown, and consequently entitled to hold them discharged from tithes.

Mr. *Bunbury*, for the defendant, objected that the lands of the hospitallers of St. John of Jerusalem coming to the crown by the statute 32 H. 8. c. 24. they could not claim the privilege of the clause of exemption, in the statute 31 H. 8. c. 13. by which it is appointed, that all monasteries, abbeyes, &c. which before had come, or hereafter should come to the King by suppression, surrender, &c. should be held and enjoyed by him in as large and ample manner as the religious houses held them; and whereas many of them were discharged from tithes, they should be held by the King and his grantees discharged, &c. and cited 2 Co. 47. a. Archbishop of *Canterbury's* case (1), where it was resolved, that the clause of discharge should extend only to those possessions which came to the King by the said act; and that it would be absurd that the branch of the act 31 H. 8. should extend to a future act of parliament, which the makers of the said statute 31 H. 8. without the spirit of prophecy could not have foreknowledge of, and insisted strongly upon the case of *Cornwallis* and *Spurling*, Cro. Jac. 57. Moor, 913. Degg. 346 (2), as an express authority in point.

Serjeant *Pengelly*, for the defendant, made use of two ways to take off the objection; first, that part of the lands of the hospitallers of St. John of Jerusalem were vested in the crown by the 31 H. 8. and that the 32 H. 8. was only made because of the great compass of their estates (some of which were in Ireland), and to be so general as to comprehend all that might be omitted in 31 H. 8. and then without doubt the branch of the act concerning discharge from tithes extends to them. But if the court should think these lands passed only by the 32 H. 8. he thought, secondly, that even upon that statute the grantee should hold them discharged from tithes; and seeing it had been resolved by some judges, that the clause of exemption in the 31 H. 8. should not extend to latter statutes (though at first that was a doubt upon the words "or hereafter shall come"), he would therefore wave that, and rely upon the 31 H. 8. by which they were vested in the crown with all privileges, &c. Now one of their privileges was, that they should hold the lands discharged from tithes, whilst they continued in their occupation, which being continued to the crown by the said statute 31 H. 8. we say is a real discharge annexed to the land, and going along with it, and it has been accordingly expressly granted to us; for we have a grant dated the 15th December, 4 Ed. 6. of this manor of Barnacle, &c. with the very same words, as are in the statute, viz. "with all privileges, &c." and we have enjoyed it ever since with benefit of this exemption. And he cited T. Raym. 225. *Fossett* and *Franklin*, where it is said by HALE, Ch. J. that by reason of the word "privileges," they shall not pay tithes, and resolved accordingly by the court.

Serjt. *Cumins*, senior, and Mr. *Ward*, senior, on the same side, cited Dy. 227. b. pl. 60. W. Jon. 182. Bridg. 32. Lat. 89. and *per Ward*, in Tr. Term, 1687, the case of *Daniel*, Vicar of *Bengo*, in Hertfordshire, and Sir *John Gower*, where, upon considering all the cases, this court held all the lands discharged, and dismissed the bill.

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Mr. *Baile* said in reply, that, in the case in *Dyer*, the lands came to the crown by 31 H. 8. and then they were immediately exempt, as *Bridg.* 32. Lat. 89. W. Jon. 182. As the case appears, the court was equally divided upon the point of discharge. As to T. Raym. 225. it was a very short report, and it does not appear upon what reasons the court went. The great stress is laid upon the word "privileges" in the statute 31 H. 8. and if that of itself had been sufficient, for what reason did they insert a particular clause of exemption from tithes? He insisted upon the case of *Cornwallis* and *Spurking*, which being determined upon a special verdict, the book also taking notice that the like judgment was given upon a demurrer, is of great authority.

GILBERT, Ch. B. Those privileges were granted to this ecclesiastical corporation by bulls from the pope; but these discharges, for want of a special clause to continue them, were extinguished in as many of them as were dissolved by the 27 H. 8. but that cramping the King in his alienation in 31 H. 8. they put in a clause to continue to the crown the privileges that were in them as special corporations. Now the question is, whether the word "privileges" in 31 H. 8. has the smallest intent to carry all other privileges to the crown. If the point had not been resolved, we should not have disputed it.

Nota. It was no further settled, for when the plaintiff went into his proof of the grants of the tithes of these lands, they appeared to be grants of different possessions, therefore his bill was dismissed, in that he failed in making out his title.

E. 12 Geo. Scacc.

Coleman v. Barker. [Gilb. Eq. Rep. 231.] 2 Gw. 665.

Tithes shall be paid for the depasturing of sheep upon turnips unsevered, where the sheep are sold to the butcher, although tithe has been paid of the wool of such sheep.

THE plaintiff by his bill demanded tithes for the depasturing of sheep on turnips, remaining on the ground unsevered.

The defendant said the sheep paid tithes of wool, and that tithes ought not to be paid twice.

It appeared, that after shearing time the defendant fed his sheep with turnips, whereby they were bettered 5s. a sheep; that they went about five months on the turnips, and then were sold to the butcher; and the defendant brought in a like quantity of new sheep before shearing time came again, so that the plaintiff always had tithe of wool of the full number.

Pengelly, for the plaintiff, said, that this improvement of the sheep by the turnips, was a new increase, and that consequently tithes ought to be paid for the improvement and increase; and if the turnips had been severed, there had been no doubt but tithes had been due. He cited three cases which he relied on.

First, the case of *Nicholas and Hooper*, 1 Rol. Abr. Dism. 462. pl. 7. where it is adjudged, that if a man pay tithe-lamb at Markside, and afterwards at Michaelmas shear the residue of the lambs, viz. the other nine, he shall pay tithe-wool, although he had before paid tithe of the lambs; for, says the book, it is a new increase.

Secondly, The second case which he quoted was *Eastmond* against *Sandys* (1), a demand for tithe-herbage of oxen, which were depastured to be fatted.

The defendant insisted, that these oxen had been used for the plough, and so were exempted; that their labour improved the parson's tithes, and so to pay tithe for their agistment would be double tithing: but the court of exchequer decreed, and it was affirmed in the House of Lords, that tithe-herbage was due for the time they were taken from the plough, they being then no otherwise beneficial to the parson in tithes.

Thirdly, The case most relied on was a decree in this court, Hil. 1 W. & M. *Dummer* and *Wingfield* (2), which was a demand of tithe for pasturage of sheep, from the time of shearing till they were sold. The defendant insisted that by the sheep's depasturing on the land, it was improved, and the plaintiff's tithes bettered thereby: but the court decreed an account, and said, that this

(1) *Ante*, p. 616.

(2) *Ante*, p. 566.

is no bar to the plaintiff's demand; and this decree, upon rehearing, was affirmed.

Ward and Bunbury, for the defendant, argued, that if this demand prevailed, would be double tithing, which was contrary to the whole tenor of the law, and cited many cases for that purpose. But the court agreed that it was a new decree; that they could not distinguish it from the case of *Dummer and Kingfield*; that the distinctions laid down in the case of *Eastmond and Sandys* are good, and decreed, that the defendant should go to an account.

E. 12 Geo. Scacc.

Cuthbert v. Westwood and others. [Gilb. Eq. Rep. 230.]

2 Wood, 280. 2 Gw. 666.

BILL against land-owners to establish a right of 40*l.* *per annum*, and in lieu of tithes; which by a decree in time of Car. 1. was to be paid out of particular lands (which were formerly part of the forest of Braden) to the ear of Cricklade, in Wiltshire.

Two objections were taken for want of parties. First, that these land-owners were tenants to the crown of lands lying within the bounds of the forest (which formerly paid no tithes), and that so the attorney-general ought to have been made a party.

Answer. It does not appear by the bill that they are lessees under the crown, and the defendants have not insisted upon it in their answers, and so it is out of the case.

Second objection.. It is not sufficient to make the landowners only, but they should have made the occupiers, parties to the bill; for a decree against the land-owners could not affect them.

Answered by *Bunbury*. That it would be endless to make all the occupiers parties, and if that were necessary to be done, the plaintiff could never come at his right; for there were great numbers of them, and any single one, would put the plaintiff to his bill of revivor, and cited the case of *risco* against the undertakers of the land-bank, before Lord-Keeper Wright, who said he would not oblige them to bring all before the court, since the right might be determined by having a view; which the court thought reasonable.

The court. Though we can decree only against the land-owners who are before the court, yet that will affect the lands; the 40*l.* a-year ought to be apportioned among the owners, and the original decree may be carried against the occupiers land.

Decree a commission should go to inquire into and ascertain the value of the lands, the owner and occupiers names, and what proportion of the 40*l.* *per annum* each tenement ought to pay.

[It was ordered by the court, as it appears by the decree book, that a special commission should issue in the country, under the seal of this court, directed to such a commission as the deputy-remembrancer should appoint, to inquire who were the several farmers and occupiers of such part of the said inclosed lands, formerly part of the forest of Braydon, which lie within the parish of Cricklade St. Sampson, in the county of Wilts, and particularly what part of such lands each farmer or occupier severally held or enjoyed, and of what yearly values the respective lands so held by them severally were; the said deputy-remembrancer to appoint the time and place of executing such commission; and the costs to be reserved.

In pursuance of the said decree, and the deputy's certificate, a special commission issued, and the commissioners returned their certificate, and certified the different lands and the respective shares and values liable to the payment of the said 40*l.* *per annum*, as set forth in the said certificate.

Upon reading the said decree, order, and certificate, and the several depositions taken by virtue of the said commission, and upon debate of the matter, it was ordered by the court, that it should be referred to the deputy-remembrancer to

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Where it does not appear by bill or answer that the defendants are lessees of the crown, no objection lies for want of parties.

In a bill for payment of 40*l.* in lieu of tithes, it being objected that all the occupiers ought to have been parties, a commission was issued to enquire of and ascertain the value of the lands, the owners and occupiers names, and how much each tenement ought to pay.

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WESTWOOD
AND OTHERS.

ascertain what part and proportion of the 40*l. per annum*, due to the plaintiff from the defendants, each defendant ought to pay, according to the number of acres in his occupation; and what was due from each defendant to the plaintiff for the arrears of the said 40*l. per annum*, according to the like proportion. The costs to be reserved.

In pursuance of the said decree, the deputy-remembrancer made his report therein, dated the 12th of July, 1728; and on the 18th of July, 1728, upon hearing counsel on both sides, and reading the decree and report; the court ordered the report to be confirmed, and the several defendants to pay to the plaintiff the several sums reported due to him, and all the defendants, except the Westwoods, to pay to the plaintiff his costs of this suit, to be taxed, but the said plaintiff was to have no costs against the defendant Westwood; and that the several defendants should for the future pay to the plaintiff 40*l. per annum*, according to the proportions in the said report mentioned.]

E. 7 Geo. Scacc.

Quilter v. Mussendine. [Gilb. Eq. Rep. 228.] 2 Gw. 668.

Where non-residence is pleaded in bar to a bill for tithes, the plaintiff is not entitled to a discovery, for the defendant having shewed that the plaintiff has no title to the tithes themselves, he in consequence can have no title to a discovery concerning them, and *HALE* said, that no construction would be too liberal to make parsons reside, and take care of their parishes.

A BILL was for a discovery of tithes by the lessee of a parson. The defendant pleads 13 Eliz. c. 20. against non-residence, in bar. *Ward*, for the plaintiff, objected to the plea.

First, That it was bad in substance, for that it did not shew, that he was not of necessity, or justifiably absent, (barely saying that he was voluntarily absent not being sufficient), as he might have done, according to *Butler* and *Goodall's* case. 6 Co. 21 b.

Secondly, The time of absence the statute requires to avoid the lease is eighty days and more, which ought to appear to be a continual absence for eighty days all together, and at one time. 1 Bulstrode, 3. *Shepard v. Townsie*, Moore, 436.

Thirdly, Though the plea should be thought good in substance, yet it could be no bar to the discovery, though it might as to the relief. To prove which he mentioned the case of a *modus* pleaded in bar to a bill for tithes, in which case it was held, that although the plea was good as to the relief, yet it was no bar as to the discovery; but that the defendant must answer, and shew the quantity, quality, and value of the tithes; and the reason upon which that has been so resolved is, because if the defendant's plea in bar should prove to be false, the plaintiff then is to have a discovery from the defendant upon oath, and they will not let him run the hazard of losing such discovery, which he might do if the defendant should die in the mean time; and that in *Hilary* term last, the court would not allow a plea of the statute of limitations to be a good bar to a bill for tithes.

Fourthly, *Edlin* objected that they had set out the year wrong in the plea, and that it did not appear, that he was absent above eighty days in any one year, taking the year to commence according to the computation of *æra* upon the 25th of March, as he insisted it might.

Bunbury and *Bootle* for the defendant, to what had been said, gave the following answer:

As to the first objection, that if he had any good excuse for his absence, it being a thing lying entirely within his own cognizance, they need not take notice of it, but he must shew it in his replication; and the whole court held the same.

Secondly, The construction they contend for would entirely defeat the statute, for at that rate he need only be there five days in the whole year. As to the opinion in *Bulstrode*, it is only that of two judges *obiter*; and as to *Moor*, 436. the *insimul ac pariter* are in the special verdict, but no notice taken of it, that it was necessary they should be in.

Thirdly, They distinguished this from a plea of a *modus*, for that admits the plaintiff's title to the tithes, but only avoids the payment of them in kind; for that by custom he was to have something else in lieu of them: in that case the

demand is allowed to be just; and the only question is, in what manner that demand is to be satisfied. But the plea in the present case denies and defeats all the plaintiff's right and title to the tithes, and to any manner of satisfaction for them. The plea of the statute of limitations was also very different from this, for that statute could not be extended to a demand for tithes.

Fourthly, That the year was to be 365 days, without reckoning it from the 25th March; and they insisted upon the case of *Etheridge and Mills*,⁽¹⁾ in this court, being in point.

GILBERT, Ch. B. The case of *Etheridge and Mills* cannot be distinguished from this.

Secondly, The case of *Bulstrode* is not law; for that would defeat the statute *caused quid supra*.

Thirdly, That this was a good plea in bar, both as to the discovery and relief. As to the case of pleading a *modus*, that allows the plaintiff's title, and so that is pleading against what you allowed before.

The reason why the statute of limitations was not allowed to be pleaded in bar to a bill for tithes was, that tithes were not of the nature of those demands that are intended to be barred by the statute; besides, that plea allows the title. Years shall not refer to the æra, but must be intended a solar year of 365 days.

PRICE, B. agreed the year shall be 365 days, and the absence any eighty days within that compass.

As to the second objection, how inconvenient it might be to allow such a plea a good bar as to the discovery, for that, supposing the plea to be false, if the defendant should die, the plaintiff might lose the benefit of a discovery, the answer was very plain; for the defendant having here shewed that the plaintiff has no title to the tithes themselves, he in consequence can have no title to a discovery concerning them.

PAGE, B. The plea of a *modus* is an acknowledgement of the title of the plaintiff, and is in part a discovery itself; for it sets out he is to pay so much for corn, so much for pigs, &c. and then it is nothing strange he should be compelled to go on a little farther, and shew the quantity and number of his corn, pigs, &c.

He took the distinction to be between a plea acknowledging the title, and one that absolutely denies it. If a bill be brought by an heir, claiming by descent against another, suggesting some fraud, and praying a discovery, there, if the defendant plead he is a purchaser for a valuable consideration, such plea, which goes to the plaintiff's title, is always good, both as to relief and discovery. So, in case of a bill for an account against one as bailiff, suggesting fraud, if the defendant pleads, that at such a time he did account, he need not go on and set out an account. And he also agreed as to the computation of the year.

HALE, B. That the plea is a good bar to the discovery, and that the case of a *modus* had been rightly distinguished from this.

As to the statute of limitations, he thought it might have been pleaded in bar to the discovery, if it could have been pleaded at all, which it could not; for that specialties are not barred by the statute, and tithes are of a higher nature.

And he farther said, that no construction would be too liberal to make parsons reside, and take care of their parishes.

(1) *Ant.*, p. 806.

Tr. 11 Geo. Scacc.

Sir Edward Blacket v. Doctor Finney. [Bunb. 176. 198. 8 Mod. 375.]
2 Wood, 250. 2 Gw. 661.

BILL suggested that there was a *modus* of four-pence per score of all sheep going on Gayerfield, in the parish of Ryton, in the county of Durham, in lieu of tithe of lamb and wool; that the defendant libelled in the spiritual

An injunction was granted to the spiritual court to stay a

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libel for tithes, where a *modus* was sought to be established.

A *modus* alleged to be payable on or about a certain day is bad, but although objected at the hearing, the court gave the party liberty to amend his bill paying the costs of the day.

court for tithes in kind; that the plaintiff moved for a prohibition in the court of pleas in Durham, but permitted a consultation to go, and depended on relief in this court, and prayed to have the *modus* established: the defendant, Doctor Finney, insisted there was no such *modus*, but that the four-pence was in lieu of the milk of ewes, which was usual in that country.

Now upon motion for an injunction to the spiritual court the defendant's counsel insisted, that this was proper matter of suggestion on a prohibition; and also the defendant had in the answer denied the *modus*: but *per curiam*, there being some dispute between the parties, whether the *modus* is as alleged in the bill, and as the spiritual court cannot try the *modus*, we will grant the injunction.

BILL to establish a *modus* of four-pence *per* score of sheep in lieu of the tithe of lamb and wool payable, or which ought to be paid on or about the 25th day of April yearly.

It was objected at the hearing to the uncertainty of the time of payment; and the court allowed the objection, but gave the plaintiff liberty to amend, upon paying the costs of the day.—[*Bunbury*.]

UPON a bill exhibited to establish a *modus*, the plaintiff set forth, that this *modus* was payable on or about the twenty-fifth day of April, &c. which is a void *modus*, because it must be payable on a certain day, as was lately resolved in the case of *Harrison* and *Clarke*.

Besides, it is laid disjunctively in the bill, viz. that the parishioners of, &c. "constantly paid, or ought to pay, so much," when it should be, "constantly paid, and ought to pay," &c. Then as to the *modus* for sheep, it is laid, that the parishioners usually paid four-pence for every score, and so *pro rata*, but does not shew what they should have paid for a less number, in case there were not so many as a score.

The defendant put in his answer; and among other things admitted, that the *modus*, as set forth in the bill, was payable on or about the twenty-fifth day of April, &c. but the plaintiff perceiving the faults in his bill, as before mentioned, moved for leave to amend, and cited the case of *Reynolds v. Rogers*, where the plaintiff suggested a *modus*, but did not lay it payable on any certain day, neither did the defendant in his answer confess any day of payment; so that no certain day of payment appearing, either in the bill or answer, the defendant, who was plaintiff in a cross-bill, having laid it to be payable on a certain day, it was held good.

The Court. This is a case where an amendment of these things will not alter the nature of the proofs; and the day being admitted by the defendant in his answer, it is reasonable that on payment of costs the plaintiff should amend, especially since his right appears on the pleadings; therefore it would be too rigorous not to give him leave to amend, for in such case the decree must be founded on his bill; and if his bill will not support it, though a day is confessed in the defendant's answer, he can have no good decree.—[*Mod.*]

Tr. 11 Geo. Scacc.

Egerton, Clerk, v. *Still*. [Bunb. 198.] 2 Wood, 250. 2 Gw. 661.

Easter offerings are due of common right.

Where there is an odd number above ten lambs, &c. it is not to be carried over to the next

IT was decreed *per curiam* in this cause, first, that plaintiff should have Easter offerings, as due of common right, although he demanded them as due by custom.

Secondly, That where there are above ten calves, lambs, pigs, &c. the tithe of the odd number above ten shall be paid according to the value, and not be carried over to the next year.

year, but the tithe shall be paid according to the value.

. 12 Geo. Scacc. *Bate v. Howland, et c. contrd.* [2 Wood, 527.]

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Kent, 6th July, 1726.

THE rector of Warehorne, in the county of Kent, by his bill stated, that he was lawfully intitled to all the predial, mixed, and personal tithes, both at and small, arising in the said parish, or to some recompense for the same; that the defendant Hodges, from the first of May, 1721, and the other defendants from 1719, had occupied, in the said parish, several quantities of marsh and other lands, together with several gardens and orchards of great yearly value; that they had made hay, and had kept, fed, and depastured milch cows, cattle, sheep, mares, and sows thereon, and from which they had calves, pigs, colts, milk, and wool; that they also had all sorts of roots, fruits, flax, nursery trees, poultry, bees, wax, honey, eggs, and divers othertitheable matters, (corn, wood, and hops only excepted,) and had taken the same away, without setting forth the tithes thereof, or making him any recompense for the same; that the defendant Brown had, for two years last past, rented of him some of his glebe lands, and had cultivated thereon, over and above the titheable matters above mentioned, all sorts of corn and hops, the tithes of which were due to him, as well as Easter offerings, but which the said Brown had refused to pay. The bill therefore prayed a full discovery, an account of, and a satisfaction for all the said tithes.

The defendants admitted that the plaintiff was rector of the parish, and intitled to receive all manner of tithes therein, or some satisfaction in lieu thereof; that they had converted to their own use the several titheable matters and things growing and being upon the several lands they held and occupied; the quantities, qualities, and values of which they set forth; for that their lands of every kind, gardens, nurseries, orchards, and all other lands whatsoever in the parish, had been immemorially called and distinguished by no other names than Upland and Marsh Land; that all and every occupier of Marsh Land had immemorially, on Michaelmas day in every year, paid to the rector of the parish his lessee, one shilling an acre, and no more, for every acre of Marsh Lands in their possessions in the said parish, except when the same had been sown or planted with corn and grain, hemp, flax, or hops, as a *modus* in lieu of the tithes of hay, pasture, and all the small tithes, excepting the tithes of hemp, flax, and hops, yearly arising upon the said Marsh Land; and so after that rate for a greater or less quantity than an acre of such Marsh Land; and that the said rate of one shilling had been constantly and immemorially accepted by the owners of the said rectory for the time being, or by their lessees, as a *modus*, in lieu of the tithe of hay and pasture and all such tithes as aforesaid: and insisted, in the like manner, of four-pence an acre for Upland, with the same exception, in lieu of the tithes of hay, pasture and all small tithes as aforesaid; they averred that no tithes in kind, either for hay, or for any small tithe, (except for flax, hemp, and hops,) had ever been demanded by any former rector or owner; and that no pretence had ever before been made to any other recompense for tithes than according to the *moduses* before stated: and they set forth several sums due from them to the plaintiff in lieu of tithes, according to the *moduses*, which they said they had always been ready to pay, and which they offered by their answer to pay to the plaintiff, together with the costs.

The plaintiff replied, and the defendants rejoined. The owners and occupiers of lands in the said parish, as well on behalf of themselves as on behalf of the several other owners and occupiers of land in the said parish, also filed their cross-bill against the plaintiff Bate, praying that the *moduses* set forth in the answer to the original bill might be established. The rector put in his answer to the effect of the original bill.

The plaintiffs replied, the defendants rejoined, and witnesses were examined on both sides; and upon opening the original bill, and reading an order made on the twenty-seventh of April last, whereby all parties were to appear gratis at the trying of both causes; and upon reading the answer of the defendants in the

In answer to a bill for tithes, the defendants say, that all the lands in the parish are distinguished either as Upland or as Marsh Land: and that there are *moduses* of one shilling an acre for the Upland, and four-pence an acre for the Marsh Land, payable to the rector on every Michaelmas-day, excepting when the said lands are sown with corn, grain, hemp, flax, or planted with hops, in lieu of all tithes of hay, pasture and small tithes arising thereon, excepting the tithes of hemp, flax, and hops; upon issues directed, the *moduses* were found, and the bill dismissed with costs.

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original cause, no counsel attending for them to open either the answer or the cross-bill;

The court ordered the defendants to the original bill to account with the plaintiff for their tithes in kind for the time demanded by the bill, except such as the rector had waived by his replication; that the deputy-remembrancer should take the account; and that the cross-bill should be dismissed, unless cause were shewn to the contrary; the defendants first paying five pounds costs for this day's attendance before they were heard.

The defendants paid the five pounds costs; and on the eighth of December, 1726, the cause came again before the court; when, upon opening the pleadings, the court directed a trial at law upon the two following issues, viz.

First, Whether all and every occupiers of Marsh Land within the parish of Warehorne have, time out of mind, paid, or ought to pay, every Michaelmas day, to the rectors of the said parish, or their lessee or lessees, for the time being, one shilling an acre, and no more, for every acre of Marsh Land in their respective possessions within the said parish, (except when the same hath been sown with corn or grain, or with hemp or flax, or planted with hops,) as a *modus*, and in lieu of the tithe of hay and pasture, and all small tithes, (except the tithes of hemp, flax and hops,) yearly arising upon the Marsh Land in their respective possessions within the said parish and titheable places thereof; and so after that rate for a greater or less quantity than an acre of such Marsh Land in their respective possessions.

Secondly, Whether the occupiers of Upland within the said parish and the titheable places thereof, have, time out of mind, paid, or ought to pay, yearly, every Michaelmas-day, to the rector or rectors of the said parish, or their lessees or lessee for the time being, four-pence an acre, and no more, for every acre of Upland in their respective possessions within the said parish and titheable places thereof (except when the same is sown with corn or grain, or hemp or flax, or planted with hops); and so after that rate for a greater or less quantity than an acre of such Upland in their respective possessions within the said parish and titheable places thereof, as a *modus*, and in lieu of the tithe hay and pasture, and all small tithes, (except the tithes of hemp, flax, and hops,) yearly arising upon the Uplands in their respective possessions within the said parish and titheable places thereof.

A trial was accordingly had; and thereupon the jury found their verdict as to the first issue, That all and every the occupiers of Marsh Land within the parish of Warehorne, from the time whereof the memory of man is not to the contrary, had paid, or ought to have paid, to the rectors of the parish aforesaid, or their lessee or lessees thereof for the time being, one shilling and no more, for every acre of Marsh Land in their respective tenures within the said parish, (except when the same was sown with corn or grain, or with hemp, flax, or hops,) as a *modus*, and in lieu of tithe-hay and pasture, and all small tithes, (except tithes of hemp, flax, and hops,) yearly arising upon the Marsh Land, in their respective tenures within the said parish and titheable places of the same; and so after that rate for a greater or less quantity than an acre of such Marsh Land, as the said defendants had alleged by the plea. And as to the second issue, the jury by their verdict found, That the occupiers of Upland within the said parish and titheable places thereof, from the time whereof the memory of man is not to the contrary, had paid, or ought to have paid, yearly, on the aforesaid feast of St. Michael the Archangel, unto the rector or rectors, or their lessee or lessees for the time being, four-pence, and no more, for every acre of Upland, in their respective tenures within the said parish and titheable places of the same, (except when the same was sown with corn or grain, or with hemp or flax, or planted with hops,) and so after that rate for a greater or less quantity than an acre of such Upland in their respective tenures within the said parish and titheable places of the same, as a *modus*, and in lieu of tithes of hay and pasture, and of all small tithes, (except the tithes of hemp, flax, and hops,) yearly arising upon the Uplands in their respective tenures within

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the said parish and titheable places of the same, as the defendants had alleged by their plea.

On the sixth of December, 1728, these causes came on for further directions; and upon hearing counsel for all parties; and reading the decree and postea; and full debate of the matter;

The court ordered that the original bill be dismissed, with costs both at law and in equity; and that the cross-bill be dismissed, with costs in equity.

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Tr. 12 Geo. Scacc. *Peirce v. Warrener*. [2 Wood, 261.]

Wiltshire, 6th July, 1726.

THE bill stated that the plaintiff had been, for four years past, duly instituted and inducted in the vicarage and parish church of Chirton, in the county of Wilts; that thereby, and by virtue of some ancient endowment, usage, custom, prescription, or otherwise, he was justly entitled to all tithes of grass and hay within the said parish, save only the tithes of three meadows within the manor and tithing of Connock, in the said parish, the tithes whereof, the plaintiff admitted, were, by some ancient prescription or otherwise, due to the owners of the impropriate tithes of the manor of Chirton, in the said parish; that the defendant from Lady-day, 1720, had occupied land in the said manor of Connock, amongst which were two of the three meadows aforesaid, of which the tithes did not belong to the vicar; but that the tithe-hay and grass of all the rest did belong to him; that the said defendant did cut down clover and other grass growing on the said lands, and made it into hay, and converted it to his own use, without setting out the tithes thereof, on a pretence that the said tithes belonged to him as possessor of the impropriate tithes of Connock; and that in truth they belonged to the impropriator of Chirton. The bill therefore prayed, that the defendant might answer the premises, and true discovery make of the several matters charged in the bill.

The defendant admitted, that the plaintiff might be instituted and inducted into the vicarage, and entitled to receive some small tithes, Easter offerings, and oblations, incident thereto; but denied that he, or any of his predecessors, as vicars there, had ever any legal right to the tithes of all or any sorts of grass and hay annually arising within the said tithing of Connock, in the said parish; or that the manor of Chirton, the demesne lands, all houses, lands, commons, royalties, the advowson of the church, the glebe lands thereof, all tithes of what nature or kind soever, and all the rights, members, and appurtenances, to the said church belonging, were, about the reign of Henry IV. given to the prior and convent of Saint John the Baptist, commonly called Louthmay, first founded in Wales, and afterwards removed in or near Gloucester, and dedicated to the Virgin Mary; that the said manor, at the time of its donation to the said prior or convent, consisted, and still consists, of two tithings, namely, the tithing of Cherington, otherwise Chirton, and the tithing of Connock, otherwise Connock; that the said tithings, houses, lands, glebe lands, tithings, hereditaments and appurtenances, to each of them belonging, were granted by the said prior and convent distinctly, in separate leases, under distinct rents, and had ever since continued distinct; that on the dissolution of the said priory, the said manor, tithes, and premises, with the other possessions of the said priory, were given and granted to King Henry VIII. in whose reign a true account and particular thereof was returned into the augmentation court; that King Henry VIII. was seised of the said manor and premises, after the determination of the particular estates then existing, from grants made by the said prior and convent; that the same descended to Queen Elizabeth; that Queen Elizabeth, by letters-patent of the fifth year of her reign, demised the said messuages, lands, tenements, glebe-lands, and tithes both great and small, of what nature or kind soever, in the said tithing of Connock, in the said parish of Chirton, for a term of years, to E. Barnard and his assigns; and afterwards, in the fourth year of her reign, to Lady Stafford; and afterwards, in the thirty-third year

A vicar claims the tithes of hay arising within the manor and tithing of Connock, in the parish of Chirton, excepting only of three meadows, the tithes of which belong to the impropriator of Chirton.

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year of her reign, to Richard Pavie, for a term of years ; that the reversion and inheritance thereof descended to James I. ; that James I. by letters-patent, in the sixth year of his reign, granted the same to R. Moore and F. Phelps, their heirs and assigns, for ever, which said grant is recited *verbatim* in his answer ; that all the premises so demised were, by the said R. Moore and F. Phelps, granted and conveyed to the defendant's ancestors, under whom he claimed ; and he insisted on his right and title thereto, and to receive and take the same as his ancestors had always done. He denied that the plaintiff, or any of his predecessors as vicars of Chirton, had always received the tithes of all sorts of grass and hay, and particularly of clover grass, from the time of its being first sown in the said parish, within the said tithing of Connock, (the three meadows in the bill only excepted,) for that it was sown there only fifty years ago ; and he insisted, that he was intitled thereto as impropiator of the tithes of Connock, and to all great and small tithes, together with the glebe lands lying in the said tithing belonging to the said parish of Chirton. He admitted, that the impropiator of the tithing of Chirton received the tithes of the said three meadows ; but he denied that the plaintiff had any right or title to the tithe of any kind of hay or grass, either of the defendant's glebe lands, or of any other of his lands or possessions within the tithing of Connock ; and he set forth the land which he held, and the quantities and values of his tithes.

The plaintiff replied ; the defendant rejoined ; and divers witnesses were examined on both sides ; and upon opening the bill, and no counsel attending for the defendant ; and on reading an affidavit of a service of *subpoena* to hear judgment ; the court ordered the defendant to account for the tithes which he had in the parish of Chirton during the time demanded by the bill, unless cause were shewn to the contrary, the defendant first paying five pounds costs before he be heard.

The defendant paid the costs, and the cause came on again before the court on the fourteenth of November, 1726 ; when upon hearing counsel, and reading several proofs taken in the cause,

The court directed a trial at law upon this issue, Whether the plaintiff is intitled to the tithe of hay arising upon any and what lands lying within the tithing of Connock, in the parish of Chirton, in the county of Wilts, (except the three meadows commonly called or known by the several names of the Rumings, the Freehold Meadow, and Bewley's Mead,) in the said bill mentioned : The plaintiff in equity to be plaintiff in law.

A trial at law was accordingly had ; and a verdict, upon full evidence, given for the plaintiff.

On the eighth of May, 1727, upon reading the decree and *postea*,

The court ordered the defendant to account for the tithes demanded by the bill, with taxed costs both at law and in equity.

The deputy, to whom the taking of the account was referred, made his report accordingly on the fourteenth of July last ; and upon reading the report and the decree ;

The court ordered that the said report be confirmed ; and that the defendant do forthwith pay to the plaintiff two pounds eight shillings reported due for his tithes, together with his subsequent costs, to be taxed by the said deputy.

Tr. 12 Geo. Scacc.

Somerville, D.D. v. Wise. [2 Wood, 263.] 2 Gw. 671.

Oxfordshire, 5th July, 1726.

A vicar entitled to the small tithes of the parish, excepting from the rectory and demesnes

of the church, and the tithe hay on the copyholds belonging to the Bishop of Winchester. A custom to pay every tenth meal or morning and night's milk, from all milch cows in the parish from the first going upon the common, for ten tithe meals or turns of morning's and night's milk, in lieu of all tithe-milk, is bad. A *modus* of 2d. a mower in lieu of tithe of hay of each Lot Meadow, is bad.

THE bill stated, that the plaintiff, for two years past, had been vicar of Adderbury, in the county of Oxford, with the chapelries of Bodicott and Bedford thereto belonging ; and that, by endowment or usage, he was entitled to

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to the tithes of hay, milk, calves, and all offerings and small tithes, except the tithes arising from and out of the rectory and demesnes of the parish church of Adderbury aforesaid; and except the tithe hay arising out of certain demesne lands belonging to the bishop of Winchester there; that the defendants, for the years 1722 and 1723, were inhabitants therein, and had occupied several parcels of ground, which are no part of the said rectory or demesne lands, called the Ten Pound Plott, Pease Porridge Meadow, the Moors, and the Mill Meadow, and had yearly mowed great quantities of hay therefrom, and carried the same away, without setting out the tithes thereof, or making any satisfaction for the same, though they had regularly paid him the tithe for the same for several years before the said two years; that during the said two years they had kept several milch cows, the tithes of which, though the defendants admit the same to belong to the plaintiff, they had only paid from the tenth of May to the tenth of August yearly, insisting that no tithe milk ought to be paid for the remaining part of the year; that the tithe of the milk so taken was spoiled, and not regularly set out, the defendants pretending that there is a *modus* due for the same; but that, on the contrary, the payments they have made were only compositions for the said tithes. The bill therefore prayed an account, and a satisfaction for the said tithes.

The defendants admitted that the plaintiff was vicar of Adderbury, and entitled to the tithes of hay, milk, calves, and other small tithes, except as in the bill and answer are mentioned, or to some *modus* in lieu thereof.

The defendant Wise, sen. admitted, that in the year 1723, he had occupied and mowed the meadow called the Ten Pound Plot, lying in a meadow called the Misse, containing about four or five acres, and about four men's math; and he set forth what hay he had made thereon; but insisted that the Ten Pound Plot had been immemorially part of two yard lands formerly belonging to one Baylis, for the tithes of which a *modus* of one shilling a-year was due; that as the same had been constantly paid and received, he ought to be discharged thereupon from all tithe hay.

The other defendants set forth the respective shares and interest they had in the meadows called Pease Porridge Meadow, Mill Meadow, Ward's Meadow, and the Moors, as they severally occupied them in the said years, and the quantities and values of the hay they had made thereon; but they insisted that the said meadows were part of the demesne lands excepted from the payment of tithes by the bill. They also set forth their proportions in the Lott Meadows, which they insisted had never, within the memory of man, paid any tithes in kind to the vicar; but that sixty years ago and before, time out of mind, the occupiers thereof used to pay to the vicar, at Michaelmas, yearly, a *modus* of two-pence a mower, and so in proportion for any other quantity of meadow, in lieu of all tithes thereof; that about sixty years ago the occupiers compounded with Dr. Bean, the then vicar, for all vicarial tithes, at the rate of eight shillings a yard land, including the *modus* of two-pence a mower; which rate was accepted for all tithes by the vicars until the present plaintiff became vicar of the said church; and they insisted that only the said *modus* of two-pence a mower or man's math was due for the tithe hay of the Lott Meadows, which, they said, they had been always willing to pay.

The defendants also admitted that they had kept large quantities of milch cows in the said parish; but said, that the vicars thereof had immemorially taken every tenth meal, or morning and night's milk, from all milch cows in the said parish, from their first going upon the common, which happens usually on the third of May, for ten tithe meals or turns of morning and night's milk, in lieu of all tithe milk; and that the plaintiff had actually received the same from them ever since he had been vicar; but they denied that they had obstructed him in taking his tithe milk, or that they had spoiled the same; and they set forth the quantities and values of the several titheable matters and things which they respectively had on their said grounds.

The plaintiff replied; the defendants rejoined; and divers witnesses were examined on both sides; and upon reading all the depositions taken on both
sides,

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sides; and the several exhibits following, viz. an inquisition taken on Thursday next after the feast of St. Ambrose, in the fifteenth year of Edward the Third; a roll of assessment for the county of Oxford, dated the second of March, in the fifteenth year of Edward the Third; letters-patent of King Richard the Second, dated the thirtieth of April, in the fourth year of his reign; a charter of W. Wickham, bishop of Winchester, dated the tenth of May, 1381, in the fourth year of Richard the Second; a charter of the priory and convent of the cathedral church of Winchester, dated the twenty-fourth of May, 1381, in the fourth year of Richard the Second; letters-patent of Thomas, bishop of Rochester, delegate of Pope Urban, dated the twenty-sixth of June, 1381, in the fourth year of Richard the Second; the like of the said bishop, dated the ninth of July, 1381; an indenture between the warden and scholars of the college, called St. Mary Winchester College, in Oxford, and the vicar of Atterbury, dated the eighth of October, 1397; the confirmation of the bishop of Lincoln, subjoined to the said indenture; the terrier of the rectory of Adderbury, taken the thirty-first of March, 1659; a copy of a bill and answers in this court, in the ninth year of George the First, *Somerville v. Wise*; also court rolls of the manor of Adderbury, beginning the nineteenth of October, 1678, and ending the twenty-sixth of October, 1715; a survey of the bishop of Winchester's demesnes, in Adderbury, in 1647; and a letter from Lady Rochester; and upon long debate of the matter,

The court was of opinion, that the custom of paying ten meals, or morning and night's milk, in lieu of the tithes of milk, as set forth in the answer, is not good in law; and therefore do overrule and set aside the same, and declare that the defendants ought to account with the plaintiff for the tithes of their milk for the whole year.

The court, as to the tithe hay of the Ten Pound Plot, occupied by the defendant, Richard Wise, sen. he insisting that the same was part of two yard lands, formerly belonging to one Baylis; and that a *modus* of one shilling a-year was due to the vicar, in lieu of the tithes thereof in kind, overruled and set aside the said pretended exemption, and ordered the defendant Richard Wise, sen. to account for the tithe hay thereof, as claimed by the bill.

The court, as to the tithe hay of the Lott Meadows, was of opinion, that the pretended *modus* of two-pence a mower, in lieu of tithe hay of such meadows, is not good in law, and therefore overruled the same, and decreed the defendants to account for the tithes of the same.

The court, as to the tithe hay of the meadows called Pease Porridge Meadow, the Moors, the Mill Meadow, and Ward's Meadow, which are alleged to be part of the Demesne Lands excepted in the bill, and that therefore no tithes of hay are due to the plaintiff for the same, was of opinion, that the plaintiff's right to the tithes thereof should be tried at law.

It was thereupon ordered and decreed by the court, that the defendants do severally account with and satisfy the plaintiff for the tithes of the milk had by them respectively within the said parish during the whole of the years demanded by the bill, deducting thereout what tithe milk the plaintiff had received.

It is likewise ordered by the court, that the defendant Richard Wise, sen. do account with and satisfy the plaintiff for the value of the tithe hay of the meadow called the Ten Pound Plot, during the time demanded by the bill.

It is also ordered, that the defendants do severally account with and satisfy the plaintiff for the tithe hay of their shares of the Lott Meadows, and also of Sweetnay and Hadgay Meadows, in the said parish, occupied by them severally during the years in the bill mentioned.

And as to the tithes of hay of the meadows called Pease Porridge Meadow, the Moors, the Mill Meadow, and Ward's Meadow, a trial at law was ordered concerning the same; the plaintiff in equity to be plaintiff at law; and the issue to be, "Whether the said meadows, or any and what part thereof, are "copyhold lands held under the bishop of Winton, or not?"

By an order of court made the sixth of December last, it was ordered, by the

the consent of five of the defendants, (who were all the defendants that had any lands within the said meadows, they being sensible that the said four meadows were not such copyhold lands, and therefore desirous of avoiding the expense of such trial,) that the issue directed as aforesaid should be taken *pro confesso* as against them; and that they should account with, satisfy, and pay to the plaintiff for the values of the tithes arising on such parts of the said four meadows as were in their respective occupations during the time demanded by the bill; the deputy-remembrancer to take the account.

The deputy made his report, dated the twenty-eighth of January last; and upon reading the said orders and report, and no counsel attending for the defendants, and no exceptions having been filed thereto, the court ordered the report to be ratified and confirmed, and the defendants to pay to the plaintiff the several sums reported due for their tithes, together with his costs to be taxed.

THE COURT FULL.

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Tr. 12 Geo. Scacc. *Gouge v. Clarke.* [2 Wood, 268.]

Yorkshire, 7th July, 1726.

**T**HE rector of Gilling, in the county of York, claimed the tithes of the parish.

The defendant said, the demesnes of the lordship of Gilling belonged to Charles Fairfax, lord thereof, and had ever been enjoyed free from the payment of tithes in kind; for that the plaintiff, and every rector of the said parish, had, time out of mind, received yearly, in lieu of tithes in kind arising on the said demesne lands, all the hay yearly growing upon three acres of meadow and a close in Gilling, called Low Ings; and he insisted on the benefit of the said prescription in bar of the tithes in kind arising upon the said demesne lands; for that all the closes which he occupied as tenant under the said Mr. Fairfax, viz. Meathill Close, Whiteland Heads, Freshholme, Holding Close Paddock, and Green Close, are all (except Green Close) part of the said demesne lands. He further said, that in the said years he had occupied other closes, viz. Socker Flatt, Trisdale End, Millburne East Field, Fatt Close, Tho. Milburne's Pasture, the Top of Mill Spring, the Mill Hill, Knagg's Close, and the Old Park, and about a rood of meadow, all which were exempted from payment of tithes.

A custom that the rector had received and enjoyed a close, and the tithes of hay yearly growing upon three acres of meadow, in lieu of all tithes arising upon the demesnes of a lordship, held good.

The plaintiff replied; the defendant rejoined; and divers witnesses were examined in the cause; and upon reading several proofs taken in the cause, and on full debate;

It is ordered by the court, that the bill, as to such part thereof as seeks from the defendant an account of tithes for the lands within the parish of Gilling, insisted on by the answer to be parcel of the demesne lands of the lordship of Gilling, and tithe free, shall be dismissed, with costs to be taxed; but as to all other titheable matters and things demanded by the said bill which the said defendant had on his lands within the said parish of Gilling, the defendant is to account for with the plaintiff.

PRICE, B. PAGE, B. HALE, B.

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M. 13 Geo. Scacc.

*Thompson v. Holt.* [2 Wood, 269.] 2 Gw. 671.

Buckinghamshire, 23d June, 1726.

*Moduses of a garden penny by all occupiers of ancient gardens, in lieu of tithes of all garden stuff and fruit (except apples and pears); 2d. for every new milch cow, and 1½d. for every old milch cow depastured in the common fields; 8d. a score, and so in proportion, in lieu of tithe of wool of sheep shorn in the parish, but not wintered there; a small penny in lieu of all wood, furze and fuel spent in the house; 1½d. for each calf weaned for the pail in the parish, allowed. No tithes are due for pigeons not sold; nor of loppings and toppings of wood above twenty years growth.*

**T**HE rector of Loughton, in the county of Bucks, claimed the tithes of garden stuff, apples, pears, pigeons, cows, milk, lambs, sheep, wool, faggots, furze, calves, and the loppings of oak, ash, and elm.

The defendant Holt said, that he held an ancient garden in the said parish; but that no tithe in kind was due to the rector for the fruit thereof; for that, time out of mind, all occupiers of ancient gardens in the said parish had paid, and ought to pay, to the rector of the said parish, at Easter, yearly, one penny, called a garden penny, in lieu of all garden stuff or fruit (except apples and pears) yearly arising in such gardens; and he tendered the same, with his proportionable costs. He also admitted, that he had several dozen of pigeons; but denied that he had sold any; and insisted, that no tithes were due for them. He also admitted, that he had several cows, which he had kept sometimes upon his inclosures, and sometimes in the common fields belonging to the said parish; and insisted, that he was not accountable to the plaintiff for the tithe of such milk as was milked from the cows while they were depastured upon the common fields; for that, time out of mind, there had been due and payable to the rector of the said parish for the time being, at Christmas, yearly, for every new milch cow, two-pence, and for every old milch cow, three halfpence, depastured on the common fields, and which he, by his answer, tendered accordingly, as also a tenth part of the value of the milk milked from his cows while depasturing on his inclosures, with his proportionable costs. He also set forth that he had two lambs, and tendered the plaintiff a half-penny a piece for them. He also stated, that in April, 1723, he had brought into the parish several sheep that had been wintered in other counties, and were by him shorn in the parish in that year; but he insisted, that he was not accountable for the tithe wool of them; for that, time out of mind, there had been due and payable, at Christmas, yearly, eight-pence a score, and so proportionably for a greater or less number which were so brought into the parish, and not wintered there, in full satisfaction of the tithe wool of such sheep so brought in. He also said, that in the said year he had caused several hundreds of furze faggots to be cut upon Loughton common; that some thereof were sold, and the rest burnt in his family; and that there had been due and payable, at Easter yearly, to the rector of the said parish, one penny, called a smoke penny, in lieu of all wood, furze, and fuel burnt and spent in the house of every inhabitant within the said parish; and he tendered the same by his answer, with his proportionable costs. He also said, that the said parish of Loughton lay within the hundred of Newport Pagnell; and that no tithe for wood of hedges, hedge-rows, bushes, willows, and furze, which were either sold or used for firing, was ever paid within the said hundred; that he had lopped from oak, ash, and elm trees, of above twenty years growth, several hundred of faggots; had sold some, and spent the rest in his family; and insisted, that no tithe was due from the same, or any thing in lieu thereof. He also set forth an account of his calves, and the price for which he had sold them; and stated, that two thereof were weaned for the pail; and he insisted, that a *modus* of three halfpence a calf for each calf weaned for the purpose aforesaid was due to the rector in lieu of the tithes of such calves, which he also tendered to the plaintiff.

The other defendants, by their answers, also insisted upon the said *moduses*.

The plaintiff replied; the defendants rejoined; and divers witnesses were examined on both sides; and upon reading the proofs in the cause;

The court ordered the defendants to account for tithe-milk in kind during the time the defendant's cows were kept on their inclosed grounds and pasture lands; for the tithes of their wood and furze (except for the loppings and toppings

pings of timber trees above twenty years growth, or burnt in their houses, or used in fencing); for the tithes of apples and pears, lambs, Easter offerings, pigeons sold, and such dry cows as were altogether unprofitable, and through which no tithe did otherwise accrue to the rector of the parish; but as to the other matters, they were ordered to account, according to the *modus* set forth in the answers.

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MOLT.  
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THE COURT FULL.

M. 13 Geo. Scacc. *Mason v. Hype*. [2 Wood, 271.]

Buckinghamshire, 10th December, 1726.

THE rector of Ludgershall, in the county of Bucks, claimed all tithes in kind, both great and small, arising in the parish; and stated, that all the defendants were so well satisfied of his right to tithes in kind, that they, before Lady day, 1723, desired him to accept twelve shillings a-year for every yard land, in lieu of tithe-hay and small tithes; that he did accept the same accordingly; and that all the defendants (except Jones) had paid him six shillings a yard land for the first half year; but that they afterwards refused to perform the said agreement, or to set out their tithe-hay in kind, or to make him any satisfaction for the same.

A *modus* that the rector enjoys two meadows, called the Parson's Pieces, in lieu of the tithes of hay, except of certain lands called Berry Lands, found by verdict and established.

The defendants denied that the plaintiff was entitled to any tithes, except the tithes of corn, which, with the parsonage and glebe, they said, were worth one hundred and eighty pounds a-year; and they insisted, that there was an immemorial custom, that all the proprietors and occupiers of land within the said parish should yearly, at Lady day and Michaelmas, pay to the rector six shillings and eight-pence for every yard land occupied and possessed by them respectively, in lieu of all and all manner of small tithes whatsoever within the said parish and the titheable places thereof; and likewise that the rectors of the said parish had immemorially enjoyed two pieces of meadow, called the Parson's Pieces, in satisfaction for all tithes of hay within the said parish and titheable places thereof, except the tithe-hay of certain lands called the Berry Lands. And as to the Berry Lands they also insisted, that above two hundred and thirty years ago the proprietors of the lands then occupied and possessed by them, or those under whom they claimed, had purchased several lands from A. Warren, the devisee of Sir J. Borlace, and amongst them the said lands called the Berry Lands, which were conveyed to them discharged of, and from all manner of tithes whatsoever; of which the said plaintiff had notice, and never made claim for any tithes of the said lands till lately. They admitted that they had made the agreement with the plaintiff; but said, that it was in dread of suits; and they set forth their titheable matters and things.

On reading the proofs in the cause; a lease granted of the tithes of the parish by one W. Knight to Queen Elizabeth, dated the second of February, in the twenty-fifth year of her reign; another deed of assignment of the said tithes, executed by Queen Elizabeth to one C. Freeman, dated the fourth of June, in the thirteenth year of her reign; and upon debate of the matter,

The court ordered the defendants to account for the small tithes from Lady day, 1723, to the filing of the bill.

And as to the tithe-hay in kind, a trial at law was directed upon this issue, "Whether the plaintiff and his predecessors, rectors of the said parish of Ludgershall, have, from time immemorial, had and enjoyed as his and their own several right and property, the two pieces of meadow in the pleadings mentioned, called the Parson's Pieces, for and in lieu of, and in satisfaction for, all tithes of hay arising and growing in the said parish and the titheable places thereof, except the tithes of the lands called Berry Lands:" to be tried by a special jury of the county.

The court also ordered the defendants to pay costs, so far as relates to the tithes of Berry Lands, and to the small tithes in kind.

A trial was accordingly had, and a verdict was found for the defendants.

The

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The court ordered, that so much of the bill as seeks to compel the payment and delivery of tithe-hay in kind (except for Berry Lands) be dismissed, with costs at law and in equity.

THO. PENGELLY,
B. HALE,

LAW. CARTER,
J. COMYNS.

M. 13 Geo. Scacc.

Bokenham v. Bentfield. [Com. 392.] Raym. 289.

Where non-residence is pleaded to a bill for tithes, quantities and values need not be discovered.

BILL by lessee of the parson of for tithes against defendant, a parishioner; to which defendant pleaded stat. 13 Eliz. chap. 20. by which it is enacted "that no lease of any benefice or ecclesiastical promotion with cure, or any part thereof, shall endure any longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice without absence above fourscore days in any one year, but that such lease, immediately upon such absence, shall cease and be void," &c. and that the lessor was absent above fourscore days in such year, whereby his lease to the plaintiff did become void; and the plea being admitted to be heard according to the rules of court, no one then appeared to defend or maintain the title of the plaintiff, for it was said by the counsel for the defendant, that such plea was formerly allowed, viz. between *Mills* and *Etheridge*, February 5, Hilary term, 12 Geo. 1. (1)

That it was also allowed in Easter term, between *Quiller* and *Muscendine*, (2) that the sole question in those cases was, if the defendant should not answer to the quantities and values alleged by the bill, at the same time he tenders his plea; so as where the defendant insists on a *modus* as a discharge of his payment of tithes in kind, yet the defendant ought to answer to the quantity and value of the tithes charged in the bill; otherwise, if it were afterwards found there was no such *modus*, plaintiff cannot have a decree against defendant, because it does not appear how much is due by him for his tithes, to the plaintiff.

But it was then resolved by the court, that upon such plea of non-residence of the lessor, the defendant need not answer to the quantities and values, for such plea goes to the right and title of the plaintiff; but where a *modus* is alleged, that admits the title of the plaintiffs to take tithes of the defendant, and only goes to the manner of payment, if tithes should be paid in kind or not.

And upon all these authorities alleged, the plea in the present case was allowed.

(1) *Antè*, p. 806.

(2) *Antè*, p. 816.

E. 13 Geo. Scacc.

Lawrence v. Yeates; et à contrà. [2 Wood, 276.]

Gloucestershire, 8th May, 1727.

A vicar entitled to small tithes except of lands formerly belonging to dissolved monasteries.

THE vicar of Brockworth, in the county of Gloucester, claimed the tithes of wool, lambs, calves, and all other tithes whatsoever, for eight years last past, in kind, except the tithes of corn and hay.

The defendant admitted, that the plaintiff was, as vicar of the parish, entitled to the tithes of wool, lambs, and to all other tithes, except the tithes of corn, hay, and wood, or to some *modus* in lieu thereof; and that he held a messuage and lands called Abbott's Wood, or Brockworth Park; a meadow called Mansmores, formerly consisting of two closes, but now lying open; a close called Trippett's; a little orchard, which was part of the said close; and a meadow called the Lilleys, which he rented; and he set forth what titheable matters and things he had thereon: but he insisted that he was not obliged to pay any tithes in kind for the same, or any thing in lieu thereof, to the plaintiff: and that no vicar had ever received any tithe in kind, or any thing in lieu of the same; for that the messuage and lands called Abbott's Woods or

or Brockworth Park, were heretofore parcel of the manor of Droise Court, in Brockworth, and formerly part of the dissolved abbey of Saint Peter's in Gloucester; that the said abbey was one of the greater abbeys; that the same came to the crown by the statute 31 Hen. 8. c. 13; that the abbot and convent of St. Peter's had immemorially, and at the time of the dissolution, held and enjoyed the same, freed and discharged from the payment of any tithes in kind, or any thing in lieu thereof; that the said messuage and lands, so vested in the crown, free and discharged from tithes, had ever since been so enjoyed; that he same, by letters-patent, dated the fourth of September, the thirty-third year of King Henry the Eighth, were given and granted to J. Wakeman, then bishop of Gloucester, and his successors, for ever; and had, ever since been, from time to time, granted by leases for lives by the bishop of Gloucester, and sold by their lessees and tenants, tithe free, and no demand ever made for the tithes thereof except by the plaintiff; and that the said messuage and lands, so discharged of tithes, were, by lease, dated the nineteenth of October, 1703, devised to W. Guise, and his heirs, &c. under which the defendant held the same discharged as aforesaid. The defendant further stated, that the closes called Mansmores, Trippett's, and the Little Orchard thereto belonging, were and are part of the demesnes of the said manor of Brockworth; that the same with the tithes thereof were part of the possessions of the late dissolved priory of Lanthony, in the said city; that the said priory was one of the greater monasteries; and having come to the crown by the statute 31 Hen. 8. c. 13. were, by letters-patent dated the twenty-sixth of June in the thirty-second year of Henry the Eighth, granted to J. Guise, and his heirs, and by several conveyances and descents were now vested in Sir John Guise; that Sir John Guise, by indenture, in February, 1708, demised the same to the said W. Guise, and his heirs, &c. for three lives, under which the defendant claimed the same; and he insisted, that the same had been enjoyed without the payment of any tithes, or any thing in lieu thereof; and that no demand had ever been made for tithes, except by the plaintiff. The defendant further insisted, that all the said lands and tenements held by him, except the close called the Lilleys, were legally discharged from the payment of tithes, or any thing in lieu, as aforesaid; and as to the Lilleys, he insisted, that no tithes in kind had ever, during the memory of man, been paid for the same, but that three shillings a-year, and no more, had been immemorially paid to the vicar, as a *modus* in lieu of all vicarial tithes; and he averred that he had often tendered the same to him. The defendant admitted, that he had not paid any Easter offerings, and tendered to the plaintiff two-pence a-piece for himself and his wife for each year.

The defendant, with others, filed their cross-bill against Lawrence, and insisting, that the said lands, &c. were exempted from the payment of tithes, prayed, that they might be quieted in the said respective premises, and that the *modus* of three shillings, for the tithes of the Lilleys, might be established.

The vicar, in answer to the cross-bill, admitted, that the priory of Lanthony was one of the greater dissolved monasteries; that the manor, lordship, and tithes of Brockworth, had come to Henry the Eighth; that the tithes of the demesne lands thereof belonged to the priory; that they were granted by Henry the Eighth to John Guise; but not the small tithes of other demesne lands; and that the said lands were vested in Sir John Guise, but not the small tithes of other demesnes, nor the small tithes of such lands in Brockworth, as were let with the said demesnes belonging to the said priory of Lanthony. The vicar further said, that he believed, that Sir John Guise was the then owner of the said manor and demesnes, and that he and his tenants had held the same, and the whole tithes thereof, without interruption; and that the said lands did belong to the said priory, as appears by a terrier in the first fruits office, taken the twenty-sixth year of Henry the Eighth; but he insisted, that all other demesne lands were exempted from the payment of vicarial tithes; and that although the land belonging to the said priory might be called demesne lands, he was entitled to have vicarial tithes for the same. The vicar further said, that Mansmores and Trippett's Meadow were granted by Sir J. Guise

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Guise to the said W. Guise, with the great tithes thereof, but not the small tithes; and that he had never heard that the same were the demesnes of the manor of Brockworth. He denied, that the said W. Guise had let the said two meadows and orchard, and the said closes called Abbott's Wood, or Brockworth Park, discharged from the payment of tithes. The vicar further answered, that the abbot and convent of the monastery of Saint Peter, in Gloucester, were seised of the manor of Droise Court, with the appurtenances, but he denied, that they were seised of the tithes thereof, or that their tenants had held any part of the said manor freed from tithes; or that the said manor, by the dissolution of the said monastery, had come to the crown so discharged; for that the same being one of the greater abbeys, dissolved by the said statute, it could only come to the crown in as ample a manner as the abbot had held the same; and he insisted, that the owners of several of the lands of the said abbey had paid tithes for the same in many places. He further said, that the manor of Droise Court, with its appurtenances, was granted to the bishop of Gloucester, and his successors; but denied, that the lands were so granted discharged of tithes; for that the tenants of the said manor had yearly and immemorially paid tithes, both impropriate and vicarial, for the same, after the rate of four-pence in the pound, according to the yearly rent, in the same manner as all other landholders in the said parish had uniformly and constantly done. He also admitted, that the messuage, little orchard, and three closes aforesaid, are bishop's lands, but he denied, that they were held with the manor of Droise Court, and insisted, that they had been leased out to different persons by the bishop, time out of mind. He admitted the grant or lease by the bishop to W. Guise, and that the plaintiff, Dorothy Guise, had no other lands in the parish. He also said, that the plaintiff Johnson was entitled to the close called the Lilleys, and had demised the same to the plaintiff Yeates, and that no tithes for the same had been paid in kind, for that the same had always been mowed or grazed; and the occupiers thereof had immemorially paid to the vicars four-pence in the pound of the yearly value thereof for the small tithes; and that the defendant, having compounded with him for the same, had paid him three shillings and two-pence yearly, for the tithes thereof; and he said, that he never had insisted on the payment of three shillings a-year as a *modus* for the said close called the Lilleys, till this suit, but only on the said composition of four-pence in the pound.

The plaintiffs in each of the said causes replied; the defendants rejoined; and divers witnesses were examined on both sides; and upon reading the depositions of several witnesses on both sides; and on long debate of the matter; and upon reading the said grants to the bishop of Gloucester, dated the fourth of September, in the thirty-third year of Henry the Eighth; the grant to John Guise, dated the twenty-sixth of June, in the thirty-second year of Henry the Eighth; the lease dated the seventh of February, 1703, made by the said J. Guise to W. Guise, of the two meadows, called Mansmores and Trippett's, together with all the tithes thereof;

The court was of opinion, that the vicar, notwithstanding the matters and things in the original bill, and the answer to the cross-bill, mentioned, had no right to any small tithes, arising on the respective lands, formerly part of the possessions of the priory of Lanthony, and the late dissolved monastery of Saint Peter, in Gloucester.

The court was also of opinion, that the *modus* of three shillings a-year, in lieu of all tithes for the Lilleys, was well proved; and that therefore the vicar was not entitled to the tithes in kind arising on the said close, but to the said *modus* of three shillings a-year only, in lieu thereof.

The original bill, as to the whole demand for the tithes therein, was accordingly dismissed with costs; and Dorothy Guise, Henry Guise, and their tenants, decreed to hold and enjoy the said messuage and lands, called Abbott's Wood, otherwise Brockworth Park, Mansmores, Trippett's, and the Little Orchard, clear of all tithes payable to the vicar of Brockworth, or any thing in lieu thereof, and be quieted in the possession thereof accordingly.

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The court also ordered and decreed, that the plaintiff Johnson, and his tenants, should hold enjoy the Lalleys free from the payment of any tithes in kind to the vicar, upon the payment of the *modus* of three shillings a-year; and that the said *modus* be established; with costs as to all the matters contained in the cross-bill.

The court also, as to the Easter offerings, demanded by the original bill, did not think fit to make a decree for the same only.

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END OF THE FIRST VOLUME.
